SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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ANNA-LISA KIRSHNER and PAUL ZAGLIUO SCHIMOLER,

Plaintiffs,

-against-

VILLAGE/TOWN OF SCARSDALE, SCARSDALE UFSD/SCARSDALE PUBLIC SCHOOLS, SUPERINTENDENT OF SCARSDALE PUBLIC SCHOOLS DR. THOMAS HAGERMAN, NEW YORK SCHOOLS INSURANCE RECIPROCAL and MARIANNA MORANO,

Defendants.

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DECISION & ORDER

Index No: 65439/2019

Motion Sequence No. 2

The following papers (NYSCEF document nos. 42-65; 70-90; 93-95) were read on the motion by the defendants, Scarsdale Union Free School District sued herein as Scarsdale UFSD/Scarsdale Public Schools, Superintendent of Scarsdale Public Schools Dr. Thomas Hagerman, and Marianna Morano, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint insofar as asserts a cause of action against said defendants upon the grounds that the plaintiff, Anna-Lisa Kirshner, did not sustain a serious injury within the meaning of Insurance Law 5102 (d).

Notice of Motion-Affirmation-Exhibits (A-B)-Statement of Facts-Exhibits (A-P)-Memorandum of Law
Affirmation in Opposition-Exhibits (1-23)
Reply Affirmation-Exhibit (A)

Upon reading the foregoing papers, the motion is determined as follows:

Plaintiff, Anna-Lisa Kirshner, sues for personal injuries allegedly sustained in a rear-end motor vehicle collision that occurred on April 9, 2019, on Weaver Street in Scarsdale, New York. Plaintiff alleges that as a result of the subject motor vehicle accident, she sustained injuries to her cervical, lumbar and thoracic spine as well as a posterior tibial tendon rupture in her right ankle. On October 10, 2019, plaintiff underwent anterior cervical decompression and fusion surgery which, she asserts, was necessary as a result of the subject collision.

According to the plaintiff, she suffers from serious injuries within the meaning of Insurance Law 5102 (d), in that she has sustained permanent consequential limitations of the use of a body organ or member (specifically, to her neck, back and right ankle), significant limitations of the use of a body function or system (specifically, the use of her neck, back, and right ankle), and a medically determined injury or impairment of a non-permanent nature which prevents her from performing her usual and customary daily activities for 90 of 180 days following the alleged accident.

Following the completion of discovery, the defendants, Scarsdale Union Free School District sued herein as Scarsdale UFSD/Scarsdale Public Schools, Superintendent of Scarsdale Public Schools Dr. Thomas Hagerman, and Marianna Morano, move for an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint that asserts a cause of action against them upon the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102 (d). Plaintiff opposes the motion.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). "Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues" (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

Under New York Insurance Law, a party seeking damages for pain and suffering arising out of a motor vehicle accident must demonstrate that she has sustained a serious injury (*see* Insurance Law 5104 [a]). Pursuant to Insurance Law 5102 (d), serious injury is defined, in part, as a personal injury that results in:

> "[P]ermanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not

less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Whether a claimed injury meets the statutory definition of a serious injury is a question of law which may properly be decided by the court on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). A defendant moving for summary judgment under Insurance Law 5102 (d) must establish a *prima facie* case that the plaintiff has not suffered a serious injury within the meaning of Insurance Law 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]; *Macchio v Ndukwu*, 114 AD3d 647, 647 [2d Dept 2014]). If that burden is met, the burden of going forward shifts to the plaintiff to produce evidence in admissible form sufficient to raise a triable issue of fact as to whether a serious injury was sustained (*see Licari*, 57 NY2d 230).

It is well established that a permanent loss of use must be "total" to qualify as a "serious injury" (*Oberly v Bangs Ambulance,* 96 NY2d 295 [2001]). Consequential limitation means an important and qualitative limitation of use of a body part based on normal function, purpose and use of that that body part (*see Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345 [2002]). Significant limitation requires a plaintiff to demonstrate that the injury is one which has limited the use of the afflicted area in an objectively "significant" way (*see id*). A "minor, mild or slight limitation of use is classified as insignificant within the meaning of the no-fault statute" (*Gaddy*, 79 NY2d at 957 [1992] [internal quotation marks and brackets omitted]). A plaintiff must present objective evidence of the extent or degree of the alleged limitation (*Curry v Velez*, 243 AD2d 442, 443 [2d Dept 1997]). A medically determined injury or impairment of a non-permanent nature preventing a plaintiff from performing substantially all of the material acts which constitute usual and customary daily activities for more than 90 of the first 180 days following the alleged incident requires a plaintiff to demonstrate that the plaintiff has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment (*Licari*, 57 NY2d at 236) and an inability to perform recreational and household activities is insufficient (*Omar v Goodman*, 295 AD2d 413, 414 [2d Dept 2002]).

Generally, where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved in a summary judgment context but instead require a trial in which the trier of fact shall resolve the credibility issue (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]; *Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *Francis v Basic Metal, Inc.*, 144 AD2d 634 [2d Dept 1981]).

Here, defendants and plaintiff have proffered competing medical affirmations/affidavits and competing biomechanical engineer affidavits thereby creating triable issues of fact with respect to the issues of whether plaintiff sustained a serious injury

within the meaning of Insurance Law 5102 (d) under the "permanent consequential limitation" and "significant limitation" categories and whether such injuries were causally related to the subject collision. Although defendants' expert radiologist, Dr. Fisher, negates causation of plaintiff's injuries to the subject collision and affirms that such injuries are degenerative in nature, and defendants' biomechanical engineer, Dr. Toosi, opines that the force of the accident could not have caused the alleged injuries, plaintiff, in opposition, tenders the expert affirmations of radiologist Dr. Frazzini, physiatrist Dr. Rao, neurosurgeon Dr. Das, and chiropractor Dr. Noel, and her medical records, as well as the affidavit of biomechanist Dr. Ivancic. Plaintiff's experts opine, among other things, that her injuries were exacerbated by the subject collision and relate the alleged injuries to the subject accident (*see Linton v Nawaz*, 62 AD3d 434 [1st Dept 2009] *aff'd*, 14 NY3d 821 [2010]). Viewing the evidence submitted by plaintiff in a light most favorable to her, as nonmovant, it is sufficient to raise a triable issue of material fact. Accordingly, defendants' motion for summary judgment is denied.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED the motion is denied; and it is further

ORDERED the parties shall appear in the Central Pre-Trial Alternative Dispute Resolution Part for a settlement conference. The clerk shall advise the parties of the date, time, and method of the settlement conference.

ENTER,

Dated: White Plains, New York
January 6, 2022

HON. JOAN B. LEFKOWITZ, J.S.C.