

Williams v Lettuere
2023 NY Slip Op 35181(U)
March 21, 2023
Supreme Court, Richmond County
Docket Number: Index No. 151134/2019
Judge: Catherine M. DiDomenico
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND-----X
DOREEN WILLIAMS,

Plaintiff

Part- IAS 11

Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDER

NICHOLAS D. LETTUERE

Index No. 151134/2019

Motion Sequence Nos.: 002,003

Defendants.
-----X

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion
Sequence Number 002 & 003

	<u>Numbered</u>
Notice of Motion by Defendant (002),	1
Notice of Cross Motion (003) and Opposition by Plaintiff	2
Affirmation in Opposition to Cross Motion and Reply to 002	3
Transcript of Oral Argument dated 7/21/22	4
Supplemental Affirmation in Opposition to 002	5
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Upon the foregoing cited papers, the Decision and Order is as follows:

Procedural History

Defendant, Nicholas Lettuere, moves by Notice of Motion (Seq. No. 002) for an order granting him summary judgment dismissing the case on the ground that Plaintiff, Doreen Williams, did not sustain a "serious injury" as defined by Section 5102(d) of the Insurance Law. Plaintiff Doreen Williams opposed the motion in its entirety and filed a cross motion (Seq. No. 003) seeking sanctions for what she argued was a "frivolous motion." Oral argument of both motions was initially held on June 21, 2022. During argument, this Court denied Plaintiff's cross motion for sanctions as Defendant's motion was by no means frivolous. While the cross motion was denied, it is still considered herein as Plaintiff's opposition to summary judgment.

During the initial argument of the present summary judgment motion Defendant argued that Plaintiff's expert witness, Dr. Matthew Wert M.D.'s Affirmation dated April 28, 2022 was fatally defective because it failed to adequately address the fact that Plaintiff had a factually similar accident in 2013 where she allegedly sustained injuries to the same parts of her body as

claimed in the present accident. Defendant further argued that Dr. Wert failed to review all the relevant medical records related to those prior injuries making his opinions as to causation speculative. Upon review of Dr. Wert's Report, this Court found that it was unclear as to what prior medical records he reviewed as there were at least some references to prior injuries. Accordingly, over Defendant's objection, this Court allowed Plaintiff to supplement his opposition after providing Dr. Wert with the relevant medical records for review. In so ruling, this Court did not indicate what weight, if any, it would attribute to any amendments made by Dr. Wert. However, as summary judgment is a harsh remedy, this Court determined that justice would be best served by having a complete motion record. *See Garafano v. Alvarado*, 112 A.D.3d 783 (2d Dept. 2013); see also *U.S. Bank Trust, N.A. v. Ellis*, 181 A.D.3d 451 (1st Dept. 2020). In furtherance of this ruling the Court granted Defendant the right to conduct a supplemental IME and authorized supplemental reply papers. *See Guzek v. B&L Wholesale Supply, Inc.*, 126 A.D.3d 1506 (4th Dept. 2015).

Plaintiff filed a Supplemental Affirmation in Opposition on August 4, 2022. Annexed to Plaintiff's supplemental opposition is an amended Affirmation from Dr. Wert dated July 11, 2022. In response to Plaintiff's supplemental filing, Defendants filed a "Second Affirmation in Reply" wherein they argue that even after being given a second opportunity to address "fatal flaws" in their original opposition, Dr. Wert *still* fails to review all the relevant medical records necessary to offer a non-speculative opinion as to causation. The present motion was submitted for Decision upon receipt of the supplemental filings together with the transcripts of oral argument held before and after the supplemental filing.

Factual Background

The present motion relates to a motor vehicle accident which occurred on March 21, 2019. At the time of the accident Defendant was operating a motor vehicle and Plaintiff was a pedestrian. At her deposition Plaintiff described her contact with the Defendant's vehicle as "two taps." Plaintiff was "spun around" but did not fall as a result of the impact (Tr. 12/19/19 Pgs 51-52). Immediately after the impact Plaintiff leaned on Defendants vehicle and "screamed at him." Plaintiff and Defendant then moved to the side of the road as they were blocking traffic. Approximately three minutes after the accident Plaintiff was transported by ambulance to Richmond University Medical Center where she was released after diagnostic testing. After leaving the hospital Plaintiff went home and immediately called her attorney (Tr. 12/19/19 Pg. 69).

In her Amended Bill of Particulars dated July 13, 2020, Plaintiff alleges injuries to her right hand and wrist, right knee, right shoulder, thoracic spine, lumbar spine, and cervical spine.

After a program of conservative treatment, Plaintiff underwent three surgeries in 2021, a percutaneous cervical discectomy, a lumbar percutaneous discectomy, and right shoulder arthroscopy with labral repair. The shoulder surgery was performed by Dr. Matthew Wert, M.D., on February 19, 2021. The cervical discectomy was performed by Dr. William B. Jones, M.D., on April 13, 2021. The lumbar discectomy was performed by Dr. Rene Hilderbrand, D.O., on June 8, 2021.

This is not the Plaintiff's first motor vehicle accident. In 2013 Plaintiff was involved in a factually similar accident wherein she was a pedestrian struck by a motor vehicle. A personal injury lawsuit (Richmond County Index 101951/2013) was commenced in relation to that accident wherein Plaintiff was represented by her current attorneys. That case settled before trial for an undisclosed amount. In relation to the 2013 accident, it was alleged that Plaintiff suffered injuries to her right shoulder, hip, and knee together with neck and back injuries. Plaintiff's Bill of Particulars related to the 2013 accident (dated 2/5/14) indicates that she suffered both a labral tear and a rotator-cuff tear in her right shoulder that would require future surgery. She also claimed injuries to her right hip that would require future hip replacement, and a meniscus tear in her right knee that would require future knee surgery. Regarding her neck and back injuries, Plaintiff claimed herniations and bulges in her cervical and lumbar spine that would require the need for spinal surgery in the future. Notably, Plaintiff's Amended Bill of Particulars in the present case (dated 7/13/20) only raises a claim of exacerbation and/or aggravation of prior injuries in relation to her lumbar spine. Plaintiff's Amended Bill of Particulars does not allege a claim of exacerbation in relation to any of the other injuries claimed, although they are almost identical to the injuries claimed in the 2013 accident.

Plaintiff commenced the present suit on May 10, 2019. After an exchange of document discovery, including authorizations for medical records relating to both the 2013 accident and the present accident, Plaintiff was seen for two Independent Medical Examinations (IME's). Plaintiff was examined by Dr. Jeffrey Richmond, M.D., on March 11, 2022. Dr. Richmond is a board-certified Orthopedic Surgeon. Prior to his examination, Dr. Richmond conducted a thorough review of voluminous medical records relating to Plaintiff's treatment for both the 2013 and 2019 accidents. In addition to medical records, Dr. Richmond also reviewed the Plaintiff's legal filings and deposition transcripts in both cases. A lengthy list of the documents reviewed by Dr. Richmond are detailed on the first three pages of his report.

After conducting an examination of Plaintiff, Dr. Richmond admits that there is objective evidence that Plaintiff has soft tissue conditions in her neck and lower back. However, he opines that those conditions were caused by a mixture of degeneration from age and the 2013 accident. Dr. Richmond opines that he sees no objective evidence of acute injury caused by the 2019

accident in Plaintiff's neck or back. After comparison of the diagnostic testing and medical records relating to both accidents Dr. Richmond further opines that there is no evidence of significant changes in the two studies. In other words, Dr. Richmond states that the admitted neck and back conditions that Plaintiff had in 2013 were the same conditions that she presently has, with added degeneration. Finally, Dr. Richmond suggests that the discectomy surgeries performed were of "questionable utility/value." As part of his examination, Dr. Richmond performed range of motion testing on Plaintiff's neck and back and she admittedly exhibited significant deficits. However, Dr. Richmond opines that the limitations found by these subjective tests were self-imposed and grossly out of proportion to the objective MRI findings.

In addition to her alleged neck and back injuries Dr. Richmond examined Plaintiff's right knee, hip and hand. Based upon his examination he finds no objective medical evidence of a hand, knee, or hip injury whatsoever. These findings were corroborated by subjective range of motion testing wherein Plaintiff did not exhibit any significant deficits. Dr. Richmond opines that these findings, together with the lack of any current complaints regarding these body parts render her original claims that she would likely need to undergo complete wrist and knee replacement surgery to be "outlandish."

Finally, Dr. Richmond examined Plaintiff's right shoulder. Plaintiff admittedly has a long history of shoulder issues relating at least back to the 2013 accident. After reviewing the relevant medical records, Dr. Richmond explains that she underwent an arthroscopic debridement procedure in 2014. In relation to the present accident, she was referred to Dr. Matthew Wert M.D, a non-board-certified surgeon, who performed another arthroscopic debridement procedure which Dr. Richmond believes was of questionable value. After examination and medical record review, Dr. Richmond opines that there is no objective medical evidence that Plaintiff suffered a shoulder injury as a result of the 2019 accident and that any condition that does exist is related to the 2013 accident. In addition to his document review and interview of Plaintiff, Dr. Richmond performed range of motion testing. Dr. Richmond admits that Plaintiff exhibited significant loss of motion in her right shoulder, but also exhibited similar deficits in her allegedly uninjured left shoulder.

In addition to being examined by Dr. Richmond, Plaintiff also underwent an independent medical evaluation by Dr. Nicholas Post M.D., a board-certified neurologist. Like Dr. Richmond, Dr. Post lists the voluminous legal and medical documentation that he reviewed before conducting his examination. The extensive list of documents takes up five pages of his report. The records reviewed relate to both the 2013 accident and resulting lawsuit, and the 2019 accident and lawsuit. As a neurologist, Dr. Post paid particular attention to Plaintiff's diagnostic MRIs. Upon review, he found objective evidence of disc herniations and bulges in her cervical

and lumbar spine. However, on the issue of causation, Dr. Post opines that the findings in Plaintiff's 2019 MRI are similar to her 2013 MRI and that any differences "describe the gradual evolution of...a degenerative condition over a 5-to-6-year interval." Dr. Post concludes that Plaintiff's neck and back conditions predate the subject accident and are thus not causally related to it. Upon physical examination, Dr. Post notes that Plaintiff exhibited range of motion deficits. However, he attributes those limitations, in part, to "suboptimal effort." Regarding the course of treatment for her neck and back condition, Dr. Post provides a lengthy discussion of how a "percutaneous discectomy" is vastly less invasive than a traditional "microsurgical discectomy" and that the two should not be confused.

In addition to the IME Reports of Dr. Richmond and Dr. Post, Defendant retained the services of Dr. Mark Decker M.D., a board-certified Radiologist. Dr. Decker was tasked with comparing Plaintiff's 2013 MRI's with her 2019 MRI's. In his Report, Dr. Decker finds that upon comparison, the findings in the 2019 studies have not significantly changed from the 2013 studies. Regarding Plaintiff's cervical spine, Dr. Decker notes that there are two "new" disc herniations at C3-C4 and C6-C7. However, he indicates that, in his professional opinion, they are degenerative in nature, longstanding, and not causally related to the 2019 accident.

Applicable Law

The proponent of a summary judgment motion has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. See *Otty Cab Corp. v. Nazir*, 72 N.Y.S.3d 517 (2d Dept. 2017). A movant's burden can be satisfied by the submission of sworn affirmations (from physicians), affidavits, or deposition testimony in proper evidentiary form. See *Charlie Fox, Inc. v. Diallo*, 48 N.Y.S.3d 264 (2d Dept. 2016). When seeking summary judgment pursuant to Insurance Law §5102(d) the moving defendant must conclusively establish that the plaintiff did not suffer any of the enumerated "serious injuries" set forth in that statute. See *Cortez v. Bray*, 192 A.D.3d 451 (1st Dept. 2021). Once a prima facie showing of entitlement to summary judgment has been established, the burden shifts to the non-moving party to raise a material issue of fact sufficient to warrant a trial. See *Ubillus-Tambini v. Ischakov*, 36 N.Y.S.3d 410 (2d Dept. 2016). A plaintiff opposing a "threshold" motion bears the burden of offering objective evidence of a serious injury. See *Stevens v. Homiak Transp., Inc.*, 21 A.D.3d 300 (1st Dept. 2005). When relying upon the "significant limitation" category, a plaintiff must also offer objective evidence of a significant loss of use, normally measured by range of motion testing. See *Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 343 (2002). When facing a claim that the conditions predate the accident at issue, are degenerative in nature, or were caused by a prior injury, it becomes the Plaintiff's burden to distinguish the prior injuries from the present ones.

See *Pommells v. Perez*, 4 N.Y.3d 566 (2005). If it is claimed that the current accident made preexisting injuries or conditions worse, it becomes a plaintiff's burden to explain "in a specific and nonconclusory manner" how the accident aggravated or exacerbated their preexisting conditions. See *Sanchez v. Steele*, 149 A.D.3d 458 (1st Dept. 2017).

Decision

It is undisputed that there is objective medical evidence in the form of MRI films, that indicate the presence of soft tissue conditions in Plaintiff's neck, back, and right shoulder. It is also undisputed that upon examination by her treating physician, and the IME physicians, that Plaintiff exhibited significant range of motion deficits as compared to what is normal. These undisputed facts are sufficient to satisfy two out of the three prongs of a serious injury claim under the "significant limitation of use of a body function or system" category relied upon by Plaintiff. To the extent that Plaintiff alleges that her "injuries" are permanent, the same analysis applies to the "permanent consequential limitation" category. The issue raised by Defendant's motion is one of causation. Defendant alleges that all the conditions claimed by Plaintiff as injuries related to the 2019 accident were actually caused by Plaintiff's prior 2013 accident together with normal age-related degeneration. Thus, it is Defendant's initial burden to establish, through admissible evidence, that the injuries claimed by Plaintiff were not related to the 2019 accident, but instead were preexisting. See *Cavitolo v. Broser*, 163 A.D.3d 913 (2d Dept. 2018); see also *Cinelli v. Greyhound Lines, Inc.*, 211 A.D.3d 517 (1st Dept. 2022).

Defendant has met his initial burden of establishing his entitlement to summary judgment as a matter of law. See *Al-Khilwei v. R. Turman*, 82 A.D.3d 1021 (2d Dept. 2011). Defendant has provided detailed, thorough reports from three board certified physicians who all conclude the same thing, that Plaintiff suffers from a combination of degenerative conditions and injuries that were caused by a 2013 accident. Dr. Richmond, Dr. Post, and Dr. Decker all agree that there is no evidence whatsoever of a causal connection between the Plaintiff's alleged injuries and the 2019 accident. It is important to note that they base this determination not only upon recent examinations, but also upon an extensive comparison of Plaintiff's current medical diagnostic and treatment records against her diagnostic and treatment records from 2013. See *Antepara v. Garcia*, 194 A.D.3d 513 (1st Dept. 2021). As Defendant has established his entitlement to summary judgment as a matter of law on all relevant threshold categories, the burden shifts to the non-moving party, in this case Plaintiff, to raise a material question of fact. See *Paula v. City of New York*, 249 A.D.2d 100 (1st Dept. 1998).

In her opposition papers, and during oral argument, Plaintiff argues that any claim that she did not suffer a serious injury as a result of the 2019 accident is frivolous because she

underwent three surgeries. The need for surgery, in and of itself, is insufficient to establish a serious injury. See *Schmitt v. Reeves*, 273 A.D.2d 295 (2d Dept. 2000). Surgery is a treatment for an injury, not an injury itself. Moreover, reliance upon the fact that Plaintiff underwent surgical intervention does not address the relevant issue here, which is one of causation. As Defendant has met his prima facie burden on the ground that the conditions that required¹ surgical intervention were caused by a 2013 accident and degeneration, it became the Plaintiff's burden to raise a material issue of fact as to how those injuries were causally related to the 2019 accident. See *Pommells v. Perez*, 4 N.Y.3d 566 (2005).

On the issue of causation, Plaintiff primarily relies upon a pair of affirmed narrative reports by Matthew Wert, M.D., the Orthopedic Surgeon who performed her recent shoulder surgery. While Dr. Wert did not perform the Plaintiff's spinal discectomies, he also opines on her neck and back injuries. The operative reports offered by the physicians who performed Plaintiff's neck and back surgeries are unsworn and uncertified and are therefore inadmissible. See *Grasso v. Angerami*, 79 N.Y.2d 813 (1991). Even if they were admissible, they do not address the issue of causation. Dr. Wert's first report, dated April 28, 2022, concludes that the "absence of any prior injury or treatment to [Plaintiff's] cervical or lumbar spine explains that these injuries did not pre-exist the above noted accident." This statement is obviously false, as Plaintiff admittedly suffered injuries to her neck and back in relation to a 2013 accident.

Regarding her right shoulder, Dr. Wert acknowledges that Plaintiff underwent right shoulder surgery in 2014 but concludes that Plaintiff "stated that her shoulder was free of pain" in 2019. This self-serving and conclusory statement offered by Plaintiff is woefully insufficient to establish that her pre-existing shoulder injury was asymptomatic. See *Hagan v. Thompson*, 234 A.D.2d 420 (2d Dept. 1996); see also *Marshall v. Albano*, 182 A.D.2d 614 (2d Dept. 1992). Dr. Wert further concludes that Plaintiff's labral tear in her right shoulder is a "new injury" as there was no indication of treatment to fix a labral tear in her 2014 medical records. Despite his intentions, this finding inures to the benefit of Defendant. The list of documentation that Dr. Wert reviewed before preparing his Report indicates that he did not consider any of the legal filings related to Plaintiff's 2013 accident. If he had reviewed those documents, he would have discovered that Plaintiff claimed a "right shoulder labral tear" in 2014 (see Bill of Particulars dated 2/4/14 Para. 8). The fact that this claimed 2014 tear was not repaired and still existed when he performed surgery in 2021 supports Defendant's claim of a pre-existing condition. Dr. Wert's report offers no opinion on Plaintiff's claimed injuries to her hand, knee, hip or thoracic spine.

¹ The board-certified IME doctors all indicate that the Plaintiff's surgeries were of questionable medical necessity and had little utility or value given the nature of her conditions.

Dr. Wert's first report was obviously insufficient to raise a question of fact regarding causation because he was given very little information relating to Plaintiff's 2013 accident and resulting lawsuit. For the reasons set forth above, and over the objection of Defendant, this Court granted Plaintiff leave to amend his opposition and to obtain an amended report from Dr. Wert after he was provided all the relevant records relating to the 2013 accident. Dr. Wert issued a Revised Report dated July 11, 2022, and Plaintiff's counsel submitted Supplemental Opposition on August 4, 2022.

Despite being given the opportunity to supplement their papers, Plaintiff's Supplemental Opposition still fails to adequately address the relevant issue, *to wit*, the need to clearly and specifically distinguish, with admissible medical evidence, how and why Plaintiff's claimed injuries were not caused by the 2013 accident and/or degeneration and were instead causally related to the 2019 accident. See *Cinelli v. Greyhound Lines, Inc.*, 211 A.D.3d 571 (1st Dept. 2022); see also *Kabir v. Vanderhost*, 150 A.D.3d 811 (2d Dept. 2013). While Plaintiff's counsel attempts to make the necessary distinctions, he is still reliant upon Dr. Wert's analysis to successfully raise a triable issue of fact.

Dr. Wert's Revised Affirmation also fails to adequately make this required causation distinction. As discussed above, both Dr. Richmond and Dr. Post reviewed *voluminous* documentation relating to the medical treatment provided to Plaintiff in relation to her 2013 accident, together with legal documentation regarding the resulting lawsuit and her claims therein. This allowed the IME doctors to make a fair comparison between the 2013 injuries and the claimed 2019 injuries. In contrast, Dr. Wert's initial narrative report indicates that he reviewed six medical files² relating only to Plaintiff's treatment in relation to the 2019 accident and her prior shoulder surgery. After being given the opportunity to review *all* of the documentation relating to the prior accident, Dr. Wert's revised affirmation indicates that he was given one additional document by Plaintiff, "AMDS Radiology 2013 Cspine and Lspine MRI results." There is no indication that Dr. Wert reviewed the extensive medical treatment that Plaintiff underwent in relation to the 2013 accident or any documents relating to either lawsuit.

Without reviewing the entirety of the Plaintiff's relevant medical history, Dr. Wert's opinion as to causation is speculative. See *Vidor v. Davila*, 37 A.D.3d 826 (2d Dept. 2007); see also *Penaloza v. Chavez*, 48 A.D.3d 654 (2d Dept. 2008); *Irizarry v. Lindor*, 110 A.D.3d 846 (2d Dept. 2013). Rather than making specific comparisons between Plaintiff's 2013 injuries and her claimed 2019 injuries, Dr. Wert relies upon Plaintiff's subjective, self-serving representation that her prior neck and back injuries were resolved after she allegedly ceased treatment in 2014.

2 (1) Dr. Chapman's records, (2) Dr. Hilderbrand's records, (3) Dr. Jones' records, (4) Stelton radiology records, (5) Millennium AMB surgical center records, and (6) Rockville Centre Pain Management & Rehabilitation records.

This reliance upon Plaintiff's subjective representations, without corroboration and reference to prior medical records, further renders Dr. Wert's opinion as to causation speculative. See *Varvris v. Franco*, 71 A.D.3d 1128 (2d Dept. 2010); see also *Dorrian v. Cantalicio*, 101 A.D.3d 578 (1st Dept. 2012).

Lacking a proper basis for comparison, Dr. Wert opines that some of the injuries alleged by Plaintiff are "new." As discussed above, he claims that the Labral Tear is new, but that is belied by Plaintiff's claims in her 2013 lawsuit. He further claims that Plaintiff's 2019 MRI's indicate new injuries at C6-C7 and a worsening of the L3-L4 and L4-L5 bulges to the point where they should be considered herniations. However, Dr. Wert fails to explain how these injuries, to the extent they are new, were caused by the subject accident and not by degeneration, as established by the IME doctors. However, even assuming these injuries are new, or an exacerbation of old injuries, it is well established that disc herniations and bulges, *on their own*, are not serious injuries pursuant to Insurance Law §5102(d). See *Choi Ping Wong v. Innocent*, 54 A.D.3d 384 (2d Dept. 2008). To be actionable, bulges and herniations must be accompanied by objective medical evidence showing that Plaintiff suffered significant physical limitations as a result. See *Shvartsman v. Vildman*, 47 A.D.3d 700 (2d Dept. 2008).

Here, it is undisputed that the range of motion testing administered to Plaintiff revealed subjective evidence of significant limitation to use. However, there is no discussion in Dr. Wert's report explaining how that limitation of use is causally related to the "new" bulges and herniations (e.g. C6-C7) and not the "old" ones (e.g. C5-C6). Moreover, absent a complete review of Plaintiff's prior medical records, it is impossible for Dr. Wert to determine if Plaintiff's range of motion has gotten better, worse, or stayed the same between 2013 and the present. See *Yunatanov v. Stein*, 69 A.D.3d 708 (2d Dept. 2010); see also *Silla v. Mohammad*, 52 A.D.3d 681 (2d Dept. 2008). While prior range of motion testing is not always available in cases where pre-existing conditions exist, in this case, the 2013 accident was brought to suit by the same attorneys who represent Plaintiff now. There is no explanation offered as to why Dr. Wert did not review Plaintiff's prior range of motion testing, despite being given two opportunities to do so. As Plaintiff failed to causally relate the alleged "new" injuries to a specific loss of use separate and apart from the loss of use related to Plaintiff's prior injuries, the herniations that are allegedly "new" are insufficient to raise a triable issue of fact. See *Finkelshteyn v. Harris*, 280 A.D.2d 579 (2d Dept. 2001); see also *Carter v. Full Serv., Inc.*, 29 A.D.3d 342 (1st Dept. 2006). Soft tissue injuries that are not causally connected to a specific loss of use are not actionable. See *Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45 (2d Dept. 2005).

Throughout Dr. Wert's medical report, and in Defendant's Opposition papers, there are

brief, unexplained references as to how the 2019 accident may have aggravated or exacerbated any preexisting degenerative conditions or prior injuries. For example, in his conclusion, Dr. Wert opines that “the motor vehicle accident that occurred on 3/21/19 severely exacerbated her pre-existing cervical and lumbar condition.” It is well established that if a claim of exacerbation or aggravation of prior injuries is to be made, it must be specifically plead in the Plaintiff’s Verified Complaint or Bill of Particulars. See *Lee v. All City Van Lines, Inc.*, 131 A.D.3d 454 (2d Dept. 2015). Here, Plaintiff’s Verified Complaint is silent on the issue of exacerbation or aggravation. Her Amended Bill of Particulars (dated 7/13/20) makes one single reference to an exacerbation claim in relation to her lumbar spine (see para. 9). No claim for exacerbation or aggravation is made in reference to her right shoulder or cervical spine. Plaintiff’s failure to plead exacerbation or aggravation of prior injuries precludes their use of those claims to defeat a motion for summary judgment. See *Al-Khilewi v. R. Turman*, 82 A.D.3d 1021 (2d Dept. 2011); *Stewart v. Dunkleman*, 128 A.D.3d 1338 (4th Dept. 2015).

However, even if the Court were to consider a general exacerbation or aggravation claim, or the specific claim relating to her lumbar spine, Dr. Wert fails to adequately explain in a “specific and nonconclusory manner” how Plaintiff’s 2013 injuries were made worse by the 2019 accident. See *Wettstein v. Tucker*, 178 A.D.3d 1121 (2d Dept. 2019). Conclusory statements claiming exacerbation, without explanation, are insufficient to raise a triable issue of fact. See *Inzalaco v. Consalvo*, 115 A.D.3d 807 (2d Dept. 2014). Moreover, the conclusions that were made by Dr. Wert are overly speculative as he was not provided sufficient documentation of Plaintiff’s prior medical treatment and legal claims, despite being given two opportunities to review the same. See *Dawkins v. Cartwright*, 111 A.D.3d 559 (1st Dept. 2013). By not knowing the extent of the Plaintiff’s injuries and related range of motion limitations resulting from the 2013 accident, Dr. Wert was rendered unable to explain how they were made worse by the 2019 accident. See *Garcia v. Feigelson*, 130 A.D.3d 498 (1st Dept. 2015); *McNiel v. Dixon*, 9 A.D.3d 481 (2d Dept. 2004).

Conclusion

For the detailed reasons set forth above, Defendant’s motion for summary judgment dismissing Plaintiff’s Complaint on the ground that she did not suffer a serious injury is hereby granted. Defendant established his initial entitlement to summary judgment by offering admissible proof that Plaintiff’s alleged injuries pre-existed the 2019 accident. The IME Reports offered establish that the conditions in her neck, back and shoulder were all caused by her 2013 accident, or by age related degeneration. Plaintiff failed to raise a material issue of fact in opposition. To successfully oppose Defendant’s threshold motion, Plaintiff had the burden of offering admissible evidence sufficient to raise a triable issue of fact as to whether the claimed

injuries and resulting loss of use were related to the present accident, or the prior accident and degeneration. See *Pommells v. Perez*, 4 N.Y.3d 566 (2005). To do so Plaintiff's expert physician was required to review all of the available medical documentation relating to the prior accident in order to distinguish the same. Without reviewing those records Plaintiff's physician's opinions as to causation are speculative. See *Lagois v. Pub. Adm'r*, 303 A.D.2d 644 (2d Dept. 2003). Here, despite being given two opportunities to do so, Plaintiff's expert failed to make the required showing. As such, her claims are dismissed with prejudice. See *Antepara v. Garcia*, 194 A.D.3d 513 (1st Dept. 2021); see also *Seck v. Minigreen Hacking Corp.*, 53 A.D.3d 608 (2d Dept. 2008).

This constitutes the Decision and Order of the Court in relation to Motion Sequence Numbers 002 and 003. Any issue raised in those motions and not specifically addressed herein is hereby denied.

Dated: March 21, 2023


A handwritten signature in black ink, appearing to read 'C. DiDomenico', is written over a horizontal line.

Hon. Catherine M. DiDomenico