Dowd v Klay
2024 NY Slip Op 34994(U)
October 23, 2024
Supreme Court, Erie County
Docket Number: Index No. 802385/2021
Judge: Edward A. Pace
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

BRIAN DOWD, and
SUSAN DOWD, his wife,

Plaintiff,

vs.

JEFFREY KLAY

Defendant.

ORDER AND DECISION
INDEX No. 802385/2021

MOTION SEQ. 001 & 002

Appearances of Counsel:

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Pace, J.S.C.

Plaintiff, Brian Dowd, commenced this action seeking damages for injuries he sustained when the bicycle he was riding collided with a vehicle owned and operated by Jeffrey Klay (defendant). As relevant here, plaintiff moves (Seq. No. 001; Doc. Nos.: 19-27) for partial summary judgment on the issue of negligence, seeking a trial on the issues of serious injury and damages only. Defendant cross-moved (Seq. No. 002; Doc. Nos.: 28-42) for an Order of this Court granting him summary judgment pursuant to CPLR §3212, dismissing Plaintiff's Complaint, in its entirety and with prejudice alleging plaintiff did not sustain a serious injury or economic loss in excess of basic economic loss, within the meaning of Insurance Law §5102(d).

Defendant filed a response with exhibits (NYSCEF Doc. No. 17-19), to the plaintiffs' motion. Plaintiffs also filed a response with exhibits (NYSCEF Doc. No. 52-58), to defendant Klay's motion. Defendant thereafter filed papers in further support of his motion (NYSCEF Doc. No. 61).

The Court did not consider plaintiff's documents Nos. 43-44 as they should have been submitted as part of their motion and not, for the first time in response to defendant's opposition papers. However, had those papers been considered the Court would have come to the same conclusion reached in this Decision and Order.

The plaintiff argues that defendant's apology to plaintiff is an inculpatory admissions of fault. The Court, in a light most favorable to the non-movant, views these statements as expressions of civility when defendant merely assumed he was the cause of this accident. As the assumption was based solely upon the statements of others to him, and not upon his own experience or observations they are therefore not sufficient to definitively establish the statements as party admissions of negligence.

The Court has reviewed the submissions as stated above and, after hearing argument on the motions renders the following decision and Order:

FACTS

On August 20, 2020, at approximately 1:00 p.m., Plaintiff was riding his bike in a northerly direction along Covent Garden Lane nearing its intersection with Klein Road in the Town of Amherst, New York. At the same time and place, Defendant was driving a F-350 pickup truck with an attached trailer, also in the northbound lane of Covent Garden Lane approaching Plaintiff on his bike.

As the truck advanced from behind, plaintiff moved his bike to the right into the concrete drainage gutter runway on the side of and off the paved portion of the roadway. According to plaintiff, the passenger side mirror of Defendant's pick-up truck was six to twelve inches to Plaintiff's left as Defendant's truck was passing. In his testimony, the plaintiff stated that, while he is unsure, he believes it was the defendant's trailer that made contact with him. (Doc. No. 26, p. 26).

Plaintiff then testified that he "flew off his bike onto the rocky grassy area." (Doc. No. 26, p. 27.) It should be noted that questions posed to plaintiff at deposition by defendant's counsel were phrased in a manner which assumed that there was contact between the defendant's vehicle or trailer and plaintiff. For example:

> Q: So can you estimate for me how much time elapsed between the point when you got on the concrete gutter area and the contact between my client's truck and your person happened? (Doc. No. 26, P.25 Lines 11-14)
>
> Q: Do you know what portion of my client's truck or attached trailer came into contact with your person?
> A: I can't be sure. I think it was the trailer. (Doc. No. 26, P.26 Lines 2-5)
>
> Q: When you say you could feel it, would that be the rush of air as it passed by you? Is that what you mean by you could feel it?
> A. That, or that means there was this feeling of dread, like this is way too close, this is something going bad in a hurry.
> Q. Okay.
> A. But it happened faster than I could say that.
> Q. Gotcha. So once the contact happened between what you think was the trailer and your person, what happened to your body? (Doc. No. 26, P.27 Lines 7-17)
>
> Q. Prior to the contact with your body, where was your attention focused? Were you looking straight ahead?
> A. Before the mirror came close to me? (Doc. No. 26, P.28 Lines 12-14)
>
> Q. So yes, prior to the mirror passing you very closely, where was your attention focused?
> A. On the traffic, keeping my bike in the gutter. Q. So looking straight ahead or to the side, something else? A. Straight ahead. (Doc. No. 26, P.28 Lines 17-23)
>
> Q. Okay. And then in the moments between when the mirror passed you and the contact ultimately occurred, were you still looking straight ahead or had you turned your head one way or the other?

A. I don't know.
Q. Okay. I don't know or I don't remember is a perfectly fine answer.
A. No, I don't recall. I assume I was still looking straight ahead.
Q. Okay. At the time of the contact with your body, you had both hands on the handlebars?
A. Yes. (Doc. No. 26, P.29 Lines 1-12)

Defendant Klay testified that he saw the bicyclist riding on the side of the road in the concrete gutter. Klay did not witness or feel contact between the bicycle and the truck, but also does not offer an alternate theory of liability or a different explanation of the facts offered by plaintiff and did not observe his trailer either strike or miss the plaintiff. He does not remember how far his truck's mirror was to the closest part of Plaintiff's body but does "vaguely" remember passing him with his truck (Doc. No. 19, p. 27: 18-23).

Q. Okay. And then after -- so you yourself didn't witness the contact between the bicycle and the truck, correct?
A. Correct. (Doc. No. 19, p. 37: 18-21)

Q. And then did you check the tractor to see if there was any indication -- or the trailer, I'm sorry, of where there was contact, like whether there was a dirt or scrape or anything?
A. No. (Doc. No. 19, p. 47: 17-21)

Q. So what is the speed limit on Covent Garden?
A. I believe 30.
Q. And then how fast were you going?
A. Between 15 and 20.
Q. Why were you going only 15 to 20?
A. Because it was an intersection coming up and it gets narrow and there was a car right there. And I did see him and my truck passed him, and at that point I don't know what happened, what he hit, because I didn't see it. And I didn't feel, you know, the actual hit. And that's when he called me and I drove back around. (Doc. No. 19, p. 9: 18-23; p. 10: 1-6)

From the deposition testimony of the parties, it appears that the alleged contact came at a time and place when both plaintiff and defendant were traveling in the area where the northbound lane narrows. There is no testimony here that plaintiff ever left the concrete gutter prior to the impact. After the alleged contact occurred, defendant proceeded to cross over Klein Road when he received a call from Kyle Baher, a coworker that was driving behind him who said, "Jeff, you hit somebody, you have to come back" (Doc. No. 19, p. 38: 17– 18). Defendant did drive back finding Plaintiff on the side of Covent Gardens Lane "shaking like a leaf" in his words (Doc. No. 16, 2:22). They exchanged phone numbers and later in the day plaintiff called defendant for his insurance information which defendant gave to plaintiff.

The evidence of causation is sufficient if it established facts and conditions from which it may reasonably be inferred that appellants' negligence was a substantial factor in producing plaintiff's injuries (Wragge v. Lizza Asphalt Constr. Co., 17 N.Y.2d 313, 320, 270 N.Y.S.2d 616, 621, 217 N.E.2d 666, 669). When reasonable inferences are possible, the question of proximate cause is for the jury (Pagan v. Goldenberger, 51 A.D.2d 508, 382 N.Y.S.2d 549; cf. Ventricelli v. Kinney System Rent-A-Car, 45 N.Y.2d 950, 411 N.Y.S.2d 555, 383 N.E.2d 1149; Sheehan v. City of New York, 40 N.Y.2d 496, 387 N.Y.S.2d 92, 354 N.E.2d 832).

The evidence the parties submitted is not necessarily conflicting and the testimony of the parties does not give rise to credibility issues.

The Court of Appeals held that "[p]laintiffs' evidence is deemed sufficient to make out a prima facie case if it shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (Wragge v. Lizza Asphalt Constr. Co., supra, 17 N.Y.2d at 320, 270 N.Y.S.2d 616, 217 N.E.2d 666).

Plaintiff has met that test here. Both plaintiff and defendant testified that the bicycle was in the concrete gutter as defendant approached. As defendant passed within six to 12 inches of plaintiff, and the road began to narrow, and there were no other vehicles that could have made contact with the bicycle, the facts "strongly suggest" (see, Wragge v. Lizza Asphalt Constr. Co., supra) that the truck or trailer contacted plaintiff, throwing him off the bicycle. See, Pierson v Dayton, 168 A.D.2d 173 (4th Dept 1991).

Pursuant to VTL § 1231, "[e]very person riding a bicycle [...] upon a roadway [...] shall be subject to all of the duties applicable to the driver of a vehicle by this title." However, a driver operating a motor vehicle must "exercise due care to avoid colliding with any bicyclist ... upon any roadway" (Vehicle and Traffic Law § 1146[a]). Furthermore, "[t]he driver of...a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." VTL 1122(a). Although plaintiffs misquote the law in their memorandum of law at Doc. No. 45, plaintiff did submit the essence of the law, which is to pass on the left side "at a safe distance...until safely clear."

Plaintiffs met their initial burden by establishing as a matter of law that the sole proximate cause of the accident was defendant's negligence in, inter alia, backing his pickup truck into plaintiff without properly looking behind him (see Vehicle and Traffic Law §§ 1146[a]; 1211[a]; Pries–Jones v. Time Warner Cable, Inc., 93 A.D.3d 1299, 1301, 941 N.Y.S.2d 410). Based on the deposition testimony of the injured plaintiff and defendant, the Court concludes that plaintiff established as a matter of law that defendant was negligent in failing to see that which, under the circumstances, he should have seen and before passing plaintiff ascertaining that it was safe to do so (see generally Waltz v. Vink, 78 A.D.3d 1621, 1621–1622, 910 N.Y.S.2d 800). Further, contrary to the contention of defendant, plaintiffs established as a matter of law that plaintiff "was free from fault in the occurrence of the accident" (Hillman v. Eick, 8 A.D.3d 989, 991, 779 N.Y.S.2d 794), and defendants failed to raise an issue of fact with respect thereto (see generally Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718); (see, Gomez v. Buczynski, 213 A.D.3d 1312 [4th Dept. 2023].

The evidence submitted in opposition to the motion failed to raise a triable issue of fact with respect to defendant's negligence (see 1582 Kowalyk v. Wal-Mart Stores, Inc., 187 A.D.3d 1539, 1540, 132 N.Y.S.3d 205 [4th Dept. 2020]; Amerman v. Reeves, 148 A.D.3d 1632, 1633, 50 N.Y.S.3d 717 [4th Dept. 2017]). In particular that defendant did not submit an affidavit setting forth a counter version of how the accident occurred (see Cavitch v. Mateo, 58 A.D.3d 592, 593, 871 N.Y.S.2d 372 [2d Dept. 2009]), nor did defendant submit any other admissible evidence that would provide a nonnegligent explanation for the impact (see Kimyagarov v. Nixon Taxi Corp., 45 A.D.3d 736, 737, 846 N.Y.S.2d 309 [2d Dept. 2007]).

The injured plaintiff was not required to anticipate that defendant would move his vehicle or the trailer toward plaintiff, and "defendants' speculation that plaintiff might have done something to avoid the accident is insufficient to raise an issue of fact concerning plaintiff's comparative fault" (Whitfield v. Toense, 273 A.D.2d 877, 878, 709 N.Y.S.2d 746; see Garcia v. Verizon N.Y., Inc., 10 A.D.3d 339, 340, 781 N.Y.S.2d 93; Irwin v. Mucha, 154 A.D.2d 895, 896, 545 N.Y.S.2d 863).

There is no evidence to refute Dowd's testimony that never reentered the roadway from the shoulder. The only permissible inference was that Klay passed too closely striking Dowd's bicycle and the plaintiff had the right-of-way when the collision occurred (see Vehicle and Traffic Law §§ 1141, 1142[a]). Altogether, viewing the evidence in the light most favorable to defendant, no questions of fact remain that the injured plaintiff was not comparatively at fault. And, that the defendant failed to see what was to be seen and failed to exercise due care to avoid colliding with plaintiff (see Vehicle and Traffic Law § 1146[a]).

The police report is admissible to the extent that it contains facts observed by the officer who prepared it, but it is generally not admissible to the extent that it contains opinions or conclusions drawn from the facts (see, Baker v. Sport-service Corp. [appeal No. 1], 175 A.D.2d 654, 573 N.Y.S.2d 799, lv. denied 78 N.Y.2d 860, 576 N.Y.S.2d 218, 582 N.E.2d 601). Although the conclusions might be admissible if based on " 'postincident expert analysis of observable physical evidence' " (Conners v. Duck's Cesspool Serv., 144 A.D.2d 329, 533 N.Y.S.2d 942, quoting Murray v. Donlan, 77 A.D.2d 337, 347, 433 N.Y.S.2d 184, appeal dismissed 52 N.Y.2d 1071), plaintiffs here have made no showing that the officer is an expert in accident reconstruction (see, Mancuso v. Compucolor, Inc., 172 A.D.2d 153, 567 N.Y.S.2d 694). Moreover, the officer's report is not authenticated (see, Golombek v. Marine Midland Bank, 193 A.D.2d 1113, 1114, 598 N.Y.S.2d 891.

Because the report was not submitted in evidentiary form, it was not considered on the summary judgment motion (see, Mickelson v. Babcock, 190 A.D.2d 1037, 1038, 593 N.Y.S.2d 657); plaintiffs have not asked for leave of court to make this late filing nor have they provided any excuse for relaxing that strict requirement (see, Garner v. Rosa Coplon Jewish Home & Infirmary, 189 A.D.3d 2105, 134 N.Y.S.3d 880 (4th Dep't 2020), Grasso v. Angerami, 79 N.Y.2d 813, 814, 580 N.Y.S.2d 178, 588 N.E.2d 76.

SERIOUS INJURY

Pursuant to the plaintiff's verified bill of particulars (NYSCEF Doc. No. 25, 34, 35, 55), and in response to a demand for a statement of the injuries alleged to have been sustained by the plaintiff, and as to each the location, extent, duration and permanency, plaintiff is alleged to have sustained the following particular injuries as a result of the August 20, 2021, accident:

"Plaintiffs objects to this demand as he is not a medical doctor, without waiving this denial plaintiff sustained injury to left hip, left SI joint, pelvis and thigh, and headaches, including but not limited to pain, swelling, bruising, ecchymosis, clicking, popping, contusion, trochanteric bursitis, solitary sacroiliitis, aggravation of osteoarthritis, arthralgia, iliotibial band friction syndrome, loss of range of motion, aggravation of degeneration changes in the hips, functional limitations of the hip, muscle weakness gait affected, and discomfort, sleep affected and waking up unrested, headaches affect (sic) on balance, and fear of bicycle and walking near road. Plaintiff reserves the right to supplement this demand as the injuries progress and treatment continues. All of the above are believed to be permanent, except those of a transitory nature."

Pursuant to the verified Bill of Particulars (NYSCEF Doc. No., dated May 8, 2023, and in response to a demand for a statement in what respect it is claimed that the plaintiff sustained a serious injury as defined in Section 5102 of the Insurance Law, as a result of the August 20, 2021, accident, plaintiff alleges:

- "At the time of the accident, Plaintiff, Brian Dowd was working at New York Regional Census Center for 9 hours per week at $20/hour. He was unable to work as a result of the collision. The job ended on 10/8/2020. He was a retired air traffic controller after 32 years. He is claiming limitation of earning ability. Plaintiff, Brian Dowd has not yet returned to work;
- Plaintiffs are claiming vii, viii, and ix as categories of serious injury. Plaintiff objects to the demand as to usual and customary activities as overly broad. Without

waiving this objection, Plaintiff, Brian Dowd has these limitations, which is an illustration, not an exhaustive list:

- Needing to lay down a lot of the time; Only able to sleep on right side for first months and then having pain still when on right side;
- Sleep is fitful and typically Plaintiff does not wake up refreshed;
- Mild to mid-level headaches; Difficulty/pain getting in and out of car;
- Customary activities are limited or have to be slowed or stopped due to pain including but not limited to grass cutting, gardening, woodworking, house repairs, bringing in firewood, snow blowing, shoveling, taking out garbage to the garage, Christmas decorations, climbing ladders, cleaning out gutters, etc;
- Sitting in chairs is often too painful to last more than a short time, hobbies/activities are limited including golf, tennis, badminton, pickleball, skating, hiking, biking, physical acts such as frivol movements are painful, reading is limited, balance is affected, getting in and out of the shower is affected, dressing while standing up is affected, stairs are difficult, walking is limited, sexual relations are limited and activities with the family are limited;
- Plaintiffs also claim derivative damages.

Applicable Legal Standard for Summary Judgment

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (Gonyou v. McLaughlin, 82 A.D.3d 1626, 1627, 918 N.Y.S.2d 922 [4th Dept. 2011] [internal quotation marks omitted]; see Cohen v. Broten, 197 A.D.3d 949, 950, 150 N.Y.S.3d 656 [4th Dept. 2021].

Summary judgment is a drastic remedy, and, of course, should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141, 385 N.E.2d 1068; Goldstein v. County of Monroe, 77 A.D.2d 232, 236, 432 N.Y.S.2d 966) or where the issue is "arguable" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387). On a motion for summary judgment the court should accept as true the opposing party's evidence and any evidence of the movant which favors the opposing party (Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458).

In support of his motion defendant submits the summons, complaint, answer, as well as plaintiff's bill of particulars, omnibus responses, deposition testimony, and medical records from WellNow Urgent Care, Buffalo Medical Group and Excelsior Orthopaedics, LLP.

On these papers there is no clear delineation of what category(ies) of serious injury the injured Plaintiff is alleging. In the submitted bill of particulars (NYSCEF Doc. No. 24), "plaintiffs are claiming vii, viii, and ix as categories of serious injury." That bill does not actually name any category, however within Ins. Law sec 5102(d) the 7th, 8th and 9th categories are, as defendant affirms here the alleged and disputed categories of serious injury are "a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and 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." Although not required to review plaintiff's opposition papers at this point, the Court notes that plaintiff's opposition papers do not clarify or object to these three categories enumerated in defendant's papers.

Defendant has met his burden on one category of serious injury by submitting the plaintiff's medical records, specifically the WellNow (NYSCEF No. 24) hip X-ray showing no fracture. Those same records were also reviewed at Buffalo Medical Group and Excelsior Orthopaedics, LLP, (who also took x-rays of plaintiff's left hip) and confirm that there was no fracture. Those records

additionally indicate degenerative disease present, and osteophyte spurring along the roof of the acetabulum and narrowing of the joint space.

Defendant has also met his burden regarding plaintiff's claimed permanent injuries by submitting the above records with plaintiff's deposition testimony which evidence, not only the above degenerative disease but also a cessation of treatment after December 2, 2020, some 15 weeks after this accident. These medical records show plaintiff sustained only temporary soft tissue contusions as a result of the accident, which had resolved and which do not constitute serious injury (see e.g. Kracker v. O'Connor, 158 A.D.3d 1324, 1325, 70 N.Y.S.3d 730 [4th Dept. 2018].

Additionally, as plaintiff ceased treatment and home exercises within six months of the accident, any other residual alleged injuries would be attributable to his pre-existing conditions (see Perl v. Meher, 18 N.Y.3d 208, 218, 936 N.Y.S.2d 655, 960 N.E.2d 424 [2011]; Lamar, 188 A.D.3d at 1637-1638, 135 N.Y.S.3d 717).

Regarding significant or consequential limitations experienced by the plaintiff as a result of this accident, the Court of Appeals has held that "[w]hether a limitation of use or function is 'significant' or 'consequential,' (i.e., important * * *) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (Dufel, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105). For an injury to qualify under this category, the limitation must be "more than minor." Licari v. Elliot, 57 N.Y.2d 230, 236 (1982).

Objective proof that his injuries satisfy this category of the serious injury threshold is required. Toure v. Avis, 98 N.Y.2d 345, 350 (2002). Pain alone without additional objective evidence of limitations, is "insufficient to establish a serious injury." Carpenter v. Steadman, 149 A.D.3d 1599, 1600 (4th Dept. 2017).

An injured plaintiff can satisfy the "consequential" and/or "significant limitation of use" categories in one of two ways: (i) an expert's designation of a numeric percentage of the plaintiff's loss of range of motion or (ii) an expert's qualitative assessment of a plaintiff's condition so long as the evaluation has "an objective basis" and compares the person's limitations to the normal function of a particular body part. Toure, supra at 350-51.

Here, in terms of the first method of establishing a "significant limitation" mentioned above (i.e., the quantitative method), there are no objective findings in any of plaintiff's records that express a quantitative assessment concluding that he was limited to any degree, much less a significant degree, compared to normal function. Most of the quantitative assessments made during the three months following the accident show full range of motion. The lack of any such objective findings precludes his ability to argue that his injuries qualify as "significant limitations" under the quantitative method. In regard to the second method of proving a "significant limitation" injury (i.e. the qualitative method), there is no evidence that any medical professionals ever placed restrictions on plaintiff's physical capabilities or activities of daily living (ADLs). See e.g., Toure, supra.

"To qualify as a serious injury under the 90/180[-day] category, there must also be objective evidence of a medically determined injury or impairment of a non-permanent nature ... as well as evidence that plaintiff's activities were curtailed to a great extent" (Zeigler v. Ramadhan, 5 A.D.3d 1080, 1081, 774 N.Y.S.2d 211 [4th Dept. 2004] [internal quotation marks omitted]; see Licari v. Elliott, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570, 441 N.E.2d 1088 [1982]). With regards to this so called "90/180-day" category defendant's submissions indicate that the plaintiff suffered from a contusion and trochanteric bursitis of the left hip, where degenerative disease is present, manifesting as osteophyte along the roof of the acetabulum and narrowing of the joint space. These records also indicate plaintiff exhibited a normal gait with no record that limitations were ever placed on him or preventing him from engaging in his usual and customary daily activities of living (ADL's) during at least 90 of the first 180 days following either accident. Defendant has met his burden here as well.

Inasmuch as defendant met his initial burden on their motion with regards to serious injury, the burden shifts to plaintiff to come forward with competent, admissible evidence demonstrating the existence of triable issues of material fact (*see*, *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Facts and inferences must be viewed "in the light most favorable to the non-moving party," "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*id*). Similarly, mere speculation is insufficient to defeat a motion for summary judgment (see, Gomez v. Buczynski, 213 A.D.3d 1312 [4th Dept. 2023].

In opposition to defendant's motions, plaintiff submitted the report of Michael M. Canderas, M.D., dated April 29, 2024, along with his undated affirmation. His report was based upon an examination of the injured plaintiff and his review of plaintiff's relevant medical records. The affidavit/affirmation of Dr. Canderas affirms that his CV is attached, which it is not. Without the CV, the Court is left to speculate as to the extent of his claimed "extensive experience in the ER, institutional settings, and private practice." (NYSCEF Doc. No. 33 and 34).

Regardless, Dr. Canderas does not in any way describe or detail his physical examination of the plaintiff. There is no indication that Dr. Canderas read plaintiff's deposition transcript, nor does he detail any conversation he had with plaintiff regarding his limitations. This is problematic as the Court is unable to distinguish what Dr. Canderas gleaned from medical reports and what was told to him by the plaintiff. It is also problematic as there is no qualitative or quantitative assessment outside of the ostensibly unremarkable neurological exam.

This evidence also failed to address the fact that plaintiff ceased treatment for well over three years, thereby "interrupt[ing] the chain of causation between the accident and claimed injur[ies]" (Pommells, 4 N.Y.3d at 572, 797 N.Y.S.2d 380, 830 N.E.2d 278). Here, plaintiff has not provided a "reasonable explanation" in evidentiary form for the "cessation of all treatment" (id. at 574, 797 N.Y.S.2d 380, 830 N.E.2d 278). In his deposition, the plaintiff claimed that the global Covid pandemic prohibited him from seeking medical attention for any of his injuries; Dr. Canderas fails to address this notable three-year treatment lapse.

Neither does Dr. Canderas adequately address plaintiffs preexisting degenerative condition related to the hip. His conclusory remarks failed to explain how anything more than the short term swelling and bruising changes were caused by the accident, rather than by the degenerative process (see Boroszko v. Zylinski, 140 A.D.3d 1742, 1745, 32 N.Y.S.3d 424, 426 (4th Dept. 2016). These deficiencies in the report and affirmation of plaintiff's expert render the opinions therein conclusory, speculative, and insufficient to raise an issue of fact with respect to the serious injury categories identified in plaintiff's Bills of Particulars.

With regards to the claimed "90/180" injury, there must be objective evidence of "a medically determined injury or impairment of a non-permanent * * * nature" (Insurance Law § 5102 [d]; see Zeigler v. Ramadhan, 5 A.D.3d 1080,

1081, 774 N.Y.S.2d 211 [4th Dept. 2004]; Licari v. Elliott, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570, 441 N.E.2d 1088 [1982]). In opposition to the motion, plaintiff submitted the above-mentioned report and affirmation of Dr. Canderas, who offers that plaintiff had advised him that he had suffered headaches and "is still dealing with the residua of his left hip injury." There is no MRI or other evidence presented here of objective findings made by any treating physician, physical therapist or other medical professional during the 180 days following this accident and which also outline and direct any limitations of the plaintiff.

Although plaintiff's own testimony provides some proof that his activities were curtailed (see Licari v. Elliott, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570, 441 N.E.2d 1088), the plaintiff offers no evidence of contemporaneous qualitative or quantitative objective testing to substantiate this claim. Nor does the report of Dr. Canderas relate in any detail or even suggest that he ever had a conversation with plaintiff regarding the usual and customary daily activities of the plaintiff relative to our accidents. (cf. Limardi v. McLeod, 100 A.D.3d 1375, 1377, 953 N.Y.S.2d 762 [4th Dept. 2012]).

The Court concludes that plaintiff failed to raise a triable issue of fact sufficient to defeat summary judgment as the motion relates to serious injury under Insurance Law §5102, et seq. (see generally Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]).

Although a claim for economic loss does not require the plaintiff to have sustained a serious injury (see generally Colvin v. Slawoniewski, 15 A.D.3d 900, 900, 789 N.Y.S.2d 368 [4th Dept. 2005], for the above stated reasons, the injured plaintiff's economic loss claim also fails. Fry v Doyle, 227 A.D.3d 1434 [4th Dept. 2024].

While a loss of consortium claim is its own cause of action, and separate and distinct from the injured spouse's personal injury claim, the loss of consortium claim is a derivative claim dependent upon the cause of action of the injured party, see Spose v. Ragu Foods, 124 A.D.2d 980, 981, 508 N.Y.S.2d 810 [4th Dept 1986].

In accordance with the above Decision, it is hereby:

ORDERED, that Motion Sequence No. 001, by the plaintiffs, BRIAN DOWD and SUSAN DOWD for partial summary judgment on negligence GRANTED; and it is further

ORDERED, that Motion Sequence No. 002, by defendant JEFFREY KLAY, to dismiss plaintiff's Complaint for lack of a serious injury, is GRANTED, dismissing claims under Insur. Law §5102(d), fracture; permanent 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; and a medically determined injury or impairment of a non-permanent nature which prevents the injured plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the October 5, 2021, motor vehicle accident; it is further

ORDERED, that BRIAN DOWDS economic claim in excess of basic economic loss is DISMISSED.

ORDERED, that SUSAN DOWDS derivative claim is DISMISSED.

Dated: Buffalo, New York
October 23, 2024

Hon. Edward A. Pace, J.S.C.