

**Chaws v Tomilin**

2024 NY Slip Op 35143(U)

January 13, 2024

Supreme Court, Westchester County

Docket Number: Index No. 65922/2023

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

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.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

-----X  
**CHRISTINE L. CHAWS and BRIAN P. PILHOSKI,**

**Plaintiffs,**

**-against-**

**DECISION AND ORDER  
Index No. 65922/2023  
Seq Nos. 1 & 2**

**KAILYN M. TOMILIN,**

**Defendant.**

-----X  
**WOOD, J.**

In this personal injury action arising from a motor vehicle accident, New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 20-65 were read in connection with the motion for summary judgment by defendant (Seq 1) dismissing plaintiffs’ complaint on the grounds that plaintiff does not satisfy the serious injury threshold requirement under Insurance Law §5102(d) and §5104(a); and the cross-motion by plaintiffs (Seq 2) granting partial summary judgment on the issue of liability. The subject motor vehicle accident occurred on October 9, 2022, at approximately 8:00 P.M., at the intersection of Main Street and Youngs Road, Town of Amherst, County of Erie, when the vehicle operated by defendant struck the vehicle operated by plaintiff Christine L. Chaws (“plaintiff”) in the rear while stopped at a red light.

Defendant testified that on the day of the accident, she was coming from a Buffalo Bills game. Prior to the game, she consumed one beer outside the stadium, and during the game she drank approximately three spiked seltzers. Defendant testified that she was intoxicated while operating the motor vehicle at the time of the subject accident and was arrested at or close to the scene of this accident. placed in handcuffs and taken to a local jail. She was issued a

ticketed/arrested for DWI "driving while intoxicated" and for fleeing the scene of an accident. Ultimately, defendant plead guilty of to DWAI (driving while ability impaired), and speeding.

As amplified by plaintiffs' verified bill of particulars, plaintiff allegedly sustained injuries of the cervical spine, lumbar spine, thoracic spine, and right knee from the accident.

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; (*Orange County-Poughkeepsie Ltd. Partnership v Bonte*, 37 AD3d 684, 686-687 [2d Dept 2007]; *Rea v Gallagher*, 31 AD3d 731 [2d Dept 2007])). Additionally, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1986]; *Jakabovics v Rosenberg*, 49 AD3d 695 [2d Dept 2008]; *Menzel v Plotkin*, 202 AD2d 558, 558-559 [2d Dept 1994])). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (*Yelder v Walters*, 64 AD3d 762, 767 [2d Dept 2009]; *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003])). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986])).

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104 (a); (*Licari v Elliott*, 57 NY2d 230 [1982])). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against

another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury.” Pursuant to Insurance Law §5102(d), serious injury means: a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; 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 plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (*Hambusch v New York City Transit Authority*, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to “weed out frivolous claims and limit recovery to serious injuries” (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350 [2002]).

Here, the categories of injury for this matter are a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system, and the 90/180-day category.

Addressing plaintiffs’ claims for the significant limitation or permanent consequential categories, the Court of Appeals has ruled that 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” (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353

[2002]). Specifically, for the significant limitation of use of a body function, a plaintiff must substantiate his or her complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (*Ferraro v Ridge Car Serv.*, 49 AD3d 498 [2d Dept 2008]). A minor, mild, or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*Perl v Meher*, 18 NY3d 208, 218 [2011]). Of significance, the Court of Appeals noted that “in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well. Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a “significant limitation,” there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a “serious injury” (*Thrall v City of Syracuse*, 60 NY2d 950, revg 96 AD2d 715; *Partlow v Meehan*, 155 AD2d 647, 648 [2d Dept 1989]). Permanent consequential limitation requires a greater degree of proof than a significant limitation, as only the former requires proof of permanence (*Altman v Gassman*, 202 AD2d 265, 265 [1st Dept. 1994]).

Defendant’s motion is based on the pleadings, including plaintiffs’ verified bill of particulars, the transcripts of the depositions of plaintiffs, defendant, and independent medical examination reports by two doctors and a chiropractor. The record shows that plaintiff was examined by Board Certified Orthopedist, Jason R. Baynes, MD, on June 4, 2024. Dr. Baynes’ examination included range of motion testing by the use of a goniometer. Upon this court’s read of the independent medical reports, plaintiff was capable of full range of motion in all areas measured, and all objective tests were negative. Dr. Baynes opines, “In my expert medical opinion, this claimant has sprain/strains of the soft tissues of the neck, back, and right knee as a

result of this motor vehicle accident. She has pre-existing conditions which predispose her to sprain/strain of the neck and back. Her knee had a contusion from hitting the front panel, all these are resolved at this time in terms of the sprain/strain of the soft tissues. There is no evidence on MRI reports of any acute injury.” (NYSCEF#26). Plaintiff was also examined by Board Certified Neurologist, Vikas Agrawal, MD, on May 29, 2024. Dr. Agrawal’s examination included range of motion testing by the use of a goniometer. Plaintiff demonstrated full range of motion in all areas measured. Additionally, all objective tests were negative. Dr. Agrawal opines, “The claimant’s neurological examination is normal. She is able to function in her daily life quite independently, including basic and advanced activities of living and driving. She does not need any testing or treatment at this time...The claimant has an excellent prognosis...There is no evidence of permanency” (NYSCEF#27). Both doctors stated normal ranges and measured ranges.

On this basis, defendant submitted competent medical evidence establishing, prima facie, that the alleged injuries to the cervical, lumbar, thoracic regions of the plaintiff’s spine, and right knee did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see Staff v Yshua*, 59 AD3d 614 [2009]).

In opposition, plaintiffs argue that attached certified medical records to opposition papers provide objective evidence of neck and back injuries and the resultant significant limitations and/or restrictions. Plaintiffs’ counsel alleges that plaintiff suffered, and continues to suffer, from neck and lower back pain, including significant neck and back limitations, and/or restrictions and decreased ranges of motion and function are documented throughout her treating physicians certified records. Plaintiffs also offers the medical report of Paul Apostolides of

Orthopedic and Neurosurgery Specialist- date of visit August 12, 2024, which fails to include objective testing. While Apostolides states that plaintiff's range of motion is diminished, he does not state what her range of motion is, nor does he list normal values and make a comparison. (NYSCEF#52), Plaintiff also includes the IME of Chiropractor, John Iozzio dated August 22, 2023 in opposition to the subject motion. This report is over a year old and does not provide a recent qualitative and quantitative assessment of plaintiff's current condition. However, the plaintiff's medical record shows that her range of motion was tested by multiple doctors whose findings were totally at odds with the findings of defendant's IME doctors, who also conclude that the accident caused said limitations. In the interests of justice, the court finds that these extreme differences of opinion must be resolved by the finder of fact. Further, although the issue of pre-existing conditions is raised by the IME doctors and not specifically disputed by plaintiffs, the existence of pre-existing conditions do not dispute the plaintiff's doctors' conclusions that the accident caused by defendant did not exacerbate her condition to a level that meets the required threshold.

Turning next to the 90/180 category, to prove a serious injury under this category, an injury must be (1) medically-determined injury or impairment of a nonpermanent nature (2) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment and (3) there must be curtailment of usual activities to a great extent, rather than some slight curtailment (*Damas v Valdes*, 84 AD3d 87, 91 [2d Dept 2011]). Plaintiff must show by objective evidence that a medically determined injury caused the alleged limitation of activities; self-serving testimony or affidavit is insufficient without a physician's affidavit substantiating the medically determined

injury which caused the alleged limitation of her activities (*Jackson v New York City Tr. Auth.*, 273 AD2d 200, 201 [2d Dept 2000]).

Based on the record, and the doctors' reports, defendant demonstrated, prima facie, that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law §5102(d). In opposition, plaintiffs' counsel argues that plaintiff was forced to stay in a hotel near where the accident occurred for a minimum of a month due to the severity of the pain she was experiencing. Once plaintiff was able to return to her home in Yonkers, she began treating with a chiropractor every 2-3 days consistently for two full months in which it was noted that she was forced to walk with a cane, was having difficulty ambulating and turning her neck. To date, plaintiff is treating with a pain management specialist and a physical therapist. She testified that to date she is no longer able to do housework, laundry, sleep with her husband, or grocery shop/carry groceries up the stairs, and is forced to rely on her husband for everything (NYSCEF#41). In light of the foregoing, plaintiffs fail to raise a triable issue of fact (*Brown v Williams*, 207 AD3d 695 [2<sup>nd</sup> Dept 2022]).

In any event, plaintiff failed to establish through medical records and plaintiff's EBT, that she was unable to perform her usual and customary tasks of daily living for 90 of the first 180 days following the accident.

Turning next to plaintiffs' cross-motion for partial summary judgment on the issue of liability, generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (*Ortega v City of New York*, 721 NYS2d 790 [2d Dept 2000]). "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other

vehicle” (*Guralenko v New York City Transit Auth.*, 220 AD3d 847, 848 [2d Dept 2023]). “A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Fernandez v Babylon Mun. Solid Waste*, 117 AD3d 678 [2d Dept 2014]).

The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision, because the operator of that car has a duty to avoid stopping suddenly without properly signaling to avoid a collision “when there is opportunity to give such signal” (Vehicle and Traffic Law §1163; *see id.*; *Colonna v Suarez*, 278 AD2d 355 [2d Dept 2000]). “A conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation” (*Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 670 [2d Dept 2013]). But, “stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*Gutierrez v Trillium USA, LLC*, 111 AD3d at 671). However, the frontmost driver also has the duty to avoid stopping suddenly or slowing down without signaling to avoid a collision (*Martinez v Allen*, 163 AD3d 951, 952 [2d Dept 2018]).

To make a prima facie showing, the motion must be supported “by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions” (CPLR 3212[b]). Here, the deposition testimonies of the parties, that demonstrate that defendant was intoxicated, fled the scene of the accident, and rear-ended plaintiff’s motor vehicle without a reasonable excuse (NYSCEF# 42 pgs. 35-36) are sufficient to demonstrate prima facie entitlement to summary judgment, unless defendant presents a nonnegligent explanation for the

motor vehicle accident (*Thompson v New York City Transit Auth.*, 208 AD3d 815, 818 [2d Dept 2022]).

Based on the record, defendant fails to rebut the inference of negligence by providing a non-negligent explanation for the collision or submitting an affidavit from a person with personal knowledge of the facts containing competent evidence denying plaintiffs' allegations (*Cheow v Cheng Lin Jin*, 121 AD3d 1058, 1059 [2d Dept 2014]; *Ramirez v Konstanzer*, 61 AD3d 837 [2d Dept 2009]). Thus, plaintiffs' motion for partial summary judgment is granted, and the case shall proceed only on the issue of damages. Plaintiffs' evidence established, prima facie, that plaintiff bears no comparative fault and defendant is the sole cause of the accident.

The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. Accordingly, it is

ORDERED, that plaintiffs' cross-motion (Seq 2) is **granted** as to liability, as it has been clearly established that defendant's actions are the sole cause of the collision; and defendant's motion for summary judgment (Seq 1) is **denied** due to questions of fact as to whether plaintiff suffered a serious injury threshold in Insurance Law §5102(d), as to all categories listed in plaintiff's opposition papers, including the permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, except that it is **granted** on the 90/180 day category; and the issue of serious injury will be tried during the damages phase of the trial, and that the granting of plaintiffs' partial summary judgment motion for liability does not preclude further determination that plaintiff may or may not have sustained serious injury as defined by Insurance Law §5102<sup>9</sup>[d]; and it is further

ORDERED, that this matter is hereby referred to the Central Pre-Trial Alternative Dispute Resolution for a settlement conference. The Clerk of that Part shall notify the parties of the date, time, and method of the settlement conference; and it is further

ORDERED, that within twenty days of this decision and order being uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order electronically, with notice of entry, upon all parties, and file proof of service on NYSCEF within 5 days of service. The Clerk of the Court shall mark his records accordingly.

Dated: White Plains, New York  
January 13, 2024



HON. CHARLES D. WOOD  
Justice of the Supreme Court

TO: All Parties by NYSCEF