

Hamilton v Caballero

2025 NY Slip Op 32374(U)

July 2, 2025

Supreme Court, New York County

Docket Number: Index No. 451150/2019

Judge: James G. Clynnes

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

PRESENT: HON. JAMES G. CLYNES PART 22

Justice

-----X

ROSEMARY HAMILTON,

Plaintiff,

- v -

RICARDO A. TORRES CABALLERO, SENIORCARE
EMERGENCY MEDICAL SERVICES INC., THE CITY OF
NEW YORK/NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION

Defendant.

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INDEX NO. 451150/2019
MOTION DATE 03/29/2024
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action arising from a motor vehicle accident, defendants Ricardo A. Torres Caballero (Caballero) and Seniorcare Emergency Medical Services (Seniorcare) (collectively, defendants) move for summary judgment and dismissal of the complaint of plaintiff Rosemary Hamilton (Hamilton) on the grounds of emergency doctrine and on the grounds that the plaintiff’s alleged injuries fail to satisfy the serious injury threshold within the meaning of Insurance Law 5102 (d) and 5104 and the cross-motion by plaintiff Hamilton, pursuant to CPLR 3212, for an Order granting summary judgment on the issue of liability only in favor of plaintiff and against defendants and, pursuant to CPLR 3211 (b), for an Order striking defendants’ first affirmative defense, alleging contributory negligence and/or culpable conduct on the part of plaintiff, striking defendants’ second affirmative defense alleging assumption of the risk, and striking defendants’ ninth and tenth affirmative defenses alleging “emergency” situation. As set forth below, the court denies defendants’ motion for summary judgment and grants Hamilton’s motion for summary judgment with respect to liability.

BACKGROUND

On September 29, 2017, Hamilton was involved in a car accident on Front Street near Uniondale Avenue in Uniondale New York. Hamilton stated that the accident occurred as she was

traveling on the eastbound side of Front Street in Nassau County. According to Hamilton's deposition testimony, the roads were dry, it was light out, and there was no precipitation. During her deposition, Hamilton testified that at the time of the accident, she was driving a white, four-door Toyota Corolla, and she was stopped behind two vehicles at the traffic light. The accident occurred when the passenger side of the defendants' ambulance struck the driver's side rear bumper of her vehicle. She testified that this caused her vehicle to "go forward a little," "pushed my car, pushed me a little," and the accident caused "me to go forward a little and then twist my body" (Schwartz aff, exhibit G (Hamilton December 15, 2022 deposition transcript) at 19) and resulted in a dent to her rear bumper and some damage to her tail light (*id.*).

According to Hamilton's testimony, she was not confined to bed as a result of this accident, but she was confined to home for one month following the accident (Schwartz aff, exhibit F (Hamilton October 2, 2020 deposition transcript) at 132-133).

Caballero testified that at the time of the accident he was working as an EMT, employed by Seniorcare Emergency Medical Services Inc. and was driving the ambulance that came into contact with Hamilton's vehicle. According to Caballero, he was exiting a 7-Eleven parking lot onto Front Street in the eastbound direction that contained one through lane and one left-turn lane. He stopped his vehicle at the edge of the parking lot and looked to this left to make sure there were no vehicles approaching. He entered the roadway with the intention of making a left turn at the nearby intersection from the left-turn lane. Before he could complete his turn onto Front Street, Caballero saw another vehicle traveling at "high speed" in the opposite/westbound lane of traffic.

Caballero, under the impression that this oncoming vehicle was too close to the line dividing the east and westbound lanes, quickly turned his steering wheel to the right "to avoid the accident with the oncoming vehicle that was straddling the center line" (Schwartz aff, exhibit D, ¶ 8). As Caballero's ambulance moved right, into the lane where Hamilton's vehicle was stopped, it sideswiped Hamilton's vehicle so that the passenger side rear quarter panel of defendants' ambulance came into contact with the driver's side, quarter panel of Hamilton's vehicle (*id.*, ¶ 9). Caballero described this as a "sideswipe in response to an emergency situation which was not of [Caballero's] making" and that the ambulance did not strike the rear of Hamilton's vehicle (*id.*, ¶ 14). Following this accident, Caballero asked Hamilton if she was injured and Hamilton denied any injury and refused medical attention.

There was a dash camera video recorded from inside the defendants' ambulance, which defendants annexed to their motion. Additionally, defendants' assert that this footage is consistent with EMT Caballero's testimony and affidavit as to the circumstances of the accident.

Hamilton commenced this action against the defendants, alleging negligence resulting in her physical injuries and damage to her vehicle.

DISCUSSION

Defendants' motion for summary judgment based upon the emergency doctrine and Plaintiff's cross-motion for summary judgment on the issue of liability

Emergency Doctrine

Defendants argue that they are entitled to summary judgment on liability as Caballero was presented with an emergency situation and acted reasonably under the circumstances that led to the subject accident. According to defendants, the evidence, including Caballero's affidavit and deposition testimony, as well as the ambulance's dash camera video, establish that defendants were presented with an emergency situation not of their own making.

As set forth above, Caballero testified, and averred, that prior to the subject accident, he was exiting from the parking lot of a 7-Eleven convenience store. Caballero further testified that he had sufficient clearance to fully complete his right turn from the parking lot onto Front Street when he began to make his wide right turn (Schwartz aff, exhibit H, at 52; exhibit D, ¶ 6). He further stated that before he was able to complete his turn, he saw another vehicle traveling at a high rate of speed in the opposite/westbound lane of traffic on Front Street which was straddling the center dividing line between westbound traffic and his eastbound traffic lane. He "felt" this vehicle was "very close to him" (id. at 42-49; id., ¶ 7).

Caballero's testimony with respect to the oncoming vehicle that caused him to turn the ambulance into Hamilton's lane to the right is as follows:

"A. I saw a few vehicles coming from the left lane going the opposite way.

Q. Oncoming?

A. Oncoming, yes.

Q. Were you stopped or moving when you saw that, I was moving. About what speed?

A. Five to ten miles an hour.

Q. How close was the closest oncoming vehicle to you when you first saw it?

A. It felt very close to me.

Q. How close?

A. I can't quantify how close it was.

Q. If you use a car length, was it a car length away or two car lengths away, more or less?

A. I couldn't tell you.

Q. How about the rate of speed, sir?

A. It felt like they were coming on very fast”

(Schwartz aff, exhibit H at 42-43).

It was his worry that he might collide with the vehicle traveling quickly in the opposite direction:

“Q: Were you in fear of hitting the vehicle when you saw it?

A: Yes”

(id., 49-50).

“Q: When you saw that vehicle approaching at a high rate of speed, did you change your direction of travel”

A: Yes. I tightened the turning radius.

Q: What does that mean, sir?

A: I moved my steering wheel a little bit more to the right”

(id. at 45).

At this point, the ambulance that Caballero was driving came into contact with Hamilton’s vehicle. Based upon these facts, and the ambulance camera video, defendants argue that the evidence establishes that Caballero was placed in an emergency situation with no time to react or deliberate on the situation. Defendants acted reasonably under these emergency circumstances by performing “evasive maneuvering” and defendants are, therefore, entitled to the benefit of the emergency doctrine, relieving them of any liability.

Courts apply the emergency doctrine to circumstances involving a car accident where the defendant, faced with an emergency situation not of his making. The emergency doctrine:

“recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context’ provided the actor has not created the emergency”

Caristo v Sanzone, 96 NY2d 172, 174 [2001]).

Courts have applied the doctrine to grant summary judgment to a defendant where: defendants attempted to avoid two vehicles which were spinning out of control (*Wenz v Shafer*, 239 AD2d 742 [2d Dept 2002]); where an emergency stop was made by a bus operator only after distressed and panicking passengers urgently told the driver that a man had left a bomb on the bus (*Bello v Transit Authority of New York City*, 12 AD3d 58 [2d Dept 2004]); where the defendant driver of a bus was forced to brake suddenly to avoid colliding with a vehicle that suddenly drove in front of the bus (*Roviello v Schoolman Transp. System, Inc*, 10 AD3d 356 [2d Dept 2004]; see also *Brooks v New York City Transit Authority*, 19 AD3d 162, 162-163 [1st Dept 2005])[court granted summary judgment upon applying emergency doctrine where bus stopped short to avoid a collision with a cab that suddenly cut in front of him]).

The Courts have denied summary judgment with respect to the doctrine where the defendant bus driver testified that he had to stop short when he was driving 5 to 10 miles per hour after leaving a bus stop and the plaintiff, driving at 40 miles per hour, cut in front of the bus at a distance between one and three feet, compelling the bus driver to stop short (*Edwards v New York City Transit Authority*, 37 AD3d 157, 158-159 [1st Dept 2007]). Based upon the plaintiff's testimony that the bus was "driving fast" until it stopped suddenly while approaching the bus stop, the Court held that these contradictory versions of events precluded summary judgment (*id.*, at 159).

Here, Caballero admitted at his deposition that the vehicle he observed coming towards him, prior to the subject accident, was never across the dividing line that separated travel on Front Street. In other words, that oncoming vehicle never crossed into Caballero's lane. His affidavit reflects the same observation. He was asked whether the vehicle ever crossed into the left lane and he stated no. When asked how far from the dividing line was the other vehicle when he first saw it, Caballero stated that he didn't know, that the vehicle "felt" close and he "believed" it was close to the edge of the dividing line. As for the speed of the other vehicle, Caballero testified that it "felt like" the vehicle was "coming fast" (Schwartz app, exhibit H at 43). Caballero testified that at the time of the accident, the weather was clear.

The court finds that under these circumstances of the subject accident, as described by Caballero, it would be inappropriate to apply the emergency doctrine. Under the relevant case law, New York courts apply the doctrine and grant summary judgment where the facts establish the existence of "an emergency," where "an actor is faced with a sudden and unexpected

circumstance which leaves little or no time for thought, deliberation or consideration,” the actor will not be found negligent if the actions are “reasonably prudent” under the circumstances (*Edwards v New York City Transit Authority*, 37 AD3d 157, 158 [1st Dept 2007]). Here, the facts do not support the existence of an “emergency.” Instead, Caballero’s testimony establishes that Caballero “felt,” “believed” or “thought” that the oncoming vehicle might be moving quickly and might be getting close to the dividing line so that he “feared” it might cross that line. However, and significantly, Caballero testified that although that vehicle “felt close” to the edge of the dividing line, he never observed the vehicle cross into his lane. When asked how far that vehicle was from the dividing line, when he first saw it, he responded by stating that he didn’t know.

Based on Caballero’s own testimony, the court cannot find that Caballero’s actions qualify for the application of the emergency doctrine. The circumstances do not warrant a finding that Caballero turned the ambulance he was operating to avoid “a sudden and expected circumstance” that compelled him to do so. The court, therefore, will not grant summary judgment for defendants’ on this ground, but will grant summary judgment for Hamilton respecting liability on this ground.

In her complaint, Hamilton alleges negligence against the defendants, which caused both her physical injuries and damage to her vehicle. In order to establish negligence, a plaintiff must allege three elements: “(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof” (*Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 A.D.3d 216, 221 [1st Dept. 2007][internal citations omitted]). In any motor-vehicle accident case, to recover on a cause of action based in negligence, there must first be a negligent act, and then that negligent act must, in turn, have been a proximate cause of both the accident and the plaintiff's alleged injuries. *See id.* 221-24, 841 N.Y.S.2d 486. “The issue of whether a defendant's negligence was a proximate cause of an accident is separate and distinct from the negligence determination”

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that they are free from fault (*Harrison v Sow*, 165 AD3d 463, 464 [1st Dept 2018]).

Since the court finds that the emergency doctrine does not apply to the circumstances of this case, the defendants are unable to establish that Caballero was free from fault in causing the subject accident. Further, the submissions on this motion establish Hamilton’s prima facie claim

for negligence, including proximate cause, since all the parties agree that at the time of the accident, Hamilton was stopped in a line of vehicles waiting at a red light. Neither defendants nor Hamilton argue that Hamilton was in any way at fault for the subject accident. Hamilton is, therefore, able to establish the three elements of negligence as well as her lack of fault. Thus, the court grants Hamilton's motion for summary judgment on the issue of liability in her favor and against defendants. There is no evidence of culpable conduct or assumption of the risk by plaintiff and the emergency doctrine is not applicable. For these reasons, the portion of plaintiff's cross-motion seeking dismissal of defendants' first affirmative defense alleging culpable conduct by plaintiff, second affirmative defense alleging assumption of the risk by plaintiff and ninth and tenth affirmative defenses alleging emergency doctrine is granted and those affirmative defenses are dismissed.

Serious Injury Threshold

New York Insurance Law § 5102 defines "serious injury" as:

"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 eight days immediately following the occurrence of the injury or impairment."

Absent a "serious injury" as defined above, a plaintiff's sole remedy for a personal injury resulting from a motor vehicle accident is through no-fault insurance (see Insurance Law § 5104 (a)).

On a motion for summary judgment concerning the issue of serious injury, defendants must meet their prima facie burden by establishing, based upon the gathered evidence, that plaintiff did not sustain a serious injury as result of the subject accident (*see Nadim v Gadi Inc.*, 190 AD3d 648, 648 [1st Dept 2021]). In *Nadim*, for example, the Court found that defendants sustained their burden by submitting the affirmed reports of a neurologist, orthopedist and radiologist.

In opposition, a plaintiff is tasked with creating a question of fact as to whether she sustained a serious injury (*Rodriguez v Santos*, 235 AD3d 564, 564 [1st Dept 2025]). The burden

shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a serious injury (*see Baez v Rahamatali*, 6 NY3d 868, 869 [2006]). Where, in opposition to defendants' motion, plaintiff submitted medical records reflecting some limited range of motion in the month after the accident, and then submitted hearsay evidence from a physician who examined him four years later and stopped treatment in 2014, at the latest, the Court found that plaintiff failed to show any evidence of the significance or permanency of the condition and granted defendants' motion on this issue (*Nadim*, 190 AD3d at 649).

In the bill of particulars, Hamilton alleges the following injuries: (1) injuries to the lumbar spine; (2) lumbar spine surgery; (3) right knee meniscus tear; (4) straightening of the normal cervical lordosis; (5) disc bulges; (6) thoracic spine sprain; (7) disc buldge in lumbar spine; (8) acute radiculopathy; (9) acute radiculopathy at S1; peripheral neuropathy of lower extremities; (10) shoulder derangement bilaterally; (11) left knee contusion; and (12) post-concussion syndrome, serious injury under four of the nine categories of serious physical injuries set forth by Insurance Law 5102 (d). Those categories are: (1) a permanent loss of use of a body organ, member, function, or system; (2) a significant limitation of use of a body function or system; (3) a permanent consequential limitation of use of a body function or system; or (4) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment (Schwartz aff, exhibit c at para. 9).

In support of their motion, and to meet their initial burden, defendants argue that Hamilton has not sustained a serious injury as defined by Insurance Law Section 5102(d). According to defendant, the affirmed reports of Dr. Kim (Exhibit "I") and Dr. McRae (Exhibit "J"), confirm that there is no causal relationship between plaintiff's alleged injuries and the subject alleged low-speed, low-impact accident. Plaintiff was 64 years old at the time of the subject accident (Plaintiff Dep. of October 2, 2020, Exhibit F, at 10). Defendants further argue that the evidence establishes that Hamilton was not prevented from performing her customary daily activities for 90 days during the 180 days immediately following the accident. Defendants argue that plaintiff's injuries were not causally related to the accident.

On November 13, 2023, Dr. Yong H. Kim (Dr. Kim) performed an Orthopedic examination of Hamilton on behalf of the defendants. Dr. Kim concluded that as a result of the accident,

plaintiff sustained a cervical strain “that has resolved” (Schwartz, aff, exhibit I). According to Dr. Kim, plaintiff’s cervical MRI’s of November 21, 2017, June 1, 2022 and June 12, 2022 reveal stable, multilevel, spondylotic changes to her cervical spine, appropriate for plaintiff’s age group and no findings of acute or subacute traumatic injuries related to the subject accident.

With respect to plaintiff’s lumbar spine, Dr. Kim concluded that plaintiff sustained a lumbar strain consistent with a minor car accident. Plaintiff’s lumbar MRI obtained on November 16, 2017, revealed that the claimant had “preexisting, diffuse, multilevel, spondylotic, degenerative changes to her lumbar spine, with the presence of spinal stenosis resulting from chronic changes in her lumbar spine, radiographic appearance of which certainly existed prior to the subject accident of September 29, 2017” (exhibit I at 15, 16-17). All of the findings based upon this MRI are chronic in nature with no evidence of any acute or subacute traumatic injuries” (*id.* at 15).

Dr. Kim performed range of motion testing with the use of a goniometer and found restrictions in Hamilton’s range of motion: “flexion to 50 degrees (normal 60 degrees), and lateral bending to 15 degrees right/left (normal 25 degrees). According to Dr. Kim: “While plaintiff’s lumbar examination found some loss of range of motion, Dr. Kim stated that such results are expected in an individual with pre-existing, degenerative changes, along with a history of two-level fusion” There were no objective findings of any ongoing causally-related issues in plaintiff’s lumbar spine, and plaintiff does not require any further causally-related orthopedic treatment in her lumbar spine. Dr. Kim explains that that plaintiff’s May 23, 2014 work-related accident, which resulted in injuries to her knees, is likely a factor in plaintiff’s continuing lumbar pain.

For this conclusion, Dr. Kim cites to plaintiff’s treating physician’s note of October 19, 2017 which states that plaintiff’s “developing hip pain . . . seemingly indicat[ed] that the claimant was developing symptoms of lumbar radiculopathy or neurogenic claudication as a result of her prior May 23, 2014 accident” (*id.* at 14).

Hamilton testified that at the time of the accident, she was employed as a substitute teacher in Westbury Elementary School. Prior to that, she worked as a substitute teacher at Roosevelt High School, and as a teacher’s assistant at Hempstead Public School. Following the accident, she never returned to work. Additionally, she testified that she was confined to her home for one month immediately following the subject accident.

Further, Hamilton has submitted an affirmation from her treating physician, Dr. Philip Rafiy (Dr. Rafiy), and the contemporaneous medical records of Dr. Sawey Harhash of Metropolitan Medical and Rehab, P.C. These physicians found restrictions in Hamilton's range of motion with respect to her lumbar spine.

According to Dr. Rafiy, he first examined Hamilton on October 2, 2017, when he noted "thoracic paraspinal tenderness and muscle spasms and recommended physical therapy and at home exercises. During Hamilton's November 16, 2017 visit, Dr. Rafiy measured Hamilton's lumbar range of motion using a goniometer, "and noted the following: flexion 30 degrees (normal 90) and extension 10 degrees (normal 30)" (Mahan aff, exhibit G, ¶ 4, fn. 1). During her January 10, 2018 appointment, Dr. Rafiy noted Hamilton's complaints of worsening back pain radiating into her lower extremities. He again measured her lumbar range of motion with a goniometer, which reflected: "flexion 30 degrees (normal 90) and extension 10 degrees (normal 30)" (*id.*, ¶ 6).

During Hamilton's February 1, 2018 and March 1, 2018 appointments, she complained of worsening low back pain and continued numbness from her buttocks to her calves. She complained of difficulties standing and walking. Dr. Rafiy's lumbar range of motion measurements for both appointments were: "flexion 30 degrees (normal 90) and extension 10 degrees (normal 30)" (*id.*, ¶¶ 7-8). Included in his description of the March 1, 2018 appointment, Dr. Rafiy states that his review of the November 16, 2017 MRI film confirms disc herniation with stenosis and a November 14, 2017 EMG study confirmed lumbar radiculopathy (*id.*, ¶ 8).

With respect to the decision to perform lumbar spine surgery, Dr. Rafiy affirms: "Options were discussed with [Hamilton] that included conservative treatment which at this juncture had failed, or undergoing posterior lumbar laminectomy with decompression, fusion and instrumentation at the levels of compression" (*id.*, ¶ 8). As a consequence of this discussion, on March 6, 2018, Dr. Rafiy performed lumbar spine surgery on Hamilton. At a March 23, 2022 appointment, Dr. Rafiy "noted decreased sensation in the right posterior buttock and lateral calf, as well as decreased right L4 and S1 reflexes, and decreased right hip flexion motor. I performed range of motion testing using a goniometer and noted the following: flexion 30 degrees (normal 90), extension 10 degrees (normal 30); and lateral bending to the right and left 30 degrees (normal 45)" (*id.*, ¶20). On April 4, 2022, he reviewed her March 23, 2022 lumbar MRI, which showed "L3-L4 severe central canal stenosis, bilateral L4 impingement, L4 to S1 laminectomy with

decompression and fusion, incomplete fusion” (*id.*). On May 18, 2022, Dr. Rafiy performed lumbar spine surgery on Hamilton.

Dr. Rafiy most recently examined Ms. Hamilton on April 22, 2024. Following her May 18, 2022 surgery, she underwent surgeries performed by Dr. Sheng-Fu Larry Lo on June 13, 2022 and Dr. Thomas Link on June 23, 2022 “due to cerebrospinal fluid leak,” and had follow up examinations with them. On her April 22, 2024 examination with Dr. Rafiy, Plaintiff reported ongoing back pain. On physical examination, he noted lumbar tenderness and the straight leg raise test he performed was positive on the right at 70 degrees with use of a goniometer. On that date, Dr. Rafiy performed range of motion testing using a goniometer, and noted the following: flexion 40 degrees (normal 90), extension 20 degrees (normal 30); and lateral bending to the right and left 30 degrees (normal 45).

According to Dr. Rafiy’s affirmation, he was aware of Hamilton’s previous, May 23, 2014, accident in which she injured her bilateral knees. Dr. Rafiy stated that Hamilton did not injure her lower back prior to the subject September 29, 2017 motor vehicle accident. Dr. Rafiy opined that, following the subject incident, Hamilton developed severe low back pain with radiation to both lower extremities, “with associated pins and needles, weakness, paresthesia, numbness” (*id.*, ¶ 32). While Dr. Rafiy opined, after Hamilton’s March 6, 2018 surgery to her lumbar spine, that Hamilton had age-related, pre-existing “hypertrophy, and stenosis and arthrosis,” (*id.*), his observations of swollen and engorged nerve roots during surgery were consistent with her right-sided “radicular” symptoms being worse than the left. “Moreover, it would have been medically impossible for Ms. Hamilton to be pain free, symptom free, and neurologically intact had the noted nerve roots been engorged and red and erythematous with significant inflammation and swelling prior to the subject accident” (*id.*).

With respect to his findings and the threshold requirements of serious injury, Dr. Rafiy opined: “It is my opinion, within a reasonable degree of medical certainty, that due to ongoing symptoms, restrictions in range of motion almost seven years after the incident, MRI findings, X-ray findings, surgeries, intraoperative findings, and my own clinical examinations and findings, that [Hamilton's] injury represents a significant limitation in the use of her lumbar spine, and a permanent disability. [Hamilton's] present complaints of pain to her lumbar spine will also be subject to periods of exacerbation which will require further treatment” (*id.*, ¶ 33).

With respect to degeneration and pre-existing injuries, Dr. Rafiy opined, “[b]ased on the fact that she was not experiencing radiating pain, and was neurologically symptom free, and restriction free prior to the subject incident, but following the subject September 29, 2017 motor vehicle incident, she had a sudden onset of pain and radicular symptomatology which correlated to the intraoperative findings, as well as the limited restrictions in range of motion, the diagnostic testing, and the other objective signs of trauma described herein, it is my opinion, based on a reasonable degree of medical certainty, that [Hamilton's] injuries, complaints, and restrictions as diagnosed and opined to herein by me were causally related to her September 29, 2017 motor vehicle incident” (*id.*).

Dr. Rafiy opined that based on the fact that Ms. Hamilton was pain free, symptom free, and neurologically intact prior to the subject incident, with no prior trauma or medical history with treatment to her lumbar spine, that the September 29, 2017 accident was causally related to her lumbar spine injuries.

Hamilton has also submitted the medical records of Dr. Sawey Harash of Metropolitan Medical & Rehab, P.C. where plaintiff began treatment within a week of the subject accident.

In order to satisfy the statutory threshold under the Insurance Law, a plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law 5102 (d) (*Nagbe v Mimigreen Hacking Group, Inc.*, 22 AD3d 326 [1st Dept 2005]). “The plaintiff’s medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether plaintiff’s limitations were significant (*Milazzo v Gesner*, 33 AD2d 317 [1st Dept 2006]). Ranges of motion serve as objective admissible evidence of the persistence of plaintiff’s injury (*Collin v Jost*, 281 AD2d 175 [1st Dept 2001]).

In order to establish their prima facie proof of plaintiff’s lack of a serious injury, a defendant may rely either on “the sworn or affirmed statements of their examining physician, plaintiff’s deposition testimony and plaintiff’s unsworn physician’s records”.

Where there are conflicting opinions of experts, such conflicts may not be resolved on a motion for summary judgment.

Based upon the submissions for this motion, the court finds that defendants have satisfied their prima facie burden to establish that Hamilton suffered no permanent consequential limitation

of use of any body organ or member or significant limitation of a body function or system through the affirmed reports of their experts, who examined plaintiff and found limited ranges of motion in her lumbar spine, but found no causal relationship between the injuries and the subject motor vehicle accident. Defendants offer Dr. Kim's report to establish that even though his measurements of Hamilton's lumbar range of motion reflect limitations, these limitations are the result of chronic degenerative conditions and not the impact of the subject accident. It is Dr. Kim's conclusion that Hamilton's lumbar limitations and symptoms are not causally related to the accident.

In opposition, however, Hamilton is able to raise questions of fact concerning the significant and permanent nature of her lumbar injuries and whether they are causally related to the accident. Hamilton relies on the report of her treating physician Dr. Rafiy who describes the lumbar back limitations as causally related to the subject accident. Dr. Rafiy first examined Hamilton four days after the accident, examined and treated her in regular time intervals and recently examined her on April 22, 2024. During that time, Dr. Rafiy used a goniometer to measure Hamilton's lumbar range of motion. He noted Hamilton's ongoing complaints of pain, limited motion and and limited activity.

On May 18, 2022, Dr. Rafiy performed lumbar spine surgery on Hamilton and saw her on May 26, 2022 for post-operative follow up. He notes in his affirmation that he was Hamilton's treating physician after her May 23, 2014 work-related incident and states: "Hamilton did not injure her lower back in that prior May 23, 2014 incident, nor did she ever present to me, or any other physician or medical facility with complaints of pain, restrictions, or radicular complaints or symptomatology related to her lower back prior to the subject September 29, 2017 motor vehicle incident" Dr. Rafiy states that Hamilton has not had any lower back complaints or neurological deficits until the subject accident.

Dr. Rafiy reviewed Hamilton's MRI films as well as the report of the MRI Lumbar Spine, dated November 16, 2017, July 10, 2019 and March 23, 2022. Although he concedes that the films reflect "age related, pre-existing degeneration including stenosis, arthrosis, hypertrophy and ligamentum flavum thickening as would be expected of an individual in [Hamilton's]age group at the time of the accident," Dr. Rafiy finds that after the accident, Hamilton went from "a baseline of non-existent radicular pain and symptomatology, to developing posttraumatic radiculitis which again, she did not have beforehand" (Mahan aff, exhibit G, para. 32).

Dr. Rafiy concludes that the March 6, 2018 surgery as well as all the other treatments resulted from the subject accident. He opines as to why Hamilton's lumbar spine injuries are the result of the subject accident and relies on his observations during the March 6, 2018 surgery that he performed on Hamilton to support this point:

While again, it is acknowledged that Ms. Hamilton had pre-existing hypertrophy, and stenosis and arthrosis, I directly visualized the nerve roots on the right side to be engorged and red and erythematous with significant inflammation and swelling, which indicates the acuity of Ms. Hamilton's onset of radicular symptoms, and was consistent with her right sided radicular symptoms being worse than the left. Moreover, it would have been medically impossible for Ms. Hamilton to be pain free, symptom free, and neurologically intact had the noted nerve roots been engorged and red and erythematous with significant inflammation and swelling prior to the subject accident, as I visualized them to be during the March 6, 2018 lumbar fusion surgery.

(Mahan aff, exhibit G, ¶ 32).

March 6, 2018 surgery which was performed due to the sudden onset of radicular symptoms [Hamilton] developed following the September 29, 2017 incident as discussed hereinabove. Based on the fact that [Hamilton] was pain free, symptom free, and neurologically intact prior to the subject incident, with no prior trauma or medical history with treatment to her lumbar spine, but following the subject September 29, 2017 incident, she developed an onset of radicular pain, sensory deficits, motor loss, and reflex changes, including radiating pain to her lower extremities, weakness, tenderness, spasms, and restrictions in range of motion, which correlated to the noted nerve compression at the L3-4 and L4-L5 levels leads me to conclude, within a reasonable degree of medical certainty, [Hamilton]'s nerve compressions at L3-4 and L5 with resultant radiculopathy, radiculitis, neurogenic claudication tenderness, spasms, restrictions in range of motion and resultant surgeries performed to [Hamilton's] lumbar spine are directly, and causally related to the September 29, 2017 motor vehicle incident”

(*id.* at ¶ 32).

Further, the court notes that both Dr. Kim and Dr. Rafiy used an objective instrument of measurement, the goniometer, to verify range of motion limitations relating to Hamilton's lumbar spine. Additionally, according to Dr. Rafiy's affirmation, Hamilton has suffered ongoing pain that interfered with her daily living since the accident.

With respect to the 90/180 day category of serious injury under Insurance Law 5109 (d), defendants set forth the facts that Hamilton alleged in her bill of particulars that she was confined to the hospital for one day, confined to bed for four weeks immediately after the accident, two days after the trigger point injections of November 8, 2017, and four weeks after the March 6, 2018 surgery. During her deposition, Hamilton testified that she was confined to her home for four weeks immediately after the accident (Schwartz aff, exhibit G, at 132-133), and that she did not return to work after the accident.

The court, therefore, concludes that sufficient questions of fact exist to preclude a determination of summary judgment as a matter of law in favor of defendants with respect to the serious injury threshold categories alleged by Hamilton, 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/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 (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment. Therefore the portion of defendants' motion seeking summary judgment and dismissal of the complaint on the grounds that plaintiff's alleged injuries fail to satisfy the serious injury threshold requirements of Insurance Law 5102 (d) and 5104 is denied.

Plaintiff's cross-motion

Based upon the above, plaintiff's cross-motion for an order granting summary judgment on the issue of liability in plaintiff's favor and against defendants and striking defendants' first, second, ninth and tenth affirmative defenses is granted.

In accordance with the foregoing, it is

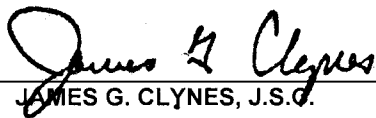
ORDERED that the motion by defendants Ricardo A. Torres Caballero and Seniorcare Emergency Medical Services Inc. for summary judgment in their favor and dismissal of the plaintiff's complaint is denied in its entirety; and it is further

ORDERED that cross-motion by plaintiff for an order granting summary judgment on liability in favor of plaintiff and against defendants and striking defendants' first, second, ninth and tenth affirmative defenses is granted; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry, and with a copy of the previously filed note of issue and statement of readiness and receipt therefor, upon counsel for all parties hereto and upon the Clerk of the General Clerk’s Office and said Clerk shall cause this matter to be placed upon the calendar for such trial; and it is further

ORDERED that such service upon the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the Decision and Order of the Court.

<u>7/2/2025</u> DATE	 _____ JAMES G. CLYNES, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE