

Horvath v Albany Water Dept.
2025 NY Slip Op 35510(U)
February 24, 2025
Supreme Court, Albany County
Docket Number: Index No. 900424-23
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JAMES HORVATH,

Plaintiff,

-against-

DECISION &
ORDER

ALBANY WATER DEPARTMENT, CITY OF
ALBANY, AND ANDREW PESEKA,
Defendants.

Index No. 900424-23

February 24, 2025

HON. DENISE A. HARTMAN, AJSC

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Hartman, J.

In this personal injury action arising from a left-turn motor vehicle collision, defendants Albany Water Department, City of Albany, and Andrew Peseka (collectively, where appropriate, defendants) move for summary judgment dismissing the complaint (Motion #2). Plaintiff James Horvath (plaintiff) opposes defendants' motion and moves for partial summary judgment on the issue of liability (Motion #3). Defendants oppose plaintiff's motion. For the reasons that follow, defendants' motion (Motion #2) is granted, in part, insofar as it seeks dismissal of plaintiff's claims for serious injury, but is denied as to plaintiff's claims for economic damages in excess of basic economic loss. Plaintiff's motion for partial summary judgment on liability (Motion #3) is granted.

I. Background

A. The Accident

Plaintiff, a career construction worker, alleges that, on December 27, 2021, he and his co-worker, non-party Phil McColloch (McColloch), were working on a construction project in the City of Albany. During their 15-minute morning break at 9:00 a.m., the two men decided to drive to plaintiff's apartment in the City of Watervliet, north of the City of Albany, to retrieve tools for the project. At all relevant times, plaintiff's driver's license was suspended, so McColloch drove the two men in plaintiff's 2000 Honda Civic.

At approximately 9:15 a.m., plaintiff and McColloch were traveling north on Broadway, which is not governed by a traffic control device at its intersection with Erie Street. Defendant Peseka, an employee of the Albany Water Department, was driving an Albany Water Department truck westbound on Erie Street, which is governed by a stop sign. As Peseka was attempting to take a left turn from Erie Street into the southbound lane of Broadway, his vehicle collided with the front passenger side of plaintiff's Honda Civic.

B. Procedural History

Plaintiff commenced this negligence action against defendants to recover damages for serious injuries (*see* Insurance Law § 5101 [d]) and economic losses in excess of basic economic loss (*see* Insurance Law § 5104) allegedly sustained as a result of the December 27, 2021 accident. Defendants joined issue by filing a verified answer in which they denied the allegations in plaintiff's complaint, and raised various affirmative defenses, including that plaintiff did not sustain a serious injury as defined under Insurance Law § 5101 (d).

By notice of motion filed June 28, 2023, plaintiff moved (Motion #1), pre-discovery, for partial summary judgment on the issue of liability. The Court (Silverman, J.) denied plaintiff's motion without prejudice to re-filing, and set deadlines for discovery (*see* NYSCEF Doc No. 84).

Discovery is now complete. By notice of motion dated October 9, 2024, defendants move to dismiss the complaint on the ground that plaintiff has failed to establish that he sustained a serious injury under Insurance Law § 5101 (d) caused by the accident (Motion #2). Plaintiff opposes defendants' motion.

Plaintiff also moves by notice of motion dated October 9, 2024 for partial summary judgment on the issue of liability (Motion #3). Defendants oppose plaintiff's motion. By so-ordered letter dated October 24, 2024, the Court, at the request of counsel, adjourned the return date of both motions to January 2, 2025 (*see* NYSCEF Doc No. 70).

II. Analysis

“On a motion for summary judgment, the movant must establish its *prima facie* entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact. Only when the movant satisfies its obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact” (*Aretakis v Cole's Collision*, 165 AD3d 1458, 1459 [3d Dept 2018] [internal quotation marks and citations omitted]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez*, 68 NY2d at 324 [citation omitted]). And “[o]n such a motion, the facts

must be viewed in the light most favorable to the [nonmovant], and every available inference must be drawn in the [nonmovant's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016] [citations omitted]).

A. Defendants' Motion for Summary Judgment on the Ground that the Evidence Fails to Show that the Accident was a Proximate Cause of a Serious Injury Under Insurance Law § 5101 (d) Is Granted (Motion #2).

Defendants argue that plaintiff had pre-existing back conditions for which he received extensive medical treatment prior to the accident and for which medical providers previously contemplated decompression surgery. Defendants contend that plaintiff's medical records following the accident and expert affirmation fail to distinguish between injuries, if any, arising from the accident and his pre-existing condition such that the evidence fails establish that the accident caused him to sustain a serious injury.

Plaintiff opposes defendants' motion, arguing that defendants have failed to establish prima facie that he did not sustain serious injury. Alternatively, plaintiff argues that questions of fact exist as to whether the accident exacerbated his pre-existing lower back conditions. Plaintiff also asserts that defendants have not moved for summary judgment as to his claims for economic loss and, therefore, have not established entitlement to summary judgment as to those claims.

“On a motion for summary judgment dismissing a complaint that alleges a 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” (*Williams v Ithaca Dispatch, Inc.*, 232 AD3d 1165, 1165 [3d Dept 2024], quoting *Murgia v Smith*, 190 AD3d 1233, 1234 [3d Dept 2021]). “Serious injury,” as defined in the Insurance Law, includes a personal injury that results in the “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 [90] days during the [180] days immediately following the occurrence of the injury or impairment” (Insurance Law § 5102 [d]). Plaintiff, in his verified bills of particulars, appears to rely on all four categories.

Objective evidence is required to sustain a claim under any of these categories. “The permanent consequential limitation and/or significant limitation of use categories require objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff’s present limitations to the normal function, purpose and use of

the affected body organ, member, function or system, and the proof must show those limitations to be more than mild, minor or slight” (*Lemieux v Horn*, 209 AD3d 1100, 1101 [3d Dept 2022], *affd* 39 NY3d 1108 [2023]). “Objective evidence, such as medically imposed limitations upon a plaintiff’s daily activities, is also required to support a claim under the 90/180-day category, and self-serving assertions on that score will not suffice” (*id.* [citations omitted]).

As discussed below, defendants have met their burden of establishing *prima facie* that plaintiff did not sustain a serious injury as a result of the December 27, 2021 accident. Though plaintiff argues that he sustained a serious injury to his lower back in the accident, defendants have established through their medical expert’s affirmation and report and plaintiff’s pre-accident medical records that plaintiff has an extensive, documented history of debilitating lower back pain and diagnosed degenerative conditions dating far back as at least 2019, well before the accident.

Defendants’ Expert

Defendants’ expert, Dr. Oppenheim, observed that plaintiff’s medical records reveal a long history of pre-existing back pain with documented degenerative conditions that, as far back as March 2019, caused pain so severe that he was unable to work and caused treating medical professionals to advise plaintiff of the potential need for spinal decompression surgery (*see* NYSCEF

Doc No. 52 at 4). Dr Oppenheim opined that plaintiff's post-accident "imaging did not show any changes" from his pre-accident imaging (NYSCEF Doc No. 50 at ¶ 21; *see id.* at ¶¶ 11-12). In particular, Dr. Oppenheim compared the results of plaintiff's March 2019 and May 2021 pre-accident MRIs with his February 2022 post-accident MRI and concluded that the February 2022 MRI results did not evidence any new conditions or any exacerbation. Dr. Oppenheim also addressed the results of a March 23, 2023 dynamic x-ray of plaintiff's lumbar spine, which he opined showed pathological movement only within the normal ranges at the L4-L5 and L5-S1 levels (*see id.* at 50 at ¶ 20).

Further, Dr. Oppenheim observed that plaintiff had been receiving epidural steroid injections in his lower back for years leading up to the accident, since at least April 2019, through July 2021—approximately five months before the accident (*see* NYSCEF Doc No. 50 at ¶ 13; NYSCEF Doc No. 42 at 105; *id.* at 262-263). Dr. Oppenheim also noted a long, documented history of prescription medication and referral to physical therapy to treat plaintiff's back pain. And while he acknowledged that Dr. Petrucci and Dr. Jacobs performed spinal decompression surgery on plaintiff on April 13, 2023, he opined that the surgery "was not indicated for any reason related to the motor vehicle accident of December 2021 as the imaging did not show any changes after the accident nor any instability caused by the accident"

(NYSCEF Doc No. 50 at 5 ¶ 21). Plaintiff's medical records corroborate Dr. Oppenheim's conclusions.

MRI Records Pre- and Post Accident

Plaintiff's pre-accident MRI imaging from March 21, 2019 showed "degenerative changes in the caudal lumbar spine at multiple levels" (NYSCEF Doc No. 42 at 39) and "mild decrease in disc space" at L4-L5; "broad-based posterior mild disc bulging"; "grade 1 spondylolisthesis" at L5-S1; "left moderate to severe and right moderate degenerative foraminal stenosis with left greater than right intraforaminal L5 nerve root compression"; and noted that "[t]here is limited evaluation for the possibility of L5 spondylolysis. This is suspected" (*id.* at 404). Assessing the results of this MRI in conjunction with plaintiff's subjective description of lower back pain, Dr. Zheng of Ellensville Regional Hospital observed in a March 30, 2019 note that, "with this pain more likely in the future, [plaintiff] may need a surgery to do fixation, to do decompression" (NYSCEF Doc No. 42 at 153).

Results from plaintiff's second pre-accident MRI on May 24, 2021, revealed an "approximately 6–7-millimeter retrolisthesis at L4-L5"; "approximately 8-9-millimeter anterolisthesis at L5-S1"; and that such "findings have not changed significantly" as compared to his March 2019 MRI (NYSCEF Doc No. 42 at 244). In particular, the May 2021 MRI showed "[n]o significant change in lumbar degenerative spondylosis with associated grade 1

retrolisthesis at L5 and grade 1 anterolisthesis associated with bilateral L5-S1” (*id.*).

Dr. Zheng’s June 26, 2021 progress note indicated that the March 2021 MRI showed “L4-L5 grade 1 retrolisthesis associated with broad based central disc herniation and bilateral stenosis, L5-S1 grade 1 anterolisthesis and spine canal stenosis, broad based posterior disc herniation with annular tear and facet joint arthritis L3 through S1” (NYSCEF Doc No. 42 at 169). Dr. Zheng also observed that plaintiff “apparently . . . has instability due to the grade 1 anterolisthesis at L5-S1 and retrolisthesis at L4-L5 with disc herniation and foraminal stenosis and par defect from spondylolysis at L5” (*id.*).

Post-accident MRIs do not on their face reveal significant differences. The post-accident MRI of plaintiff’s lumbar spine performed on February 4, 2022, revealed “stable grade 1 retrolisthesis of L4 on L5” “with associated mild broad-based disc bulge”; “[s]uperimposed central annular tear at L5-S1”; “stable grade 1 anterolisthesis of L5 on S1” (NYSCEF Doc No. 42 at 242). Dr. Dhawan’s note from plaintiff’s March 3, 2022 visit, explained that this MRI showed “stable retrolisthesis of L4 on L5 with associated mild broad-based disc bulge. This results in moderate bilateral neural foraminal narrowing. Stable bilateral chronic pars defects at L5-S1 resulting in grade 1 anterior listhesis of L5 on S1. Superimposed central annular tear at L5-S1. Unchanged severe bilateral neural foraminal stenosis at L5-S1” (*id.*). Thus, the February 2022

MRI results evidenced unchanged conditions as compared with his pre-accident imaging with respect to plaintiff's previously diagnosed anterolisthesis, retrolisthesis, disc bulge, and central annular tear at L5-S1.

Pain and Range of Motion Pre- and Post-Accident

Plaintiff's pre- and post-accident medical records both show significant pain and limitations in his range of motion of his lower back. Specifically, Dr. Dhawan at Ellensville Regional Hospital observed significant pain and limitations in plaintiff's range of motion in his lumbosacral spine in March 2019 and May 2021 (*see* NYSCEF Doc No. 42 at 33, 67). As of March 14, 2019, plaintiff was experiencing "pain [of] 8 to 9/10" in his lower back, at which time Dr. Dhawan diagnosed him with "acute on chronic low back pain" with "acute flare ups of low back pain more than 3 in a year" and noted that plaintiff's "[r]ange of motion" in his lumbosacral spine was "very much painful and limited" (*id.* at 33). And, Dr. Zheng observed in a March 30, 2019 note that plaintiff's "[l]umbar spine[] [a]ppears straightening" with "80% decreased range of motion" (*id.* at 154). Plaintiff's medical records reveal at least two separate instances, in March 2019 and May 2021, where his lower back pain became so severe and limiting that he was unable to work (*see id.* at 59, 66).

Plaintiff's pre-accident medical records are also replete with notations from his treating physicians, Dr. Dhawan and Dr. Zheng, recommending physical therapy and prescribing medication for his lower back pain, with Dr.

Zheng noting in the June 26, 2021 progress note that conservative treatment with physical therapy and daily NSAIDs had been implemented since approximately 2019, but that plaintiff was experiencing “major pain” such that “there [wa]s [now] a medical necessity to treat [him] with epidural injections to reduce the pain from lumbar radiculopathy, sciatica and . . . laxity to the face joint pain” (NYSCEF Doc No. 42 at 169).

Moreover, defendants proffered in support of their motion plaintiff's post-accident independent medical examinations performed by Dr. Cally and Dr. Polepalle in July and November 2022, respectively (*see* NYSCEF Doc Nos. 43, 45). Both IME reports indicate that plaintiff complained of pain from the accident and that plaintiff was not able to work. But both IME reports are express that they did not consider plaintiff's pre-accident medical history (*see* NYSCEF Doc No. 43 at 4; NYSCEF Doc 45 at 4). Rather, the reports state that the experts considered plaintiff's medical records dating back only to January 2022 in reaching their conclusions. Moreover, while Dr. Polepalle's IME indicated reduced range of motion in plaintiff's lumbar spine, Dr. Zheng noted as far back as March 30, 2019, that plaintiff's “[l]umbar spine[] [a]ppears straightening” with “80% decreased range of motion” (NYSCEF Doc No. 42 at 154). Similarly unavailing is plaintiff's experts' reliance on post-accident positive straight leg raise test results. Dr. Polepolle's post-accident IME indicated positive straight leg raise results (*see* NYSCEF Doc No. 45 at 4), but

Dr. Cally's post-accident IME indicated that plaintiff "ha[d] a negative straight leg raise test bilaterally" (NYSCEF Doc No. 43 at 3). And Dr. Zhang's March 30, 2019 physical examination of plaintiff's lumbar spine also reveals pre-accident "[s]traight leg raise test is positive bilaterally more on the right at 40 degrees" (NYSCEF Doc No. 42 at 153).¹

Finally, defendants proffer plaintiff's post-accident records from NY Neurological, PLLC, which includes plaintiff's treatment and surgical history with Dr. Jacobs (*see* NYSCEF Doc No. 46). Plaintiff's first record of visiting Dr. Jacobs, a March 8, 2023 exam note, does not evidence that he considered the results of plaintiff's February 4, 2022 post-accident MRI. Also absent from Dr. Jacobs' March 8, 2023 exam note is any reference to objective evidence demonstrating worsening in plaintiff's lower back condition, including any worsened spondylolisthesis. There, he notes, consistent with plaintiff's pre-accident MRI findings, only that plaintiff "has spondylolisthesis at L5-S1," and, based on plaintiff's subjective statements, that his pain increased post-accident

¹ Though there is some inconsistency in plaintiff's pre-accident medical history as to whether he suffered herniation at the L4-L5 and/or L5-S1 levels (*compare* NYSCEF Doc No. 42 at 39 [Dr. Dhawan's 29, 2019, note indicating "[n]o evidence of disc herniation"], *with id.* at 153 [Dr. Zheng's March 30, 2019 progress note, concluding that the March 21, 2019 MRI "showed L4-L5, L5-L6 disc herniation"]), such evidence pre-dates the accident. In any event, "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). The record is devoid of evidence establishing that the accident caused and/or exacerbated disc herniation or any significant physical limitations resulting therefrom.

(*id.* at 26). Dr. Jacobs indicates worsened spondylolisthesis for the first time in his April 13, 2023 operative note. But nothing in Dr. Jacobs notes or elsewhere in the record objectively distinguishes the reported increase from grade 1 to grade 2 spondylolisthesis as being caused by the accident or the reason for decompression surgery, as opposed to plaintiff's pre-existing degenerative conditions. And Dr. Jacobs' operative note is internally inconsistent in that he indicates that, "[o]n examination [plaintiff] has weakness in the lower extremities consistent with L5-S1 radiculopathy" despite immediately above indicating only "5/5" or "4+/5" results for lower extremity strength (*id.* at 25, 26). Nevertheless, Dr. Jacobs scheduled plaintiff for "lumbar decompression and fusion [surgery] with pedicle screws at L5-S1 with decompression at L4-L5" (*id.* at 24).

Dr. Oppenheim's opinion coupled with plaintiff's medical records documenting his pre-existing conditions establish, *prima facie*, that the December 27, 2021 accident was not the cause of a serious injury under any of the categories of Insurance Law § 5102 (d) (*see Iannillo v Felberbaum*, 198 AD3d 1247, 1250 [3d Dept 2021]; *Lemieux*, 209 AD3d at 1100; *Martin v LaValley*, 144 AD3d 1474, 1476 [3d Dept 2016]; *Howard v Espinosa*, 70 AD3d 1091, 1094 [3d Dept 2010]). Defendants have, therefore, established *prima facie* entitlement to dismissal of plaintiff's serious injury claims.

Accordingly, the burden shifts to plaintiff to raise a triable issue of fact through “objective medical evidence distinguishing [his] preexisting condition[] from the injuries claimed to have been caused by [the December 27, 2021] accident” (*Falkner v Hand*, 61 AD3d 1153, 1154 [3d Dept 2009]). Plaintiff has failed to meet his burden.

First, insofar as plaintiff implicitly argues that his April 2023 surgery establishes exacerbation he is mistaken. His medical records show that decompression surgery—the surgery Dr. Petrucci and Dr. Jacobs performed in April 2023—was contemplated as far back March 2019, based on his MRI results and his self-described pain levels and frequency of recurrence at that time (NYSCEF Doc No. 42 at 153).

Similarly insufficient is Dr. Jacobs’ affirmation. Dr. Jacobs states, “[w]ithin a reasonable degree of medical certainty, [plaintiff’s] surgery, necessitated following the accident in December of 2021, resulted in significant limitations” (NYSCEF Doc No. 79 at ¶ 7). He states that, at the time of surgery, plaintiff had “marked compression of the L5 nerve roots” and opined that such compression “is a competent cause of the pain and limitations described by [plaintiff]” (*id.* at ¶ 7). He states that, “[w]hile some compression may have existed prior to the accident, the post-accident worsening of the pain indicates that the accident aggravated pre-existing pathology” (*id.*). Attached to his affirmation is his April 11, 2024 note documenting plaintiff’s last visit with

him on April 10, 2024 (*see id.* at 4). In that note, Dr. Jacobs states that he “believe[s] that the motor vehicle accident that occurred on December 27, 2021 exacerbated the effects of a pre-existing pathology and condition at the L5-S1 level as the patient’s pain level markedly increased following this motor vehicle accident and became incapacitating in nature” (*id.*).

Dr. Jacobs’ affirmation and April 2024 note are insufficient to defeat defendants’ *prima facie* case. His opinions concerning exacerbation are speculative, conclusory, and “insufficient to raise a question of fact on the issue of serious injury” in that they “fail to identify the objective evidence he relied upon to conclude that [the accident] caused worsening of plaintiff’s preexisting conditions” (*Mesiti v Knight*, 190 AD3d 1141, 1145 [3d Dept 2021]; *see Iannillo*, 198 AD3d at 1251; *Cohen v Bayer*, 167 AD3d 1397, 1401 [3d Dept 2018]).

For instance, Dr. Jacobs’ opinion that the accident caused increased compression of the L5 nerve root requiring surgery is not supported by objective medical evidence, but is based on his conclusory determination that “the post-accident worsening in pain indicates that the accident aggravated pre-existing pathology” (NYSCEF Doc No. 79 at ¶ 7). In fact, Dr. Jacobs’ opinion regarding causation completely fails to provide any meaningful comparison to the significant compression at L5 observed in plaintiff’s March 21, 2019 MRI (*see* NYSCEF Doc No. 40 at 404 [March 21, 2019 MRI results noting “left moderate to severe and right moderate degenerative foraminal

stenosis with left greater than right intraforaminal L5 nerve root compression”)], or Dr. Zheng’s March 2019 conclusion that plaintiff’s degenerative L4-L5 and L5-S1 condition and associated pain “may [require] a surgery to do fixation, to do decompression” NYSCEF Doc No. 42 at 153). Nor does Dr. Jacobs distinguish the MRI “performed after the motor vehicle accident in 2021² [, that] demonstrated a disc protrusion at the L5-S1 level, spondylolisthesis at L5-S1 as well as bilateral neuroforaminal stenosis at the L5-S1 level” (NYSCEF Doc No. 79 at 3) from plaintiff’s pre-accident MRIs which also showed these pathologies (NYSCEF Doc No. 79 at 2 ¶ 6).

Plaintiff also offers in opposition an unverified vocational experts’ report. The vocational report assumes plaintiff was disabled as a result of the December 27, 2021 accident, and relies heavily on Dr. Jacobs’ post-accident opinions and plaintiff’s “stated abilities” (NYSCEF Doc No 77). Plaintiff’s subjective complaints and the vocational report are of little to no evidentiary value to the present analysis, which requires objective medical evidence to show differences in plaintiff’s pre- and post-accident condition. In any event, as the vocational expert report is unverified and unsupported by an affidavit it is inadmissible and, therefore, insufficient to meet plaintiff’s burden (see

² Though not specified in his affirmation or April 2024 note, Dr. Jacobs appears to be referencing plaintiff’s February 2022 MRI.

Fallon v Duffy, 95 AD3d 1416, 1417 [3d Dept 2012]; *Moon v Cortland Mem. Hosp.*, 27 AD3d 870, 871 [3d Dept 2006]).

None of plaintiff's proffers raises a question of fact as to whether there is "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system," (*Lemieux*, 209 AD3d at 1101), or "provide objective medical evidence distinguishing the preexisting condition[] from the injuries claimed to have been caused by the accident underlying the action" (*Mesiti*, 190 AD3d 1141, 1144 [3d Dept 2021]). Moreover, "plaintiff[s] medical submissions are devoid of any expert opinion based on objective findings linking the alleged curtailment of plaintiff's activities to an exacerbation of his preexisting injuries and are thus insufficient to meet [his] shifted burden as to the 90/180-day serious injury category (*Howard*, 70 AD3d at 1094; *see Lemieux*, 209 AD3d at 1100; *Martin*, 144 AD3d at 1476). Accordingly, as plaintiff's proof fails to raise a question of fact, defendants' motion is granted insofar as it seeks dismissal of plaintiff's serious injury claims under Insurance Law § 5102 (d), and such claims are dismissed.

B. Defendants, However, Are Not Entitled to Summary Judgment as to Plaintiff's Claims for Economic Loss in Excess of Basic Economic Loss Pursuant to Insurance Law § 5104.

For the first time in reply to plaintiff's opposition to their motion for summary judgment, defendants argue that plaintiff's claims for economic losses in excess of basic economic loss under Insurance Law § 5104 must be dismissed (NYSCEF Doc No. 80 at ¶ 13; NYSCEF Doc No. 81 at 9). Defendants contend that plaintiff has provided no admissible evidence to substantiate his claim for economic loss in excess of basic economic loss. But plaintiff is correct in arguing in reply that, although defendants' motion (Motion #2) sought dismissal of the complaint, their arguments and evidence were limited to whether plaintiff sustained a serious injury as defined under Insurance Law § 5102 (d) and did not address whether plaintiff sustained economic loss in excess of basic economic loss under Insurance Law § 5104.

"Where, as here, an injured party asserts a claim for economic loss in excess of basic economic loss, he or she need not demonstrate that a serious injury was sustained" (*Jones v Marshall*, 147 AD3d 1279, 1283 [3d Dept 2017]; see *Martin*, 144 AD3d at 1477; *Clark v Farmers New Century Ins. Co.*, 117 AD3d 1208, 1209 [3d Dept 2014], *lv denied* 24 NY3d 991 [2014]).

True, plaintiff's unverified vocational expert's report is inadmissible and, therefore, insufficient to establish prima facie plaintiff's claim for economic loss in excess of basic economic loss. But plaintiff did not seek summary judgment

on these claims and, thus, did not have the burden of establishing a prima facie case in this regard; rather, he advanced this evidence only in opposition. And defendants do not proffer their own admissible evidence to establish prima facie entitlement to dismissal of plaintiff's economic claims, but instead merely make arguments against plaintiff's pleadings and the admissibility of his submissions in support thereof (*see Jones v Marshall*, 147 AD3d 1279, 1283 [3d Dept 2017]; *see also Wells Fargo Bank, N.A. v Murray*, 208 AD3d 924, 927 [2d Dept 2022]).

Consequently, the Court declines to award defendants summary judgment dismissing plaintiff's claims for economic loss in excess of basic economic loss based on their arguments advanced for the first time in reply (*see Jones*, 147 AD3d at 1283; *Martin*, 144 AD3d at 1477; *Burke v Moran*, 85 AD3d 1710, 1711 [4th Dept 2011]). "[H]aving failed to move for summary judgment as to plaintiff[s] economic loss claim[s], defendants [are] not procedurally entitled to such relief" (*Jones*, 147 AD3d at 1283). Because these claims survive, the Court must assess plaintiff's motion for partial summary judgment as to liability.

C. Plaintiff's Motion for Partial Summary Judgment on Liability is Granted (Motion #3).

Plaintiff moves for partial summary judgment to establish defendants' fault based on Peseka's violation of various provisions of the Vehicle and

Traffic Law (VTL), including section 1142 (a) (Motion #3). Plaintiff's argument is simple: defendant Peseka violated the VTL when he failed to yield the right of way to plaintiff's vehicle and has no non-negligent explanation.

In opposition, defendants argue, as relevant, that questions of fact exist as to which vehicle had the right of way and whether Peseka used reasonable care at the time of the accident that preclude summary judgment on liability based on a violation of VTL § 1142 (a). In addition, defendants argue that non-party McColloch was negligent in failing to see Peseka's readily observable presence at the intersection such that plaintiff cannot obtain partial summary judgment on the issue of liability.

Personal injury plaintiffs are no longer required to show freedom from comparative fault to establish prima facie entitlement to judgment as a matter of law on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Buchanan v Keller*, 169 AD3d 989, 991 [3d Dept 2019]). But "[a] plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Marangoudakis v Suniar*, 208 AD3d 1233, 1235 [2d Dept 2022] [internal quotation marks and citation omitted]). "There can be more than one proximate cause of an accident, and generally, it is for the trier of fact

to determine the issue of proximate cause” (*see Khalil v Garcia-Olea*, 222 AD3d 853, 854 [2d Dept 2023] [brackets omitted]).

Though “an operator who has the right[-]of[-]way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield” (*Debra F. v New Hope View Farm*, 155 AD3d 1491, 1492 [3d Dept 2017]), “a driver cannot blindly and wantonly enter an intersection . . . but, rather, is bound to use such care to avoid [a] collision as an ordinarily prudent [motorist] would have used under the circumstances” (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *see Kreis*, 200 AD3d 1144 [“Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident.”] [brackets omitted]).

“[I]t is well settled that a defendant[']s unexcused violation of the Vehicle and Traffic Law constitutes negligence per se” (*Holownia v. Caruso*, 183 AD3d 1035, 1036 [2020] [internal quotation marks and citations omitted], *lv denied* 36 NY3d 902 [2020]; *Kreis v Kiyonaga*, 200 AD3d 1144 [3d Dept 2021]). VTL § 1142 (a) provides:

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by [VTL § 1172] and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

(VTL § 1142 [a]).

Here, plaintiff's proof is sufficient to establish prima facie that Peseka was negligent per se for violating VTL § 1142 (a) by failing to yield to plaintiff's vehicle, causing the collision. It is uncontroverted that Broadway at its intersection with Erie Street is not governed by a traffic control device, while Erie Street is governed by a stop sign at this intersection.

Plaintiff proffers Peseka's deposition testimony concerning the accident in support of his partial motion for summary judgment. Peseka testified at deposition that the day of the accident was clear with no precipitation (*see* NYSCEF Doc No. 64 at 9). He stated that, immediately prior to the accident, he pulled up to the stop sign on Erie Street and that there was a vehicle parked on the northeast corner of the intersection on Broadway, on his right side (*see id.* at 8). This vehicle obstructed his right-side view of Broadway, so he had to creep up past that vehicle into the northbound lane of Broadway to see around it to make a left turn into the southbound lane of Broadway (*see id.* at 10). Peseka testified that he looked to his left and observed no cars, then "looked back to the right and it was clear [and] by then [he] was . . . halfway across the street because [he] was making a turn because [he] had to pull passed that vehicle to see, so [he] went to finish [his] turn and all of a sudden, there was . . . this white light and then it was just impact and [he] stopped" (*id.* at 9).

Plaintiff also proffers the deposition testimony of McCulloch, the driver of plaintiff's vehicle, who testified that he never saw Peseka's truck prior to the impact (*see* NYSCEF Doc No. 65 at 62). McCulloch stated that, on the day of the accident, conditions were clear without any snow or rain (*id.* at 36). Plaintiff similarly testified at deposition that he did not see Peseka's truck until it was approximately "two feet from [him], . . . about to hit [him]" and that the accident happened too fast to react (NYSCEF Doc No. 63 at 24). Both plaintiff and McCulloch estimated at deposition that their vehicle was traveling at a rate of speed of no more than 35 miles per hour (*see* NYSCEF Doc No. 63 at 170; NYSCEF Doc No. 65 at 38).

In opposition, defendants have failed to raise a question of fact as to whether there was a non-negligent excuse for Peseka's actions. Defendants do not meaningfully dispute that Peseka failed to yield to plaintiff's vehicle, nor do they offer countervailing evidence to refute plaintiff's and McCulloch's testimony that McCulloch was driving approximately 30 to 35 miles per hour. Inasmuch as defendants posit that Peseka took steps to safely enter the intersection in light of the parked vehicle, such measures are of no moment because they were insufficient to prevent the accident. Defendants likewise offer no non-negligent explanation as to why Peseka did not see plaintiff's vehicle, which was traveling northbound on Broadway to his left, when he apparently looked in that direction prior to beginning his turn and the parked

vehicle obstructing his view was on his right. The fact that Peseka crept into the intersection at a slow rate of speed and was vigilant of his surroundings suggests that he should have seen plaintiff's vehicle and been able to avoid the accident.

Defendants' reliance on plaintiff's General Municipal Law § 50-h hearing testimony is similarly unavailing. During that hearing, plaintiff testified that he first saw Peseka's truck "way before the intersection," but clarified that the accident "happened so quick" and that Peseka's truck was "probably only like maybe like ten or 15 feet [away] before [plaintiff] actually saw it. It just happened like so quick so I couldn't really tell" (NYSCEF Doc No. 39 at 23). He also testified that he did not believe that McCulloch saw the truck because, "[i]f he saw it we might've been able to avoid it We wasn't [sic] going that fast so he probably could've definitely avoided it if it was possible" (*id.* at 24).

This proof does not defeat plaintiff's *prima facie* showing of liability. Plaintiff's testimony as to McCulloch's ability to avoid the collision was speculative. And, at most, it suggests some level of comparative fault on McCulloch's part, but it is insufficient to establish that Peseka's actions were not a proximate cause of the accident (*see Durkee v Sanchez-Rodriguez*, 229 AD3d 1315, 1316 [4th Dept 2024]; *see also Rodriguez*, 31 NY3d at 322; *Orellana v Mendez*, 208 AD3d 888, 890 [2d Dept 2022]). Accordingly, plaintiff's motion for partial summary judgment as to liability is granted.

III. Conclusion

Based on the foregoing, it is

ORDERED that defendants' motion for summary judgment (Motion #2) is **GRANTED IN PART**, as set forth herein, and so much of plaintiff's complaint alleging that he suffered a serious injury as defined under Insurance Law § 5102 is **DISMISSED**; and it is further

ORDERED that plaintiff's motion (Motion #3) for partial summary judgment on liability is **GRANTED**.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for the defendants shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
February 24, 2025



HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court



02/25/2025

Papers Considered

NYSCEF Doc Nos. 31-85