

**“SERIOUS INJURY” THRESHOLD
FOURTH DEPARTMENT
CASE SYNOPSES
2007 - 2009**

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2009 CASES

Virella v Allstate Home Care of Buffalo, Inc. (872 NYS2d 611 [4th Dept 2009])

No-Fault, Serious Injury – Plaintiff, In Actions Arising Out of Two Accident, Raised A Triable Issue Of Fact As To The Second Accident – The Medical Submission Of The Second Defendant Failed To Support A Cross Claim Against The First Defendant: Plaintiff sought recovery after being in two separate accidents. The Fourth Department held that the Supreme Court properly denied the motion for summary judgment brought by the defendant from the second accident, noting that plaintiff raised triable issues of fact whether he sustained a serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180 categories. Plaintiff properly submitted the affirmation of his orthopedic surgeon who concluded that plaintiff had quantified limited lumbar range of motion and severe aggravation of herniated discs at levels L4-5 and L5-S1 that were causally related to the second accident. Furthermore, the Fourth Department held that the earlier defendant properly met his initial burden to defeat a cross claim by submitting evidence establishing that plaintiff did not sustain a serious injury in the earlier accident under any of the categories alleged in the complaint. The second defendants, in support of their cross claim, only submitted medical evidence as to whether plaintiff sustained a serious injury in the second accident, which failed to raise a triable issue of fact to support the cross-claim.

Schultz v Penske Truck Leasing Co., L.P. (59 AD3d 1119 [4th Dept 2009])

No-Fault, Serious Injury – Plaintiff, In Part, Raised A Triable Issue Of Fact: After plaintiff was in two separate auto accidents, the defendant from the first accident appealed from an order that denied their motion seeking partial summary judgment dismissing the causes of actions with respect to the their accident on the ground that plaintiff did not sustain a serious injury or, in the alternative, seeking to sever those causes of action from the causes of action with respect to the second accident. The Fourth Department held that, though the defendant met their initial burden by submitting their own IME report which stated plaintiff's injuries stemmed from degenerative disc disease, plaintiffs raised a triable issue of fact precluding summary judgment by submitting objective evidence of plaintiff's C5-6 herniated disc injury and resulting scar.

Kmiotek v Chaba (875 NYS2d 670 [4th Dept 2009])

No-Fault, Serious Injury – Plaintiff's justified a directed verdict on her serious injuries and jury's award of damages deviated materially from what would be reasonable compensation for her injuries: Plaintiff appeals and defendants cross-appeal from a judgment awarding plaintiff damages for past pain and suffering in the amount of \$35,000 and future pain and suffering in the amount of \$40,000 over her remaining life expectancy of 40 years for injuries she sustained to her lumbar spine in a

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motor vehicle accident. First, the Fourth Department denied defendants' cross-appeal of the Supreme Court's directed verdict on the issue of serious injury threshold, noting uncontested medical evidence which showed that plaintiff sustained an annular tear and herniated discs at L4-5 and L5-S1, requiring surgery. Plaintiff thus established that she sustained a permanent consequential limitation of use of her back and a significant limitation of use of her back. The Fourth Department also agreed with plaintiff that the jury verdict awards deviated materially from reasonable compensation and raised them to \$75,000 for past pain and suffering and \$150,000 for future pain and suffering.

Endres v Shelba D. Johnson Trucking, Inc. (60 AD3d 1481 [4th Dept 2009])

No-Fault, Serious Injury – Plaintiff Failed, In Part, to Raise a Triable Question of Fact; Basis for Loss of Range of Motion Tests: Plaintiff failed to respond in his opposition to the disfigurement, fracture, and permanent loss of use categories and failed to submit any evidence that his activities were subject to a medically imposed restriction required for the 90/180 category. The Fourth Department, however, overturned the Supreme Court's order granting defendant summary judgment on the permanent consequential limitation of use and significant limitation of use categories, noting that defendants failed to offer any basis upon which their expert could conclude that plaintiff's 50% reduction in lumbar flexion and extension was caused by degenerative disease and was not exacerbated by the accident and they failed to address the absence of any prior complaints of similar pain despite indicating that plaintiff had been relatively free from pain immediately prior to the accident.

Smith v Besanceney (877 NYS2d 538 [4th Dept 2009])

No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact – 90/180, Permanent Consequential, Significant Limitation: The Supreme Court granted defendant's motion for summary judgment with respect to the permanent loss of use and 90/180 categories of serious injury and denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. The Fourth Department held that the court should have granted the motion in its entirety because, although defendant met her burden of establishing that plaintiff's psychological injury does not constitute a serious injury under the permanent consequential limitation of use or significant limitation of use category by submitting the report of the physician who examined plaintiff at defendant's request. Further, plaintiff failed to raise a triable issue of fact as to her remaining physical injuries by submitting medical reports that failed to causally link her medical condition to the underlying incident.

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2008 CASES

Parmer v Opportunities Unlimited of New York (48 AD3d 1252 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Established Prima Facie Case for Permanent Loss of Use – Plaintiff Raised a Triable Question of Fact for Permanent Consequential Limitation of Use and 90/180 Categories: Trial court granted defendants’ motion with respect to the permanent loss of use category but denied on the permanent consequential limitation of use and 90/180 categories. The Fourth Department affirmed. Defendants shifted burden through the report of an examining physiatrist who concluded that plaintiff had only a temporary disability, and the report of an orthopedist who concluded that plaintiff had achieved pre-accident status with any residual disability caused by a subsequent accident. Plaintiff raised an issue of fact through medical proof stating that the first accident, not the second caused her injuries. Plaintiff submitted objective evidence of plaintiff’s injuries, including X ray reports, an MRI report, and an expert’s designation of numeric percentages of plaintiff’s loss of range of motion. Further, plaintiff raised an issue of fact as to 90/180 through a doctor’s affidavit.

Alcombrack v Swarts (49 AD3d 1170 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact – 90/180 – “Medically Determined Injury”: Trial court granted summary judgment on liability, including the issue of serious injury. Defendant conceded negligence, but cross-moved for summary judgment on threshold grounds. Supreme Court granted plaintiffs’ motion and denied defendant’s. The Fourth Department reversed both orders and dismissed the complaint, reasoning that plaintiffs’ evidence of ongoing headaches failed to establish that he sustained “a medically determined injury or impairment of a non-permanent nature.” This requires quantifiable, objective observation of a physician, not mere complaints of headaches.

Herbst v Marshal, (49 AD3d 1194 [4th Dept 2008])

No-Fault, Serious Injury – On Reargument, Plaintiff Established a Triable Issue of Fact: Supreme Court granted defendant’s motion for summary judgment as to the permanent consequential limitation of use and significant limitation of use categories of serious injury, but denied with respect to the 90/180 category. Defendant met his initial burden by submitting his examining physician’s report, which noted no objective evidence of a serious injury. Plaintiff raised a triable issue of fact by submitting an affirmation from a radiologist who pointed out non-degenerative disc bulges and evidence from her treating physician who noted limited range of motion in her cervical spine, and stated that the accident caused plaintiff’s significant and permanent injuries.

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Beaton v Jones (50 AD3d 1500 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – No Qualitative or Quantitative Limitation Compared to “Normal” – Recent Examination: Supreme Court granted defendant summary judgment and Fourth Department affirmed. Plaintiff failed to address the permanent loss of use category and failed to submit evidence showing either injury or causation as is required to establish the 90/180 category. As for the remaining two categories, plaintiff submitted the affirmation of one doctor who failed to provide a numeric percentage of plaintiff’s loss of range of motion. Moreover, that doctor failed to qualitatively compare plaintiff’s injured state to any normal margin of reference. The plaintiff also submitted the affirmation of a second doctor who did provide the requisite percentage of loss of range of motion, but based his findings on an examination that occurred more than three years after the car accident. Additionally, both experts’ diagnoses were based upon plaintiff’s subjective description of his condition, and so were too unreliable to counteract defendant’s motion.

Bennett v Muniz (50 AD3d 1464 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Successfully Appealed A Directed Verdict As To Plaintiff’s Claim Of Serious Injury: After the Supreme Court granted plaintiff a directed verdict on the issue of serious injury, which eventually led to a jury award of \$258,000, the Fourth Department ordered a new trial. The defendant-appellant successfully showed that conflicting evidence had been presented with respect to the degree of permanent loss to plaintiff’s range of ankle motion and whether plaintiff’s back injury was a qualifying serious injury. NOTE – Compare *Kmiotek v Chaba*, 875 NYS2d 670 [4th Dep’t 2009]).

Kneappel v Casem (50 AD3d 1508 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact -- Exacerbation: Supreme court granted defendant summary judgment. The Fourth Department reversed, finding that plaintiff raised an issue of fact. Plaintiff’s affidavit in opposition contained a report from a chiropractor who had treated the injured plaintiff for five years prior to the accident. The chiropractor stated that plaintiff’s injuries, while preexisting, were seriously exacerbated by the accident and that the extension of his spine had decreased significantly. A second doctor’s report agreed that plaintiff suffered a permanent consequential limitation of use of his lower back.

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Lux v Jakson (52 AD3d 1253 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Establish Causal Relationship -- & Rebut Proof of Pre-Existing Degenerative Change: The Fourth Department reversed an order denying defendant summary judgment on the grounds that plaintiff failed to meet their burden of establishing a causal link between the car accident and her injuries. Defendant submitted a physician report finding no evidence suggesting that plaintiff's injuries resulted from the accident, but in fact were caused by a preexisting degenerative condition. The Fourth Department noted that the burden to respond with persuasive evidence to the contrary shifted to plaintiff, who failed to do so. Plaintiff's chiropractor affidavit failed to address degenerative changes in the plaintiff's injuries, or any injuries the plaintiff had before the accident. Thus, plaintiff failed to raise an issue of fact as to causation.

Feggins v Fagard (52 AD3d 1221 [4th Dept 2008])

No-Fault, Serious Injury – Defendant's Submission Of Medical Evidence Provided a Triable Issue of Fact Sufficient to Defeat Defendant's Motion for Summary Judgment: The Supreme Court denied defendant's motion for summary judgment on the issue of serious injury threshold. The Fourth Department held that plaintiff abandoned his claims with respect to the significant disfigurement, fracture, and permanent loss of use categories and that plaintiff's submission of medical records failed to raise a triable issue of fact to support his claim of permanent consequential limitation. The Fourth Department affirmed the Supreme Court's decision denying defendant's motion as to the significant limitation of use category, however, holding that defendant's own physicians reported a decreased range of motion in all directions as a result of the accident.

Campo v Neary (52 AD3d 1194 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Failed to Raise an Issue of Fact Sufficient to Overturn a Directed Verdict As To Plaintiff's Claim Of Serious Injury: The Fourth Department upheld the Supreme Court's directed verdict on the issue of serious injury with respect to plaintiff's left hand, noting that even defendants' expert stated that the laceration was significant. The Appellate Division recognized defendant's sufficient contrary medical testimony, however, and modified the Supreme Court's order granting that part of plaintiff's motion to set aside the verdict as against the weight of the evidence on the issues whether plaintiff's shoulder and ankle injuries were caused by the accident.

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McConnell v Freeman (52 AD3d 1190 [4th Dept 2008])

No-Fault, Serious Injury – Summary Judgment Granted – Plaintiff Failed to Explain Gap in Treatment: Plaintiff failed to raise a triable issue of fact to defeat defendant’s motion for summary judgment. Plaintiff’s submitted the affirmation of a physician who treated plaintiff for her back condition and, although the treating physician provided objective medical evidence that plaintiff was injured in the accident, plaintiffs failed to provide a reasonable explanation for a significant gap in plaintiff’s treatment.

Chmiel v Figueroa (53 AD3d 1092 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact – Permanent Consequential & Significant Limitation of Use: Fourth Department held that defendant had met her initial burden with respect to the permanent consequential limitations of use and significant limitation of use categories by showing that plaintiff had failed to establish a causal relation to the subject accident. Plaintiff raised on issue of fact by producing medical evidence showing that his herniated disc and loss of movement resulted directly from the surgery that was necessary following the accident. That said, the 90/180 category was dismissed because plaintiff failed to respond to defendant’s contention that plaintiff was not prevented from performing substantially all of his customary activities during 90 for the first 180 days following the accident.

Covert v Samuel (53 AD3d 1147 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Established Prima Facie Case – Defendant Raised Triable Question of Fact – Pre-existing Condition: In support of her Motion for summary judgment, plaintiff offered the testimony of two surgeons. The first diagnosed plaintiff’s degenerative condition of her cervical spine, but failed to causally link that condition to the accident in question. The second physician, however, was able to show that plaintiff’s preexisting condition was aggravated by the accident. The Fourth Department held that this combined evidence would have been sufficient to warrant granting plaintiff summary judgment, except that Defendant produced contrary medical testimony that raised a triable issue of fact. Defendant’s expert opined that plaintiff’s central complaint resulted from a preexisting condition and not necessarily from the subject accident. The Court reasoned that Plaintiff failed to prove causal relation, and reversed the order granting plaintiffs summary judgment on that issue.

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Sconiers v Barber (51 AD3d 1403 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact: Defendants met their burden by submitting the report of a physician who concluded plaintiff's injuries may have existed, but that they were not necessarily the result of the motor vehicle accident in question. The Fourth Department agreed with the Supreme Court, holding that the plaintiffs raised a triable issue of fact by submitting an affirmation indicating that the accident was indeed the cause of plaintiff's injuries. Though defendants successfully shifted the burden to the plaintiffs to provide evidence linking the injuries to the car accident, plaintiff's response was sufficient to allow for a jury trial.

Schader v Woyciesjes (55 AD3d 1292 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact, Significant Disfigurement, Significant Limitation & Permanent Consequential – Degenerative Disc Disease: Fourth Department held that defendant met his initial burden on his motion for summary judgment with respect to the fracture, permanent loss of use and 90/180 categories of serious injury by submitting plaintiff's medical records, plaintiff's deposition testimony, and the report of the physician who examined plaintiff on defendant's behalf. Defendant also met his initial burden with respect to the three remaining categories inasmuch as defendant's examining physician stated that the alleged injuries under those three categories, which ultimately resulted in surgical intervention and a scar, were not causally related to the accident but instead were attributable to plaintiff's "intrinsic degenerative disc disease". The Fourth Department concluded, however, that plaintiff successfully raised an issue of fact concerning causation of the later three categories by submitting the affirmation of her treating physician addressing the "degenerative disc disease" allegation.

Dann v Yeh (55 AD3d 1439 [4th Dept 2008])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact – 90/180, Significant Limitation, Objective Tests: The Fourth Department held the Supreme Court properly granted defendants' respective motions for summary judgment. Plaintiff did not sustain a serious injury within the meaning of the significant limitation of use and 90/180 categories. Plaintiff's expert affirmations were insufficient to raise a triable issue of fact because they failed to set forth the tests conducted to support the conclusions in the affirmations and whether those tests were objective in nature. Further, plaintiff's neurologist failed to provide either a numeric percentage of plaintiff's loss of range of motion or a qualitative assessment of plaintiff's condition, nor did plaintiff's neurologist compare the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system.

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Johnson v Dow (56 AD3d 1288 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff Raised A Triable Issue Of Fact Sufficient To Defeat The Motion, Despite A Non-Compliant Pleading: Defendant moved for summary judgment, requesting dismissal of the complaint against her because plaintiff failed to specify in her bill of particulars the particular category of serious injury that she allegedly sustained. The Supreme Court denied defendant's motion, and the Fourth Department agreed, reasoning that the proper remedy would be a motion to compel compliance. The Fourth Department added that had a motion for summary judgment on threshold grounds been brought instead, defendant would still lose inasmuch as plaintiff raised a triable issue of fact sufficient to defeat the motion.

Christie v Coady (57 AD3d 1395 [4th Dept 2008])

No-Fault, Serious Injury – Plaintiff, In Part, Raised A Triable Issue Of Fact – Permanent Consequential & Significant Limitation of Use: The Supreme Court granted defendant's motion for summary judgment. The Fourth Department reversed. Defendant established their entitlement to judgment as a matter of law with respect to the 90/180 category and, in opposition to the motion, plaintiff failed to submit the requisite objective evidence of a medically determined injury or impairment of a non-permanent nature and to establish that the injury caused the alleged limitations on plaintiff's daily activities sufficient to raise a triable issue of fact. The Fourth Department held that the lower court erred in adhering to its prior decision with respect to the permanent consequential limitation of use and significant limitation of use categories because plaintiff submitted the affidavit of her treating neurologist, who conducted two surgical procedures after the court previously had granted defendants' motion. The neurologist described her disc herniation, the necessity of surgery as well as the permanency of her condition and the resulting limitations on her range of motion. Thus, plaintiff raised an issue of fact.

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2007 CASES

Ashquabe v McConnell (46 AD3d 1419 [4th Dept 2007])

(Note: see below inset for Supreme Court synopsis)

No-Fault, Serious Injury – Preexisting Degenerative Spinal Condition – Defendant Failed to Establish Prima Facie Case: Appellate Division affirmed the order, holding that the medical affidavit in support of defendant’s motion failed to establish the existence or effect of any preexisting injury. The report failed in that it did not contain evidence that plaintiff’s pain might not be chronic and unrelated to the accident. Because defendant’s medical conclusion was insufficient, the Court held that defendant failed to meet her burden and the order should be affirmed.

Ashquabe v McConnell (14 Misc 3d 211 [Sup Ct, Erie County 2006])

No-Fault, Serious Injury – Preexisting Degenerative Spinal Condition – Defendant’s Motion for Summary Judgment Failed to Shift Burden of Proof to Plaintiff: Defendant’s medical expert’s opinion that plaintiff’s bulging discs were degenerative in nature did NOT shift burden of proof to plaintiff. Supreme Court denied defendant’s Motion for Summary Judgment, holding that defendant’s contention that plaintiff’s injuries were preexisting was insufficient to remove all issues of fact.

Barnes v Estes (46 AD3d 1441 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact as to Permanent Consequential Limitation: The Fourth Department held that plaintiffs failed to raise triable issue of fact as to whether victim sustained permanent consequential limitation of use of a body organ following accident, permitting summary judgment. Defendants first met their burden by submitting the affirmation of defendants’ examining physician, which stated that the CT scan and MRI studies did not indicate that plaintiff suffered any acute injury as a result of the accident, and the bulging discs at L3-4, L4-5 and L5-S1 were due to “congenital abnormalities.” The affirmation of plaintiff’s treating physician did not provide a numeric percentage representing plaintiff’s loss of range of motion, nor did it provide a qualitative comparison of plaintiff’s limitations to the normal function of plaintiff’s spine. The plaintiff, therefore, failed to raise an issue of fact in response to defendant’s motion for summary judgment.

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Anania v Verdgeline (45 AD3d 1473 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact – Objective Findings: Defendant met initial burden by submitting numerous records and reports of plaintiff’s treating physicians indicating that plaintiff’s alleged injuries were related to injuries suffered in two workplace accidents, one that occurred before and one that occurred after the motor vehicle accident at issue. Plaintiff’s orthopedic surgeon stated that plaintiff’s right carpal tunnel syndrome and resulting surgery were causally related to the car accident, but the surgeon’s opinion was not supported by the requisite “*competent medical evidence based upon objective medical findings and diagnostic tests.*” Plaintiff, therefore, failed to meet the burden that had shifted to plaintiff after defendant submitted evidence that the injuries in question related to a preexisting condition and an intervening medical problem.

Harris v Carella (42 AD3d 915 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established a Prima Facie Case – Plaintiff Still Had Some Use of His Spine and Failed to Raise a Triable Question of Fact Regarding Fracture, Permanent Loss of Use, and Significant Disfigurement Categories – Unsworn Reports: Trial court denied defendant summary judgment. The Fourth Department agreed that defendant met her burden with respect to the permanent consequential limitation of use and significant limitation of use categories. The court noted that the burden shifted despite the fact that defendant’s physician was not a specialist in the particular area in question, and relied upon an unsworn reports prepared by plaintiff’s treating physicians in rendering his opinion. Plaintiff raised an issue of fact as to these two categories by submitting properly prepared physician affidavits in opposition. However, plaintiff conceded the 90/180 category and the court dismissed the fracture, significant disfigurement and permanent loss categories because plaintiff still had some use of his spine and plaintiff failed to provide evidence of a fracture or significant disfigurement.

Carrier v Shaw (41 AD3d 1245 [4th Dept 2007])

No-Fault, Serious Injury – Plaintiff Raised a Triable Question of Fact – Medical Affidavit Based on Objective Findings: The Supreme Court granted defendant summary judgment. Plaintiff appealed regarding the permanent consequential limitation of use and significant limitation of use categories, but conceded 90/180. The Appellate Division held that the plaintiff’s physician affidavits setting forth findings based on their examination of plaintiff as well as her x-rays and abnormal ENG findings, raised genuine issue of material fact. These affidavits were based, therefore, not only on the subjective complaints of the plaintiff, as defendant contended, but on objective findings.

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Downs v Kehoe (39 AD3d 1152 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Summary Judgment on Significant Limitation– Subjective Complaints of Pain – Defendant Did NOT Shift Burden on 90/180 – Defendant’s Own Submission Raised Issue of Fact on 90/180: Supreme Court properly granted defendant’s motion with respect to the significant limitation of use category of serious injury. Defendant met his initial burden with respect to that category, and the affidavits in opposition of plaintiff and her treating physician, both of which were based on plaintiff’s subjective complaints of pain. The Fourth Department agreed, but stated that the defendant failed to meet his initial burden with respect to the 90/180 category of serious injury and thus that the court erred in granting defendant’s motion with respect to that category. Defendant submitted evidence establishing that two of plaintiff’s treating physicians determined that plaintiff was “temporarily totally disabled” within the first 180 days after the accident. Thus defendant’s submissions raised a triable issue of fact whether plaintiff was prevented from performing her usual and customary activities during the requisite time period.

Yoonessi v Givens (39 AD3d 1164 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact – Permanent Consequential, Significant Limitation & 90/180 Categories – Causation & Exacerbation: Although defendant met her burden by submitting competent medical evidence establishing that plaintiff did not sustain a serious injury under those categories plaintiff raised issues of fact through competent medical evidence based upon objective medical findings and diagnostic tests. Moreover, although defendant established that plaintiff’s condition was preexisting and was not exacerbated by the accident, there was a triable issue of fact with respect to causation in that plaintiff’s physician’s response was sufficient to causally relate the injuries to the car accident. The Court dismissed the 90/180 category because defendant proved that plaintiff was not limited or impaired in carrying out substantially all of his customary daily activities, but rather was able to continue functioning in a full and unrestricted manner following the accident.

McCarthy v Bellamy (39 AD3d 1166 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Meet Shifted Burden – Gap in Treatment and a Speculative Medical Opinion Did Not Address Preexisting Condition: Defendant entitled to summary judgment. Notably, defendant established the existence of a preexisting condition that plaintiffs failed to address in opposition to the motion. Moreover, plaintiffs’ failed to explain a 15- month gap in plaintiff’s treatment. The Court held that plaintiff’s expert’s opinion, therefore, was speculative and failed to raise a triable issue of fact.

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Faso v Fallato (39 AD3d 1234 [4th Dept 2007])

No-Fault, Serious Injury – Defendant Established Prima Facie Case – Plaintiff Failed to Raise a Triable Question of Fact: Plaintiff brought suit in connection with two car accidents, the second of which was with the defendant. Accident #2 Defendant moved for summary judgment on causation grounds. The Fourth Department agreed with defendant, holding that plaintiff's complaints after the first accident stayed the same after the second accident and the affirmation of an orthopedic surgeon who found no injury as the result of the second accident and no aggravation of any preexisting injury as the result of that accident.

Jaromin v Northrup (39 AD3d 1264 [4th Dept 2007])

No-Fault, Serious Injury – Plaintiff Failed to Establish a Causal Relation – Medical Affidavit Contained Insufficient Description of Injury and Was Based Only on Plaintiff's Subjective Description – Unexplained 3.5 Year Gap in Treatment: The Fourth Department held that the Supreme Court properly granted defendant summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury with regards to the permanent loss of use, permanent consequential limitation of use and significant limitation of use categories. Defendant met her initial burden by establishing that plaintiff did not sustain a qualifying serious injury that was causally related to the accident, and plaintiff failed to raise any issues of fact with respect to those categories. Plaintiff did submit expert medical evidence, but the report failed to explain a 3.5 year gap in treatment, and failed to provide either a numeric percentage of plaintiff's loss of range of motion or a qualitative assessment of plaintiff's condition. Further, the Court held that the report was based only upon plaintiff's subjective complaints of pain and thus is insufficient to overcome defendant's entitlement to summary judgment.

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