

**Stell v Snyder**

2017 NY Slip Op 30731(U)

April 10, 2017

Supreme Court, New York County

Docket Number: 652831/2014

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

-----X  
JAMES R. STELL,

Index No.: 652831/2014  
Motion Sequence No.: 1

*Plaintiff(s),*

**DECISION and ORDER**

*-against-*

DUDLEY R. SNYDER, LEASE PLAN U.S.A. INC.  
And VOLKSWAGEN GROUP OF AMERICA, INC.,  
*Defendant(s).*

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Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

<u>Papers</u>	<u>Numbered</u>
Defendants' Notice of Motion for summary judgment and affirmation with exhibits	1
Plaintiff's affirmation in opposition with exhibits	2
Defendants' reply affirmation with exhibits	3
Plaintiff's sur reply affirmation	4

*PAUL A. GOETZ, J.S.C.*

Plaintiff, James R. Stell, initiated this action against Defendants, Dudley R. Snyder, Lease Plan U.S.A., Inc. and Volkswagen Group of America, Inc. alleging serious injuries as defined by Insurance Law § 5102(d) resulting from Defendants' negligent ownership and/or operation of a motor vehicle on February 27, 2014. Defendants now move for summary judgment pursuant to CPLR § 3212.

Defendants seek summary judgment on the grounds that the injuries allegedly sustained by Plaintiff fail to establish the serious injury threshold as defined by Insurance Law Section 5102 (d) and therefore, Plaintiff's claims for non-economic losses are barred by Insurance Law 5104 Section (a). Insurance Law Sections 5104 (a) and (b) provide that a plaintiff in a personal injury action arising out of negligence in the use or operation of a motor vehicle must establish that s/he has suffered a serious injury. Serious injury is defined as personal injury which results in one of the following: "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 90 days during the 180 days immediately following the occurrence of the

injury or impairment.” (Insurance Law § 5102[d]).

Plaintiff alleges in his bill of particulars that the injuries he sustained as a result of the February 27, 2014, collision meet the following Insurance Law Section 5102 (d) criteria “serious infection, scarring, deformity, disfigurement, significant limitation of use of body functions or systems of the injured parts, with permanent pain, limitation and impairment, and medically determined injury or impairment which prevented [P]laintiff from performing substantially all of the material acts which constitute [P]laintiff’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.”<sup>1</sup>

In support of their motion, Defendants annex the sworn affirmations of an orthopedic surgeon, Daniel S. Rich, who performed an independent medical examination of Plaintiff on February 25, 2016, and a radiologist, A. Robert Tantleff and a transcript of Plaintiff’s examination before trial (“EBT”) taken on October 6, 2015. In opposition Plaintiff submits the affirmation of Plaintiff’s orthopedic surgeon, Cary B. Chapman, Plaintiff’s medical records from Gerard Medical, P.C. including Plaintiff’s first medical consultation after the accident on March 5, 2014, and an affidavit from Plaintiff.

## **PARTIES’ CONTENTIONS**

### **DEFENDANTS’ SUBMISSION**

#### **Defendants’ Radiologist, Dr. Tantleff**

Dr. Tantleff reviewed a CT Scan of Plaintiff’s right shoulder, dated May 21, 2014, and CT Scans of his cervical and lumbar spine, both dated April 23, 2014.

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<sup>1</sup>With this statement it is not entirely clear which of the nine categories of Insurance Law Section 5201 (d) Plaintiff intends to rely. “[S]erious infection” is not one of the nine categories of serious injury set out in Insurance Law section 5102 (d), and “scarring” likely falls within the “significant disfigurement” category of serious injuries. “[D]eformity” likely falls within either the “permanent consequential limitation of use or a body organ or member” or “significant limitation of use of body function or system” categories. Plaintiff’s attorney’s affirmation in opposition to Defendants’ summary judgment motion clarifies Plaintiff’s position that his alleged injuries fall within the “permanent consequential limitation of use or a body organ or member;” significant limitation of use of body function or system;” and “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment,” categories of serious injury in Insurance Law Section 5102 (d).

**Plaintiff's Right Shoulder**

Regarding Plaintiff's right shoulder, Dr. Tantleff's impression is:

Multiyear and decadal degenerative changes of the shoulder demonstrated by a prominent keel osteophyte of the acromion compressing the bursal surface of the supraspinatus tendon which is a comorbidity for degeneration, tendinosis, fibrillation fraying and degenerative tearing of the supra and infraspinatus tendon. Prominent enthesopathic changes of the footprint of the humeral head with sclerotic reactive and fibrocystic changes indicative of chronic repetitive stress changes and indicative of significant degeneration of the associated rotator cuff tendon and indicative of associated degenerative tearing thereof. Osteoarthritic spurring of the acromioclavicular joint with inferior spurring and absence of subacromial - subdeltoid bursitis. Advanced osteoarthritic changes of the glenohumeral joint with associated narrowing of the glenohumeral joint in association with the keel osteophyte is highly correlated with degeneration fibrillation fraying and degenerative tearing of the glenoid labrum. **The findings depicted on the examination represent multiyear and decadal degeneration and overuse changes unrelated to the current date of incident or a single date of incidence. Nor are the markers of acute or recent injury or exacerbatory changes. The findings demonstrated are precedent to and unrelated to the current incident.**

**All findings are precedent and casually remote to the current date of incident of 02/27/14 and unrelated thereto.**

(Emphasis supplied).

**Plaintiff's Cervical Spine**

Dr. Tantleff's impression of Plaintiff's cervical spine CT Scan is:

CAT Scan examination of the Cervical Spine as presented reveals longstanding chronic degenerative discogenic disc disease as described with advanced discogenic changes manifested by sclerosis of endplates, real loss of disc space height and degenerative spondylosis most pronounced at C4[7]5, C5/6, and C6/7, this triad of findings is indicative of and consistent with longstanding chronic degenerative disc disease. Furthermore there are prominent bridging osteophytes anteriorly at C4/5, C5/6, and C6/7 another marker of advanced discogenic changes. There is regional facet arthropathy, uncinete hypertrophy and degenerative spondylosis resulting in degenerative neuroforaminal stenosis bilaterally at

C4/5, C5/6 and C6/7, right sided at C3/4. **There is no evidence of muscle spasm of the deep muscles adjacent to the cervical spine.** There are degenerative disc osteophyte complexes at C3/4, C4/5, C5/6, and C6/7. At C5/6 and C6/7 the osteodiscal complexes approach the cervical cord and at C6/7 there is ventral compression of the cervical cord from the disc osteophyte complex. The cervical alignment is maintained as are regional soft tissues. The C4/5, C5/6 and C6/7 levels represent the areas of greatest physiological stress of the cervical spine and as a result are subjected to significant wear-and-tear resulting in associated degenerative changes. **Furthermore the findings are consistent with and not unexpected findings for the individual's age, depicting normal age consistent wear and tear; unrelated to the date of incident. Furthermore, please note that associated comorbidities for degenerative disc disease as detailed above.**

**All findings are precedent and casually remote to the current date of incident of 02/27/14 and unrelated thereto.**

(Emphasis supplied).

The following are potential non-disc related causes of pain identified on the examination unrelated to the date of incident: Degenerative disc disease; Degenerative neural foraminal stenosis.

### **Plaintiff's Lumbar Spine**

Dr. Tantleff's impression of Plaintiff's lumbar spine CT Scan is:

CAT Scan examination of the lumbar spine demonstrates advanced discogenic changes of the lumbar spine manifested by loss of disc space height sclerosis of endplates and spondylitic spurring. This triad of findings is a marker of and consistent with longstanding chronic degenerative disc disease. Another independent marker of longstanding degenerative disc disease is vacuum degeneration of the L3/4, L4/6 and L5/S1 discs. Another independent marker is the degenerative anterolisthesis of L4 on L5. Third independent maker [sic] is the ligamentum hypertrophy most pronounced at L4/5. Ligamentum Flavum hypertrophy is the commonest cause of discogenic pain and symptoms in the lumbar region. There is degenerative non compressive atraumatic disc bulge at L3/4 and L5/S1 and a degenerative bulge/pseudo bulge complex at L4/5, the latter as a result of the degenerative malalignment of L4 on L5, as a result of the degenerative anterolisthesis/ spondylolisthesis. Lumbar Lordosis and regional soft tissues are maintained. **There are no markers of acute or recent injury.** Another

independent marker of longstanding degenerative disc disease is vacuum degeneration of the L3/4, L4/6 and L5/S1 discs. The L4/5 and L5/S1 levels are the commonest levels for discal degeneration in the lumbar spine and in conjunction with the L3/4 level accounts for approximately 92-95% of degenerative changes in the lumbar spine. Furthermore, **the findings are consistent with and not unexpected findings for the individual's age; depicting normal age consistent wear and tear; unrelated to the date of incident. Furthermore, please note that associated comorbidities for degenerative disc disease as detailed above.**

**All findings are precedent and casually remote to the current date of incident of 02/27/14 and unrelated thereto.**

(Emphasis supplied).

The following are potential non-disc related causes of pain identified on the examination unrelated to the date of incident: Degenerative disc disease; Degenerative neural foraminal stenosis; Spondylolisthesis; ligamentum flavum hypertrophy.

**Defendants' Orthopedic Surgeon, Dr. Rich**

**Plaintiff's Right Shoulder**

Concerning Plaintiff's right shoulder Dr. Rich observes that Plaintiff "may well have sustained a contusion of the right shoulder . . . However, such soft tissue injuries are expected to heal uneventfully in the absence of active medical intervention and therefore should not be considered permanent injuries." Further Dr. Rich opines that Plaintiff's alleged "'Type III (hooked) acromial morphology at the right shoulder' does not represent an acute injury."

Dr. Rich reviewed the report prepared by Dr. Hussman interpreting Plaintiff's May 21, 2014, CT Scan of his right shoulder. Dr. Rich concludes that the findings in Dr. Hussman's report represent "objective evidence of pre-existing degenerative arthritis of the glenohumeral joint of the right shoulder. . . Glenohumeral degenerative disease is typically associated with degenerative tearing of the labrum . . . and is frequently associated with synovitis of the shoulder . . . This is surgically treated with [a shoulder arthroscopic synovectomy]"

Dr. Rich observes that "[d]uring the surgical procedure [performed on Plaintiff on] September 3, 2014 Dr. Chapman performed a mini open excision of the distal clavicle of the right shoulder . . . [Dr. Chapman] [ ] noted that the patient had an AC joint sprain. However a simple sprain, with no anatomic disruption alluded to in the CT scan of the

shoulder performed preoperatively, would not be treated with this procedure unless there was underlying, pre-existing AC joint pathology.”

### **Plaintiff's Cervical Spine**

Dr. Rich notes that he reviewed the report prepared by Dr. Karl L. Hussman interpreting Plaintiff's April 23, 2014, CT Scan of his cervical spine. Dr. Rich concludes that the findings in Dr. Hussman's report “represent objective evidence of substantial pre-existing cervical spinal disease. Absent from this report is objective evidence of traumatic injury, such as fracture, dislocation, ligamentous disruption, hematoma, etc., i.e. findings to suggest significant structural damage to the cervical spine.” Dr. Rich further notes that:

[d]egenerative disease of the cervical spine typically involves herniation of the disc material in the absence of intercurrent trauma. “Exacerbation” i.e. a temporary worsening of symptoms, may have occurred with regard to the pre-existing degenerative disease and prior multiple cervical spine fracture. However, there is no objective evidence that the reported injury substantially altered the natural history of these prior conditions, and it therefore cannot be considered a permanent injury.

### **Plaintiff's Lumbar Spine**

Dr. Rich also reviewed the report prepared by Dr. Hussman interpreting Plaintiff's April 23, 2014, CT Scan of Plaintiff's lumbar spine. Dr. Rich concludes that:

With regard to [Plaintiff's allegation of] ‘moderate centrals stenosis at L3-4 due to ligamentous hypertrophy’ . . . this pathology is associated with degenerative disease, not acute trauma.

With regard to [Plaintiff's allegation of] ‘sever narrowing at L3-4 and L5-S1’ . . . , in order to evaluate this it must be placed in context by quoting the item in full [from the report], i.e. [v]acuum disc degeneration at L3-4 through L5-S1 with severe narrowing of L3-4 and L5-S1’ The completed description of this finding indicates that the severe narrowing is due to degenerative rather than traumatic disease. Similarly, in the case of [the] allegation . . . [b]ilateral L5-S1 foraminal stenosis due to marginal ridge formation arising from the inferior endplate of S1’ is due to the long-standing degenerative process which results in ‘marginal ridge formation’. Degenerative disease is also associated with disc herniation absence of acute trauma, . . .

Finally, with regard to [Plaintiff's allegation] ‘Exacerbation of disc degeneration at L3-4 through L5-S1’ . . . ‘exacerbation’ i.e. a temporary worsening of symptoms may have occurred with regard to the pre-existing



disc degeneration. However, there is no objective evidence that the reported injury substantially altered the natural history of this prior condition, and it therefore cannot be considered a permanent injury.

**Plaintiff's Prior Accidents**

Plaintiff was involved in at least two prior motor vehicle collisions; one on February 13, 2009 and one on July 11, 2012. Defendants annex to their moving papers Plaintiff's verified bill of particulars from a case commenced after the February 13, 2009, incident (*James R. Stell v. Barry Boybacar and K-Hop Trans. Corp.*, S.C. NY Co. Index No.102113/2013) wherein Plaintiff alleged injuries to, inter alia, his cervical, thoracic and lumbar spine. Defendants annex no-fault records for Plaintiff's treatment after the July 11, 2012, incident.

**Plaintiff's Deposition Testimony**

Plaintiff testified at his October 6, 2015, deposition that immediately following the February 27, 2014, incident he did not seek medical attention and went to a nearby shoe store. Plaintiff first sought medical attention after the February 27, 2014, incident three to four days later. He attended physical and chiropractic therapy and acupuncture for three to four months. Subsequently, Plaintiff underwent right shoulder surgery with Dr. Chapman. After the right shoulder surgery, Plaintiff saw Dr Chapman twice and attended physical therapy for approximately three months.

Plaintiff testified that he missed "maybe a few days" from work following the accident. Plaintiff's work duties include reserving parking spots with construction cones. Plaintiff testified he performs household chores but with some difficulty. Plaintiff also testified that he has less frequent intimate relations with his wife as a result of injuries.

**PLAINTIFF'S OPPOSITION**

**Plaintiff's Medical Records**

Plaintiff submits his treatment records from Gerard Avenue Medical, P.C. which include his initial consultation with Dr. Sonia Armengol (no specialty indicated) on March 5, 2014, physical therapy progress notes, computerized muscle testing exams, follow-up evaluations by Dr. Armengol and Blue Bell Acupuncture, P.C. treatment notes.

Dr. Armengol does not indicate any past medical history regarding Plaintiff's right shoulder, and cervical and lumbar spine in her initial consultation or in her follow-up evaluations. She notes that Plaintiff has right shoulder pain and full range of motion.



Regarding Plaintiff's cervical spine Dr. Armengol indicates in her initial evaluation: "Palpation revealed moderate spasm and tenderness in both trapezius; paravertebral muscles. There are no trigger points over both suprascapular neck/shoulder area. Range of motion is limited secondary to pain in all planes of motion as follows: Flexion: 50/60; Side Flexion: R 40/50, L 40/45; Extension: 60/70; Rotation: R 70/80, L 70/80."

Regarding Plaintiff's lumbar spine, Dr. Armengol notes in her initial evaluation: "Palpation revealed moderate spasm and tenderness in both lumbar paraspinal musculature as well as multiple tender points. . . . Range of motion is limited secondary to pain as follows: Forward flexion: 40 (40 - 60); Extension: 30 (25 - 35); Side flexion: 30 (20 - 30); Rotation: 30R, 30 L (40)."

Dr. Armengol concludes in her initial evaluation that it is her "opinion and with [a] reasonable degree of certainty, there is a casual relationship between the current complaints and the injuries as a result of the accident."

**Plaintiff's Orthopedic Surgeon, Dr. Chapman**

Dr. Chapman discusses Plaintiff's medical records from Gerard Avenue Medical, annexed to Plaintiff's opposition papers, where Plaintiff received treatment from March 5, 2014 until July, 2014, including an April 1, 2014, Computerized Muscle Testing Exam of the the right shoulder which revealed deficits of 71% (flexion), 72% (abduction) and 68% (extension) compared to the left shoulder. Dr. Chapman notes that the treating physician, Dr. Armengol "opined, with a reasonable degree of medical certainty, in her initial consultation report [of March 5, 2014] and the report of May 7, 2014, that there as [sic] a 'causal relationship between the current complaints and the injuries as a result of the accident.'"

Dr. Chapman affirms that he has read Dr. Rich's and Dr. Tantleff's reports concerning Plaintiff's right shoulder but he disagrees with their finding that Plaintiff's "shoulder condition is attributable solely to a pre-existing degenerative condition." Dr. Chapman indicates that he too reviewed the CT Scan of Plaintiff's right shoulder taken on May 21, 2014. Dr. Chapman observes regarding the CT Scan of Plaintiff's right shoulder that:

Keeping in mind that Mr. Stell was sixty-one (61) years old at the time, it was not unusual to see evidence of degeneration in his shoulder or other parts of his body inasmuch as this is a natural part of the aging process. However, degenerative evidence does not always correlate to pain or to motion limitations and it is entirely possible to live a full life with degeneration that does not cause the symptoms of pain and motion limitations experienced by Mr. Stell following his car accident, particularly since his right shoulder was asymptomatic until the occurrence of that accident.

Dr. Chapman observes that Plaintiff “continues to have right shoulder pain. As set forth in the report, range of motion measurements reflect those continuing limitations.” In his report Dr. Chapman documents his July 21, 2016, examination of Plaintiff including “[r]ight shoulder forward extension is 170 degrees, abduction is 160 degrees internal rotation to T11, and external rotation is 40 degrees.” Dr. Chapman states that it is his opinion, “with a reasonable degree of medical certainty, that Mr. Stell’s shoulder condition was caused by his accident of February 27, 2014, particularly in light of the absence of any evidence of prior injury, limitations, pain or other indicia of pre-existing symptomatology.”

Dr. Chapman concludes that:

Given the nature of Mr. Stell’s pain and range limitations, as reflected in the treatment records of Gerard Avenue Medical [annexed to Plaintiff’s opposition papers], and the persistent presence of pain and range limitations five (5) months after accident, during my first examination of his right shoulder, it is my opinion, with a reasonable degree of medical certainty, that with respect to his right shoulder, Mr. Stell sustained ‘a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.’ His inability to use the right arm and shoulder for overhead activity and lifting necessarily impeded activities of daily living such as clothing and bathing and typical household chores such as cleaning, cooking, shopping, etc.

Dr. Chapman further concludes that:

in light of his continuing pain and limitations, as reflected in my recent report, no almost thirty (30) months post-accident, it is my opinion, with a reasonable degree of medical certainty, that with respect to his right shoulder, Mr. Stell has sustained both a ‘permanent consequential limitation of use of body organ or member’ and a ‘significant limitation of use of a body function or system.’ Although further treatment, such as physical therapy, cortisone injection or revision surgery may improve his symptoms, the nature and permanence of the damage cannot be reversed.

### **Plaintiff’s Affidavit**

Plaintiff avers that to date he remains on “restricted light duty” at work due to his injuries and his schedule is reduced due to “enhanced fatigue” as he struggles with the pain in his back, neck and right shoulder. Plaintiff clarifies he consulted with Dr.

Chapman because of the continuing and constant pain in his right shoulder and Dr. Chapman performed surgery on his right shoulder on September 3, 2014. Plaintiff further explains that limitations on his ability to perform household chores and the altered frequency and quality of his marital relations began immediately following the accident and continue to date.

Plaintiff further avers that following the accident he is not able to sleep his customary four to six hours without over the counter sleep aids because he can not find a comfortable position for his right arm and shoulder; he's altered the way he bathes; he sometimes needs his wife's assistance to dress; he refrains from lifting his four young grandchildren whom he sees every weekend; he is unable to ride horses with his daughter, something he enjoyed every two weeks or so for more than ten years; and he is unable to continue his martial arts training, something he studied for many years.

### ANALYSIS

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Jacobson v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014] [quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Id.* [quoting *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013)]). “If the moving party meets this burden, the burden then shifts to the non-moving party to ‘establish the existence of material issues of fact which require a trial of the action.’” (*Id.* [quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012)]).

#### *Defendants' Showing Regarding Permanent Consequential and Significant Limitation of Use*

Defendants established prima facie that Plaintiff did not sustain a serious injury by submitting the affirmed reports of Dr. Tantleff<sup>2</sup> and Dr. Rich. Dr. Tantleff opined that the CT Scans of Plaintiff's right shoulder, and cervical and lumbar spine show preexisting degenerative conditions, not causally related to the February 27, 2014, motor vehicle accident (*Cattouse v Smith*, 146 AD3d 670 [1<sup>st</sup> Dept Jan. 26, 2017] [holding the defendant established prima facie that the plaintiffs did not sustain serious injuries by submitting, inter alia, a radiologist's report concluding that plaintiffs showed preexisting degenerative conditions not causally related to the accident]).

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<sup>2</sup> Contrary to Plaintiff's contention, Dr. Tantleff's affirmation was properly affirmed “under the penalties of perjury” (CPLR § 2106; *Vishevnik v Bouna*, 147 AD3d 657 [1<sup>st</sup> Dept Feb. 23, 2017]).

Dr. Rich reviewed the report prepared by Dr. Hussman interpreting Plaintiff's May 21, 2014, CT Scan of his right shoulder and concludes that there is objective evidence of pre-existing degenerative arthritis in Plaintiff's right shoulder (*Accord Id.*). Further, Dr. Rich suggests that the surgical procedure performed by Dr. Chapman was unnecessary for the AC joint sprain noted by Dr. Chapman in light of the absence of "anatomic disruption" in the preoperative CT Scan of Plaintiff's right shoulder. (*Accord Hwang v Doe*, 144 AD3d 507 [1<sup>st</sup> Dept 2016] [holding the defendant made a prima facie showing that the plaintiff did not sustain a serious injury, where inter alia, orthopedic surgeon reviewed intraoperative photographs and concluded the surgery was not causally related to the accident]).

Dr. Rich allows that Plaintiff may have sustained a contusion to his right shoulder; he opines, however, that such a soft tissue injury is expected to heal uneventfully without medical intervention (*Accord Rickert v Diaz*, 112 AD3d 451 [1<sup>st</sup> Dept 2013] [holding where the plaintiff had multilevel disc degeneration and suffered at most a temporary soft tissue injury, the defendant established prima facie that the plaintiff did not suffer a permanent consequential or significant limitation of use injury caused by the accident]).

Regarding Plaintiff's cervical spine, Dr. Rich concludes that Dr. Hussman's report represents objective evidence of substantial pre-existing degenerative disease and absent from the report is objective evidence of traumatic injury (*Accord Cattouse*, 146 AD3d at 670).

Similarly, regarding Plaintiff's lumbar spine, Dr. Rich concludes that Dr. Hussman's report is consistent with degenerative disease, not acute trauma. (*Accord Id.*). Dr. Rich allows that Plaintiff may have experienced a temporary worsening of symptoms in his lumbar spine; he finds, however, there is no objective evidence that the natural history of the Plaintiff's condition was altered by subject event (*See Rickert*, 112 AD3d at 451 [where orthopedist found "temporary soft tissue injury superimposed on underlying degenerative processes."]).

Consequently, Defendants have established, prima facie, through the affirmations of Dr. Tantleff and Dr. Rich that Plaintiff did not suffer a permanent consequential or significant limitation of use injury caused by the accident (*Cattouse*, 146 AD3d at 670; *Hwang*, 144 AD3d at 507; *Rikert*, 112 AD3d at 451).

#### *Defendants' Showing Regarding 90/180*

The absence of a causal connection between the accident and Plaintiff's injuries also establishes prima facie that Defendants are entitled to a judgment as a matter of law on Plaintiff's 90/180 claim (*Nakamura v Montalvo*, 137 AD3d 695 [1<sup>st</sup> Dept 2016]). Moreover, while Plaintiff testified that he may have missed a few days from work, he performs household chores with some difficulty and he has less frequent intimate

relations with his wife; he was not directed by a physician to restrict any of his activities (*Reyes v Park*, 127 AD3d 459 [1<sup>st</sup> Dept 2015]). Therefore, because Defendants have established the absence of a causal connection between the accident and Plaintiff's injuries and that he was not directed by a physician to restrict any of his activities, Defendants have made a prima facie showing that Plaintiff does not have a 90/180 claim (*Nakamura*, 137 AD3d at 695; *Reyes*, 127 AD3d at 459).

*Plaintiff's Opposition and Defendants' Reply*

None of Plaintiff's medical records from Gerard Avenue Medical, P.C. address Defendants' findings of degenerative changes in his right shoulder and cervical and lumbar spine rendering Dr. Armengol's conclusion that there is a causal relationship between Plaintiff's injuries and the accident speculative (*Arroyo v Morris*, 85 AD3d 679 [1<sup>st</sup> Dept 2011]; *Valentin v Pomilla*, 59 AD3d 184 [1<sup>st</sup> Dept 2009]).

In his affirmation Dr. Chapman disagrees that Plaintiff's right shoulder condition is attributable solely to his pre-existing degenerative and explains that "degenerative evidence does not always correlate to pain or to motion limitations and it is entirely possible to live a full life with degeneration that does not cause the symptoms of pain and motion limitations experienced by Mr. Stell following his car accident, *particularly since his right shoulder was asymptomatic until occurrence of that accident.*"

In short, the only basis for Dr. Chapman's opinion that the accident caused Plaintiff's injury to his right shoulder is his observation that degenerative changes do not always cause pain and his observation that Plaintiff was asymptomatic until the time of the accident. The observation that degenerative changes do not always cause pain, is not "objective medical evidence responsive to defendant's showing of degenerative changes" (*Ortiz v Ash Leasing, Inc.*, 63 AD3d 556 [1<sup>st</sup> Dept 2009]). Plaintiff's report to Dr. Chapman that he did not have pain in his right shoulder until after the accident is also not objective proof that the accident caused Plaintiff's right shoulder injury (*Perl v Meher*, 18 NY3d 208 [2011] [observing "subjective complaints alone are not sufficient to support a claim of serious injury; there must be "objective proof"]]).

Moreover, Dr. Chapman's factual assumption that Plaintiff's shoulder was asymptomatic up until the accident is inaccurate. Annexed to Defendants' reply papers is an initial comprehensive medical evaluation of Plaintiff by Unimed Medical P.C., dated February 16, 2000, concerning an accident Plaintiff was involved in on January 20, 2000. The examining doctor, Dr. Roger Perard notes that among Plaintiff's chief complaint is "[p]ain in the right shoulder more than the left shoulder." While "generally, evidence submitted for the first time in reply papers should be disregarded by the court" the February 16, 2000 medical evaluation of Plaintiff may be considered since it is in response to Dr. Chapman's assumption that Plaintiff did not have pain in his right shoulder prior to the accident in this case (*OneWest Bank, FSB v Simpson*, 2017 NY App Div LEXIS 1795; 2017 NY Slip Op 01875 [2<sup>nd</sup> Dept March 15, 2017]). Since an

underlying assumption by Dr. Chapman was not accurate in that Plaintiff did at some point in fact have right shoulder pain, his conclusion that the subject accident caused Plaintiff's right shoulder injury is speculative at best and does not rebut Defendants' showing that the accident did not cause the injury to Plaintiff's right shoulder (*Cf Ortiz*, 63 AD3d at 556). Therefore, Plaintiff's submission fails to raise a triable issue of fact by providing objective medical evidence ruling out degenerative conditions as the cause of Plaintiff's injuries (*Id.*).

Accordingly, Defendants' motion for summary judgment is granted.

Based upon the foregoing, it is hereby

**ORDERED** that Defendants' motion for summary judgment is GRANTED in its entirety; and it is further

**ORDERED** that Plaintiff's complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: April 10, 2017

ENTER:

  
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HON. PAUL A. GOETZ, J.S.C.