

<b>Schuldt v Brande</b>
2020 NY Slip Op 35083(U)
December 8, 2020
Supreme Court, Westchester County
Docket Number: Index No. 60703/2018
Judge: Janet C. Malone
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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR § 5513[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY

-----X  
GARY SCHULDT and LINDA SCHULDT,

Index No. 60703/2018

Plaintiffs,

-against-

DEBRA STACIE BRANDE,

DECISION AND ORDER  
(*Serious Injury Threshold*)  
Motion Sequence: 2

Defendant.

-----X  
MALONE, J.

The following papers numbered 1-3 were read in deciding Defendant’s motion for summary judgment pursuant to CPLR R 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/ Affirmation in Support of Samantha L. Cruzado, Esq./ Exhibits A-M	1
Affirmation in Opposition of Adam R. Raclaw, Esq./Exhibits 1-7	2
Affirmation of Samantha L. Cruzado, Esq. in Reply	3

On the issue of whether Plaintiffs Gary Schuldt and Linda Schuldt (“Plaintiffs” or “Mr. Schuldt” or Ms. Schuldt”) injuries meet the serious injury threshold under New York Insurance Law §5102(d), Defendant’s summary judgment motion is **denied** as set forth below.

Relevant to this Decision and Order, this negligence action arises out of a motor vehicle accident which occurred on December 5, 2016 at approximately 6:10 p.m., when Mr. Schuldt was operating a motor vehicle travelling on Route 118, at the intersection with Allen Avenue, in the Town of Yorktown, County of Westchester, State of New York, with passenger and wife Ms.

Schuldt when the vehicle owned and operated by Defendant rear-ended Plaintiffs' vehicle that was stopped at a red light. *See*, NYSCEF Doc. Nos. 54 and 55.

Plaintiffs commenced this negligence action on July 13, 2018 and issue was joined on February 13, 2019 with the filing of Defendant's Answer. *See*, NYSCEF Doc. No. 54. Plaintiff served a Verified Bill of Particulars dated April 19, 2019 (NYSCEF Doc. No. 55) which states in relevant part that Plaintiffs sustained a serious injury as defined by New York Insurance Law §5102(d) as Plaintiffs injuries have resulted in: 1) permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; and 3) a medically determined injury or impairment which prevented the Plaintiffs from performing substantially all of their customary daily activities for a period of at least ninety (90) days out of the one hundred and eight days (180) following the accident. The Verified Bill of Particulars also alleges that Mr. Schuldt suffered injuries to his right hip, lumbar spine, and right hand and that Ms. Schuldt suffered injuries to her cervical spine. By Supplemental Bills of Particulars dated June 27, 2019 (NYSCEF Doc. No. 56) Plaintiff Gary Schuldt alleged that he received a total hip replacement on February 19, 2019.

Based upon the conflicting expert reports provided by the parties, issues of fact exist as to whether or not either Plaintiff suffered a serious injury under Insurance Law § 5102. *See, Gaddy v. Eyler*, 79 N.Y. 2d 955 (1992) and *Dufresne v. Cestra*, 185 Misc. 2d 383 (Sup. Ct. 2000). In relation to Mr. Schuldt, issues of fact are raised as to whether his current limitations were pre-existing in nature and if these pre-existing conditions were exacerbated by the subject car accident. For example, in the expert report of Scott V. Haig, M.D. dated October 3, 2019 (NYSCEF Doc. No. 58), Dr. Haig concludes that Mr. Schuldt's post hip replacement and lumbar spinal arthrosis and strain, which were fully resolved as of his examination, and any right hip arthrosis seemed to

be pre-existing in nature based on the surgical pathology report. In opposition, Plaintiffs' Counsel submits the "Physician's Affirmation" of Seth P. Shifrin, M.D. dated August 27, 2020 (NYSCEF Doc. No. 76) wherein Dr. Shifrin indicated that upon physical examination Mr. Schuldt had lasting physical deficits in his right hip and lumbar spine. Dr. Shifrin also concluded that to the extent these conditions were pre-existing they were dormant prior to the subject motor vehicle accident and that there is a causal connection between Mr. Schuldt's limitations and complaints and the subject accident.

As to Ms. Schuldt, her current complaints are also disputed by experts for both sides. In addition, issues of fact are also raised about whether Ms. Schuldt's current complaints stem from pre-existing conditions or exacerbations of previous conditions. Defendant's medical expert Rene Elkin, M.D. concluded in her report dated November 4, 2019 (NYSCEF Doc. No. 63), that there was no evidence of any accident related neurological injury, and that there was no evidence of acute injury to the cervical or thoracic spine resulting from this accident. Dr. Elkin goes on to state that the results of the cervical MRI demonstrated age related degenerative changes that may account for Ms. Schuldt's ongoing pain but are not caused by this accident. In contrast, Plaintiffs submit the "Physician's Affirmation" of Stacy S. Gross, M.D. dated August 27, 2020 (NYSCEF Doc. No. 79) which states that Ms. Schuldt exhibited signs of reduced range of motion in her cervical spine and that any pre-existing conditions of the cervical spine were exacerbated by the subject accident.

[INTENTIONALLY LEFT BLANK]

Therefore, as issues of fact exist, Defendant's motion for summary judgment is **denied**.

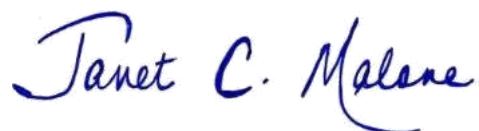
This matter is scheduled before the **Settlement Conference Part**, with a conference to be scheduled at a later date.

To the extent not addressed, the remaining relief is denied.

This constitutes the Decision and Order of this Court.

Dated: December 8, 2020  
White Plains, New York

ENTER:



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HON. JANET C. MALONE  
Justice of the Supreme Court

**TO ALL VIA NYSCEF**