No._____

In the

Supreme Court of the United States

YOUNG SUNG LEE & HAE SUK BAE,

Petitioners,

v.

KATELYN M. GARVEY,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. District Court for the Southern District of New York, by Magistrate Judge Lisa Margaret Smith, dismissed petitioners' personal injury claim on a Rule 50(a) motion for dismissal after petitioners' case was presented, based upon an unsettled body of New York State common law, and unsettled interpretations of the New York State Insurance Law, regarding "permanency" of injury. The lower courts permitted the Magistrate Judge to cherry pick between two competing bodies of state law on a diversity case, on an erroneous concept of a Rule 50(a) motion for directed verdict based upon facts that were not properly viewed in the light most favorable to the non-moving party.

The questions before the Court are:

1. Whether the Magistrate Judge erred as a matter of law in granting a Rule 50(a) motion for directed verdict when (a) both parties' experts agreed that petitioners were permanently injured; (b) the state law supports Petitioners' position.

2. Whether, given the state law split, should the courts have permitted the case to be decided by the jury or refer it to the highest court for settlement of the conflicting case law.

3. Whether the federal court has no power to invalidate one branch of state case law created by trial and intermediate appellate courts, while sitting in diversity.

Of the two competing strands of case law, interpreting statutory law, by the New York state intermediate courts (and the highest court, the New York Court of Appeals having yet to settle the law), the first branch holds that a meniscus tears, requiring surgery, are "serious" injuries under the Insurance Law. *See, e.g., Gutierrez v. City of New York*, 2011 NY Slip Op 34140 (U) (N.Y. Sup. Ct. November 11, 2011) and *Vig v. The New York Hairspray Co., LP*, 67 A.D.3d 140 (1st Dept. 2009). The meniscus tear-plus-surgery concept, as being deemed permanent was more thoroughly discussed in *Johnson v. Singh*, 2009 NY Slip Op 52807 (U) (N.Y. Sup. Ct. October 21, 2008), then Supreme Court Justice Nelson Roman (now of the USDC, SDNY), in an analogous case on "all fours" with this case, held that a meniscus tear requiring surgery "alone is sufficient to establish the existence of serious injury." Judge Roman's comprehensive discussion of the "serious injury" threshold cited both First and Second Department cases, and states that it is "well-settled" law in New York that mensicus tears are serious injury:

> . . . However, with regard, to meniscus tears, *it is well settled that evidence of a meniscus tear requiring surgery raises an issue of fact as to the existence of a serious injury*. *Noriega v. Sauerhaft*, 5 AD3d 121 (1st Dept. 2004); *Rangel-Vargas v. Vurchio,* 289 AD2d 92 (1st Dept. 2001); *Pollas v. Jackson*, 2 AD3d 700 (2nd Dept. 2003). . . .

Id. at 14.(emphasis added) *See also Armstrong v. Quinto*, 2012 NY Slip Op. 32335 (N.Y. Sup. Ct. August 8, 2012) (non-surgery case where meniscus tear was serious injury); *Manilla-Chalas v. Familia*, 2015 NY Slip Op. 31648 (U) (N.Y. Sup. Ct. January 9, 2015) (rotator cuff injury requiring surgery was serious injury, even where plaintiff did not complain of should injury at time of collision).

Despite the authoritative intermediate and trial court decisions from New York State, which includes now- District Judge Nelson Roman's holding, the Magistrate Judge below cherry picked a conflicting strand of state case law and cited to *Resek v. Morreal*, 74 A.D..3d. 1043 (N.Y. App. Div. 2nd Dept. 2010), and *McCloud v. Reyes*, 82 A.D.3d. 848 (N.Y. App. Div. 2nd Dept.. 2011), to support the Magistrate Judge's thesis that plaintiffs' injuries-plus-surgery, even if true, did not present a jury case of "permanency."

Irrespective of any circuit split, the Court's review is necessary and proper under the Court's Internal Rule 10(a), clause 3:

> Rule 10. Considerations Governing Review on Writ of Certiorari
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's

> discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; ***or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power***;

Because the Magistrate Judge's holding is so flatly contrary to law, and because a Rule 50(a) was not intended to apply to what ultimately is a "fact dispute," ***under unsettled state law***, even if the Magistrate Judge held that the facts were "assumed" in Petitioner's favor, *see* PR. 6-3-16 at 9-15; App-1, the holding is so contrary to basic Rule 50(a) principles and other federal procedure, that this Court's supervisory intervention is necessary and proper, because petitioners have been deprived of their claim.

Upon a grant of certiorari, the Court should either summarily grant relief, or grant relief otherwise, and reverse the lower courts' orders and reinstate Petitioners' claims for a jury determination.

LIST OF PARTIES

The parties who participated in all of the proceedings before the U.S. District Court and the U.S. court of Appeals for the Second Circuit are as stated in the caption: Petitioners-plaintiffs Hae Suk Bae; Young Sung Lee; Respondent-defendant Katelyn M. Garvey.

CORPORATE DISCLOSURE

Not applicable.

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PETITION FOR A WRIT OF CERTIORARI

Honorable Chief Justice Roberts and Associate Justices of the Supreme Court of the United States:

Petitioners Lee and Bae, individually, respectfully pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit, the Second Circuit's denial of rehearing and rehearing en banc, and the Magistrate Judge's order below, which all resulted in Petitioners' case being dismissed on a Rule 50(a) motion for directed verdict after the Petitioners' case was presented.

OPINIONS BELOW

The Magistrate Judge's decision are set forth at App-1; the U.S. Court of Appeals Decision is appended at App-3; and Court of Appeals decision denying rehearing is appended at App-12.

STATEMENT OF JURISDICTION

The Second Circuit's affirmance and denial of rehearing, was most recently filed January 24, 2018; and this Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13.1 of the Supreme Court Rules.

RELEVANT CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ...

RELEVANT STATUTES AND RULES

Rule 50(a) of the Federal Rules of Civil Procedure states:

> (a) Judgment as a Matter of Law.
>
> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> > (A) resolve the issue against the party; and
> >
> > (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) Motion. A motion for judgment as a matter of law may be made at any time

> before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

STATEMENT OF THE CASE

Trial in this matter began on May 31, 2016, and proceeded on June 1, 2, and 3. Plaintiffs' case-in-chief presented three witnesses: plaintiff Hae Suk Bae; plaintiff Young Sung Lee; plaintiffs' orthopaedic surgery expert Drew Stein, MD; and defendant Katelyn M. Garvey, through deposition readings. The following facts were adduced at trial:

A. Defendant Caused the Collision on January 3, 2013

Plaintiffs are husband and wife. On Saturday, January 3, 2013, at approximately 7:00pm, along with their children, plaintiffs were in their vehicle traveling northbound on Route 303, from their home in Closter, New Jersey to the Palisades Mall in New York. *See* JA1130-1131. As plaintiffs' vehicle was approaching the intersection of Route 303 and King's Highway, as Ms. Bae testified, defendant was traveling west-bound on Kings Highway. *See* JA1132. Defendant approached the intersection, but failed to heed plaintiffs' right of way, and collided into plaintiffs' car. *Id.*

An ambulance arrived on the scene shortly thereafter, and transported the plaintiffs to Nyack Hospital, Emergency Department. JA1136. Each plaintiff complained of a headache at the time. JA1137. A cursory, life-saving examination was undertaken, as explained by Dr. Stein:

> Q. Dr. Stein, what is the function of an emergency room care setting?
>
> A. So they're there to basically make sure you don't have any life threatening or serious trauma. They're not there to do comprehensive musculoskeletal exam. It's very rudimentary and they -- they're not there to definitively treat you either. For instance, if you did come to the ER with knee pain after a basketball injury, they wouldn't get an MRI on you, they would get an x-ray and send you to a doctor and say, go follow up with an orthopedist somewhere for definitive treatment.

JA1290. Plaintiffs were discharged from the ED and instructed to follow-up with private doctors if they needed.

B. Plaintiffs Are "Permanently Injured"

Two days after the collision, plaintiff Mrs. Bae went to Dr. Chee Gap Kim, a pain management specialist. JA1138. Plaintiff Lee presented for treatment at the

same facility a few days later. JA1335. Dr. Kim ordered a physical therapy regime; and both plaintiffs were referred for MRI imaging.

As stated by Dr. Stein, based on his review of the medical records of each plaintiff, MRI imaging was undertaken at Paramus Medical Imaging on February 11, 2013 (Bae and Lee) and March 16, 2013 (Bae), which revealed herniated discs in the spine at C6-7, L5-S1, and L4-L5 (Bae), and L5-S1, and L4-5 (Lee); and mensicus tearing in both plaintiffs' left knees.

As to plaintiff Lee, Dr. Stein testified:

> Q. And based upon your review of records and your evaluation, were you able to draw any conclusions within a reasonable degree of medical certainty as to whether Mr. Lee suffered any permanent impairment?
>
> A. Yeah. I wrote that he had a permanent, mild orthopedic disability.

JA1246 (emphasis added). As to Mrs. Bae's injuries, Dr. Stein testified:

> Q. Could you describe what those permanent injuries consisted of?

> A. So her impression at the end of the exam was that she had left knee medial lateral meniscus tears with chondromalacia, and she had an arthroscopy for that. She had bilateral shoulder sprains/strains, cervical spine herniated disc at C6, C7, and lumbar spine annular tears with herniated disc at L4, L5, and L5 as one, and I thought her disability was a permanent mild orthopedic disability.

JA1218 (emphasis added). Dr. Stein discussed these injuries repeatedly during his testimony. *See*, e.g., JA1218;1225; 1229; 1238; 1241; 1246.

Dr. Kim subsequently referred plaintiffs for examination with Dr. Fred Lee, a board certified orthopaedic surgeon. Dr. Lee determined that as to both plaintiff Bae and plaintiff Lee that each required knee surgery. Mrs. Bae had a knee arthroscopy surgery performed on August 22, 2013, JA1230; Mr. Lee had a knee arthroscopy surgery on January 30, 2014, JA1246.

Since the surgery, plaintiffs continue to suffer lasting affects to their routines of daily living, since before and after their surgeries, and going back to accident. They are unable to engage in activities that they used to engage in such as hiking and biking; playing with their children; they have been unable to have normal marital relations which requires the movement of the entire body.

Mrs. Bae described:

> Q. What are your current conditions and your current symptoms, if any?
>
> A. First of all, if I'm standing my knee hurts a lot. After two hours, I mean it starts hurting and always I had this heavy feeling in lower back. It hurts badly so that I can't really do daily activities.
>
> Q. You're not in a wheelchair today, right?
>
> A. No.
>
> Q. Is your ability to act on a day-to-day basis, to use your body, to do everything that you used to do before the accident still the same or different?
>
> A. It's different. It's completely changed.
>
> Q. How has it completely changed?
>
> A. The job that I had been doing, even before I had the accident, I have to be standing, selling coffee and bread, bakery. Sometimes I do office work sitting in an office. And then I have to go back

and forth, like driving, managing different branch stores. I cannot do that job, that kind of work anymore. So I ended up changing my job. There are a lot of, it's very, very uncomfortable enjoying the leisure and sports activities that I used to do with my children.

Q. Such as what activities?

A. Hiking, riding a bike, playing soccer, volleyball.

Q. How is your day-to-day interaction and physical activities with your young children?

A. At this point, I mean I can't really play with them enough. It's very difficult to have physical relationship, sex relationship with my husband.

***

Q. Concerning your personal physical, your own physical limitations, have you tried playing soccer with your son?

A. I try. But I couldn't.

Q. Hiking, what type of hiking did you used to do?

> A. I used to go to Bear Mountain frequently on the weekends with my children.
>
> ***
>
> Q. And what kinds of pains or symptoms do you feel in your back?
>
> A. I can take, maybe endure sitting down for maybe about an hour, maybe like driving. Beyond two hours I can't, it becomes difficult and even standing for a long time is difficult.
>
> Q. What symptoms do you feel in your back after two hours or more the?
>
> A. The pain starts from my lower back and radiates down to my leg and my leg feels numb.

JA1142-1146 (emphasis added).

Mr. Lee described:

> Q. Currently today and these days, what activities, if any, that you used to be able to do before the accident are you unable to do or are you having difficulty doing?

> A. First of all, the ones I have difficulty doing are sex problem with my wife. The things that I cannot do at all is like playing soccer with my children. I used to really love sports. I used to love golf. Now I cannot even start. I mean, I cannot even dream about doing hiking, mountain climbing.

JA1339-1340 (emphasis added).

C. Drew Stein, MD, Opined Plaintiffs Were "Permanently Injured"

Dr. Stein testified that plaintiffs' injuries to their knees, cervical and lumbar spines, were casually related the car collision on January 5, 2013, see JA1218; 1233; 1246; 1250; and that such injuries "permanently" injured plaintiffs, see JA1218; 1232; 1245. Dr. Stein stated it this way as to plaintiff Bae:

> Q. Could you describe what those permanent injuries consisted of?
>
> A. So her impression at the end of the exam was that she had left knee medial lateral meniscus tears with chondromalacia, and she had an arthroscopy for that. She had bilateral shoulder sprains/strains, cervical spine herniated disc at C6, C7, and lumbar spine annular tears with herniated disc at L4, L5, and L5 as one, and I thought

> her disability was a permanent mild orthopedic disability.

JA1218 (emphasis added). And further as to plaintiff Lee:

> Q. And based upon your review of records and your evaluation, were you able to draw any conclusions within a reasonable degree of medical certainty as to whether Mr. Lee suffered any permanent impairment?
>
> A. Yeah. I wrote that he had a permanent, mild orthopedic disability.

JA1245 (emphasis added).

Dr. Stein stated that his opinions are based on his review of plaintiffs' medical records from Nyack Emergency Room, where plaintiffs were provided routine emergency treatment after the collision; records from Chee Gap Kim, MD, a board certified pain doctor; MRI films and the readings; and the records of Fred Lee, MD, who operated on each plaintiff's torn left meniscus; as well as conducting his Independent Medical Examination of the plaintiffs in July, 2015. *See* JA1216-1218; 1245.

Dr. Stein stated that each plaintiff's "permanent injury" was of a "mild degree." The Court focused on the "mild degree" rather than on the "permanency" and on the whole picture and did not consider the fact that,

where a meniscus tear occurs, it is a permanent loss, to say nothing of the herniated discs.

D. Defense Expert Barschi, MD, Conceded "Permanency"

Defense expert Dr. Barschi, a professional defense doctor who has handled approximately 3000 to 4000 defense cases, *See* JA1429, a significant fact, conceded that a meniscus tear is permanent and it cannot be re-attached. On that issue — the critical issue in the case — Dr. Barschi conceded:

> Q. When a torn meniscus is reattached, some meniscus is lost; is that right?
>
> A. I don't understand the question.
>
> Q. It's like a fabric. When a fabric is ripped off and you reattach it, it gets shorter; does it get shorter?
>
> A. I would say 90 percent of surgeries for torn meniscus do not reattach the meniscus but remove the small piece that's torn and leave the rest of the meniscus intact. So I don't understand your question.
>
> Q. Right. So, in essence, you have less than a whole meniscus that you began with; right?

A. Correct.

JA1421 (emphasis added). Indeed, Dr. Barschi himself conceded that a meniscus tear — which each plaintiff suffered — was "by definition" a permanent injury that cannot heal itself:

> Q. A meniscus tear is permanent; right?
>
> It's permanent; is that right?
>
> MR. FITZGERALD: Your Honor, this is beyond the scope.
>
> THE COURT: It is indeed.
> The objection is sustained.
> Ask questions within the scope, Mr. Kimm.
>
> MR. KIMM: He asked whether soft tissue was permanent, Judge. Four questions ago.
>
> THE COURT: All right. Answer the question, doctor.
>
> THE WITNESS: Okay.
>
> A. Some people would question whether a meniscus is soft tissue, because it's fibrocartilage. But assuming even

> that it is soft tissue, I believe you asked me before when a tear occurs, whether it can heal. And we talked about certain parts of the meniscus could heal and certain parts -- most of the meniscus could not. ***So by definition, if you have a tear in the meniscus and it's not in the healing zone, it would be considered permanent***.

JA1436 (emphasis added).

While Dr. Barschi's testimony comes from an out-of-turn accommodation during plaintiff's case-in-chief and therefore theoretically beyond the purview of a Rule 50(a) motion, where only plaintiffs' evidence is to be considered, the point is that, permanency was never really disputed, and was indeed admitted by both doctors. The Court, in impliedly determining that, despite the removal of the torn meniscus, a person is "normal" and "not permanently injured," in granting defendant's motion for dismissal under Rule 50(a), was contradictory to the evidence adduced, which was never disputed by anyone.

REASONS FOR GRANTING A WRIT

I

BECAUSE PETITIONERS' CASE-IN-CHIEF ESTABLISHES THAT THE INJURIES TO THEIR LEFT KNEES WERE "SERIOUS INJURY" AND "PERMANENT INJURY," SURPASSING THE

STATUTORY THRESHOLD UNDER NEW YORK INTERMEDIATE APPELLATE CASES, THE LOWER COURTS SHOULD HAVE REFERRED THE CASE TO THE JURY AND SHOULD HAVE DENIED DEFENDANT'S MOTION FOR DISMISSAL

A. Applicable Standard of Review

Under Fed. R. Civ. P. 50, judgment as a matter of law requires a finding that "there is no legally sufficient evidentiary basis for a reasonable jury to find for the party on that issue." Fed. R. Civ. P. 50(a); *see also Merrill Lynch Interfunding v. Argentia*, 155 F.3d 113, 120 (2d Cir. 1998).

The standard for judgment as a matter of law, made post-verdict, is the same as for summary judgment under Fed. R. Civ. P. 56. *This is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 146 (2000) ("[t]he standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same."). The only difference is the timing — the question under each is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

Judgment as a matter of law is appropriate where, when viewing the evidence in a light most favorable to

the nonmoving party, without weighing the credibility of the witnesses or considering the weight of the evidence, the only reasonable conclusion that can be reached is in favor of the movant. *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 51 (2d Cir.2000); *Cruz v. Locan Union No. Three of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154-55 (2d Cir. 1994); *Merrill Lynch Interfunding*, 155 F.3d at 120-121; *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131 (2d Cir. 1995).

In considering a Rule 50 motion, the judge must not make any credibility determinations, or substitute the judge's views of the evidence for that of the jury. *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 51 (2d Cir.2000). The court should, however, give weight to the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses." *Reeves*, 530 U.S. at 150-51 (emphasis added).

There was no dispute that both plaintiffs suffered from a permanent orthopaedic disability; with the only question being the level of disability, which is a fact issue for the jury, and not a judge issue. *See Bocoum v. Ruhman*, 2011 N.Y. Slip Op. 34138 (N.Y. Sup. Ct. January 17, 2012) (ADD-015) (citing *Miller v. Miller*, 508 N.Y.S.2d 418, 419 (1986) (holding that the "extent of claimant's injuries [] are generally resolved by the jury").

Where multiple injuries are implicated, a plaintiff need only establish that one injury falls within the

definition of "serious" injury to vault the threshold. "If a jury determines that plaintiff has met the threshold for serious injury, the jury may award damages for all of plaintiff's injuries causally related to the accident, even those not meeting the serious injury threshold." *Kang v. Almanzar*, 984 N.Y.S.2d 42 (1st Dept. 2014). *See also Prince v. Lovelace*, 981 N.Y.S.2d 410 (1st Dept. 2014) (holding that the Court need not consider plaintiff's cervical and lumbar injuries where plaintiff satisfied the threshold burden with respect to this right knee injury). Plaintiffs' case in chief adequately established accordingly.

B. Dr. Stein's Testimony that Plaintiffs' Injuries are Permanent and Plaintiffs Continue to Suffer Residual Impairment Precluded Defendant's Rule 50 Motion

1. Meniscus tears are "serious" injuries under persuasive New York, intermediate case law

Dr. Stein stated that a meniscus tear — as both plaintiffs suffered — is permanent structural injury that is not repairable by surgery or further treatment. 2T:155. He stated that this is because the mensicus lacks sufficient blood flow and as a result, when the mensicus tears, it is incapable of healing, even with surgery. Id. According to Dr. Stein, once a meniscus is torn, such an injury cannot be reversed to the pre-accident state, and Plaintiffs will always suffer residual impairment:

> Q. When a meniscus is torn, can it heel itself without surgical intervention?
>
> A. So we talked about this before. Meniscus has no blood supply, it won't heal. Like a loose tooth won't become firm again unless you go to the dentist, but like we talked about they can become asymptomatic based on your activity level. If you're a sedentary person, it may not bother you. If you become more active with sports or hiking or golf, pivoting on the knee, then it may hurt you more and more.

JA1250 (emphasis added).

For this reason, Dr. Stein said that each plaintiff suffered permanent impairment. Dr. Stein stated repeatedly that each plaintiff's injuries were permanent:

> Q. Based on your review of the records and your evaluation, were you able to draw any conclusions within a reasonable degree of medical certitude as to whether Mrs. Bae suffered any permanent injury?
>
> A. Yes.
>
> Q. Could you describe what those permanent injuries consisted of?

> A. So her impression at the end of the exam was that she had left knee medial lateral meniscus tears with chondromalacia, and she had an arthroscopy for that. She had bilateral shoulder sprains/strains, cervical spine herniated disc at C6, C7, and lumbar spine annular tears with herniated disc at L4, L5, and L5 as one, and I thought her disability was a permanent mild orthopedic disability.

JA1218. Dr. Stein continued:

> Q. Dr. Stein, what conclusions have you drawn as to the medical expectancy of Mrs. Bae's recovery following the arthroscopic surgery?
>
> MR. FITZGERALD: Objection.
>
> THE COURT: Overruled.
>
> A. So, in general, what I tell patients is after an arthroscopy –
>
> MR. FITZGERALD: Objection.
>
> THE COURT: It's not a question of in generally. From what you know, from everything that you've reviewed, from your own examination, what is your

> opinion of the likelihood of Mrs. Bae's recovery to be, good, bad or indifferent?
>
> THE WITNESS: Well, at this point she's still having complaints and symptoms and pain. Her, like I stated in my report, her recovery is now limited and she has permanent deficits.

JA1232. He also stated that Mr. Lee's injuries were permanent:

> Q. And based upon your review of records and your evaluation, were you able to draw any conclusions within a reasonable degree of medical certainty as to whether Mr. Lee suffered any permanent impairment?
>
> A. Yeah. I wrote that he had a permanent, mild orthopedic disability.

JA1245-1246.

> Q. What conclusions were you able to draw as to the residual permanency of Mr. Lee's lumbar spine injury?
>
> A. So he had continued complaints and pain with numbness and tingling or radiating pain, excuse me, down the right leg, with numbness down the right leg. Pain seven to eight out of ten. And he was status post an epidural steroid injection.

> So he had continued complaints with a permanent mild orthopedic disability.

JA1251.

Dr. Stein derived this opinion from a number of things. First, Dr. Stein reviewed each plaintiffs' treatment records spanning January, 2013 to May, 2014. JA1216; 1245. Dr. Stein also conducted Independent Medical Evaluations on July 16, 2015. JA125; 1245. Finally, Dr. Stein reviewed each plaintiff's pre-operative MRI films, which confirmed the diagnoses and the necessity and propriety of surgery. JA1217; 1225; 1238; 1245. Based on these records, Dr. Stein concluded to a reasonable degree of professional certitude that each plaintiff suffers permanent orthopaedic disability with residual implications.

On a Rule 50 motion, the Court was required to accept these facts as true. *See Caruolo*, 226 F.3d at 5. Instead, the Court held as a matter of law that a "mild permanent orthopaedic disability" necessarily does not qualify as a "serious" injury under the NY Insurance Law:

> . . . "Mild" cannot equal "serious," cannot equal "severe." It simply cannot. By definition, a mild, permanent injury, no matter its permanence, cannot qualify as a serious injury...

JA1511.

The Court's holding was primarily based on two Second Department cases, *Resek v. Morreal*, 74 A.D..3d. 1043 (N.Y. App. Div. 2nd Dept. 2010), and *McCloud v. Reyes*, 82 A.D.3d. 848 (N.Y. App. Div. 2nd Dept.. 2011). *See* JA1511.

These cases, however, conflict with the applicable New York cases that hold meniscus tears are "serious" injuries. Two of these cases were provided to the Court during a break in the trial, namely *Gutierrez v. City of New York*, 2011 NY Slip Op 34140 (U) (N.Y. Sup. Ct. November 11, 2011) (ADD-040) and *Vig v. The New York Hairspray Co., LP*, 67 A.D.3d 140 (1st Dept. 2009). That line of authority includes the following.

In *Johnson v. Singh*, 2009 NY Slip Op 52807 (U) (N.Y. Sup. Ct. October 21, 2008) (ADD-055), then Supreme Court Justice Nelson Roman, in an analogous case on "all fours" with this case, held that a meniscus tear requiring surgery "alone is sufficient to establish the existence of serious injury." Judge Roman's comprehensive discussion of the "serious injury" threshold cited both First and Second Department cases, and states that it is "well-settled" law in New York that mensicus tears are serious injury:

> . . . However, with regard, to meniscus tears, it is well settled that evidence of a meniscus tear requiring surgery raises an issue of fact as to the existence of a serious injury. *Noriega v. Sauerhaft*, 5 AD3d 121 (1st Dept. 2004); *Rangel-Vargas v. Vurchio*, 289 AD2d 92 (1st Dept. 2001); *Pollas v. Jackson*, 2 AD3d 700 (2nd Dept. 2003). Moreover,

> while there are no case squarely addressing the issue of whether MRI films indicating tears of the meniscus, by themselves, are sufficient to establish the existence of a serious injury, this Court concludes that said evidence alone is sufficient to establish the existence of a serious injury.

Id. at 14. *See* also *Armstrong v. Quinto*, 2012 NY Slip Op. 32335 (N.Y. Sup. Ct. August 8, 2012) (ADD-001) (non-surgery case where meniscus tear was serious injury); *Manilla-Chalas v. Familia*, 2015 NY Slip Op. 31648 (U) (N.Y. Sup. Ct. January 9, 2015) (ADD-079) (rotator cuff injury requiring surgery was serious injury, even where plaintiff did not complain of should injury at time of collision).

Similarly, in *Ortiz v. Ash Leasing*, 2008 NY Slip Op 52170 (U) (N.Y. Sup. Ct. October 21, 2009) (ADD-085), Justice Roman discussed that MRI films are objective evidence of serious injury under *Toure*:

> . . . As such, this case stands for the proposition, that plaintiff would have established a serious injury, if the MRI films indicated a meniscus tear as alleged. In *Vignola v. Varrichio*, 243 AD2d 464 (2nd Dept. 1997), the court granted defendant's motion for summary judgment finding no serious injury when plaintiff's doctor, in opposition, failed to cite to any MRI films confirming a meniscus tear. Thus, this case also stands for the proposition that MRI films

> indicating tears of the meniscus are indeed evidence of a serious injury.
>
> An MRI or a CT study is objective medical evidence .... *Id*.; *Toure v. Avis Rent A Car Systems, Inc*., 98 NY2d 345 (2002).

Id. at 15.

The quantum of New York state case law is decidedly inline with cases such as *Ortiz* and *Johnson*, which hold that meniscus tears are "serious" injuries, and not with the limited Second Department authority that the Court perceived to mean that "mild cannot equal serious." In *Corcino v. Miles*, 2016 Slip Op 32362 (U), at * 2-3 (N.Y. Sup. Ct. 2016) (ADD-034), New York Supreme Court Justice Leticia Ramirez, denying a defense motions for summary judgment on "serious injury" threshold, held that tears, such as to a tendon or ligament, are "serious injury" where they are verified by objective medical evidence, such as an MRI, which was the case here. *Corcino* discusses:

> An acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot*, 57 N.Y.2d 230 (1982); *Smith-Carter v Valdez*, 2008 NY Slip OP 31231U (Sup. Ct. N.Y. 2008); *Rodriguez v Russell*, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); *Maenza v Letkajornsook*, 172 A.D.2d 500 (2nd Dept. 1991); *Konco v E.T.C. Leasing Corp*., 160 A.D.2d 680

(2nd Dept. 1990). Furthermore, a tendon or ligament tear, or a bulging or herniated disc may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Jacobs v Perciballi Container Service, Inc.*, 2013 NY Slip Op. 31350U (Sup. Ct. NY 2013); *Chen v Caroprese*, 2012 NY Slip Op. 31142U (Sup. Ct. NY 2012); *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Shvartsman v Vildman*, 47 A.D.3d 700 (2nd Dept. 2008); *Tobias v Chupenko*, 41 A.D.3d 583 (2nd Dept. 2007); *Lewis v White*, 274 A.D.2d 455 (2nd Dept. 2000). However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot*, 57 N.Y.2d 230 (1982); *Pommells v Perez*, 4 N.Y.3d 566 (2005).

In this action, plaintiff sufficiently raised triable issues of fact as to whether she sustained, inter alia, a tear of the posterior horn of the medial meniscus of the right knee; disc herniations at C3-4, C4-5, C5-6, C6-7 and/or L4-5; an acute cervical sprain and/or strain; or an acute lumbar sprain and/or strain; as a result of the subject accident on September 23, 2013 and whether she sustained a "significant limitation" or a "permanent consequential limitation" of her right knee, cervical spine or lumbar spine as a

> result of the subject accident with the affirmed report of Dr. Maxim Tyorkin dated October 17, 2013 and the affirmed report of Dr. Gabriel Dassa dated April 29, 2016 as well as the unsworn right knee MRI report dated October 23, 2013 and the unsworn cervical and lumbar MRI reports dated November 1, 2013. Although these MRI reports are unsworn, as they were reviewed and considered by the defendants' expert, they are properly before the Court for consideration. Nelson v Distant, 308 A.D.2d 308 (1st Dept. 2003).

Id. at 2-3 (emphasis added).

Other cases hold similarly that where a plaintiff suffers a tear, and that is provable by the medical records, the serious injury threshold is vaulted such that a summary decision is improper. *See*, e.g., *Betemit v. Finnerty*, 2016 NY Slip Op 31179(U), at *2-3 (N.Y. Sup. Ct. Jun. 21, 2016) (ADD-012) (holding that a tear is "serious injury" if it is supported by corroborating medical evidence such as MRI films); *Bello v. Campbell*, 2016 NY Slip Op 30699(U), at *3 (N.Y. Sup. Ct., 2016) (ADD-008) (citing *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *Brown v. Achy*, 776 N.Y.S.2d 56 (1st Dep't. 2004)) (holding that MRIs of the plaintiffs are "objective medical evidence ... which sufficiently establish the existence of a serious injury"); *Jaisingh v. Samnarine*, 31 N.Y.S.3d 921 (N.Y. Sup. Ct., 2015) (ADD-051) (internal citations omitted) (denying summary judgment where plaintiff underwent a knee surgery).

The case law is also clear that competing expert opinions as to the level of disability are questions of fact for the jury to resolve. In *Figueroa v. Berroe*, 2016 NY Slip Op 31153(U) (N.Y. Sup. Ct., 2016) (ADD-037), Bronx County Justice Aarons, held that, where competing experts have issued conflicting opinions, those are fact issues reserved for the jury:

> The evidence proffered by the plaintiff's experts showing disc herniations and bulges in the cervical spine, right shoulder tear and right knee meniscus tear which required surgical intervention along with restricted range of motions to the cervical spine, right shoulder, right knee and persistent pain associated with this accident are sufficient to establish that there are divergent medical opinions from both sides on the question of whether or not these injuries are causally related to the accident. Also, Dr. Cesarski and Dr. Graziosa opined that the injuries were caused by subject accident and not merely as a result of degeneration.
>
> The dispute between the parties' experts as to whether plaintiff's injuries were causally related to the accident or degenerative in etiology, raises issues of fact (*Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]). A jury must determine the physicians' credibility and the weight to be accorded to their expert testimony (*Windisch v Weiman*, 161 AD2d 433 [1st

> Dept 1990]). Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiff, the Court finds that the plaintiff has provided sufficient medical evidence to raise a factual issue which requires resolution by a jury.

Id. at 3. *See also, Uveges v. Crill*, 2015 NY Slip Op 32510 (U), at *23 (N.Y. Sup. Ct. 2016) (ADD-112) (same).

Here, Dr. Stein testified that he reviewed plaintiffs' MRI films, which confirmed that each plaintiff suffered meniscus tears. Under *Ortiz* and *Johnson*, with reference to *Toure*, the MRI films are objective evidence of plaintiffs' injuries. The Court's view that Dr. Stein's opinion "rel[ied] solely on the subjective response of the plaintiffs to [the] physical examinations," was incorrect, since Dr. Stein stated that his conclusions were based on his review of plaintiffs medical records, his review of their MRI films and reports, in addition to plaintiffs' subjective complaints. Thus, Dr. Stein's opinions were based on objective evidence and subjective complaints, not one or the other.

The Court's hyper-focus on the limited Second Department line of cases was not appropriate, since the quantum of New York law establishes that mensicus tears are serious injury. Sitting in diversity, the District Court had a duty to apply New York state law, and not merely the conflicting inter-departmental law.

In *Vidal v. Maldonado*, 23 Misc 3d 186 (N.Y. Sup. Ct. December 8, 2008) (ADD-126), Justice Paul A. Victor

confronted this dilemma which he described as the Appellate Division's "Inconsistent Application of *Toure* Guideline." In a 21-page decision, he outlines:

> A comparison of opinions issued in the Appellate Division, First Department, after Toure will exemplify the frustrations and difficulty encountered by all courts when attempting to discern whether the plaintiff has proffered sufficient evidence to establish a "serious injury." (*See* and compare *Brown v. Achy*, 9 AD3d 30, 31 [1st Dept 2004], with *Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520 [1st Dept 2007].) These decisions, which were both issued in the First Department, appear to be inconsistent with each other; and the *Parreno* decision seems to impose conditions which are more harsh than those set forth by the Court of Appeals in the *Toure* series of cases. It is noted that in *Parreno* (which was decided by a different panel of jurists in the First Department than those in *Brown*), no attempt is made to distinguish or recall *Brown* or its rationale.

Id. at 201-202 (emphasis added). The Opinion goes on:

> The *Parreno* standard of review seems harsh and much more stringent than that found satisfactory in *Toure* and *Brown* (supra). The *Parreno* bench appears to require a more technical and

> ritualistic application of the "qualitative" and "quantitative" assessments discussed and approved in *Toure*. The *Parreno* review does not appear to have "viewed the trial evidence in a light most favorable to the plaintiff," and unlike the *Brown* panel, appears to apply a construction which would, when technical requirements are not meticulously followed, deprive a plaintiff of a common-law right. Its construction, at least to this court, appears to go far beyond what is necessary to weed out the "frivolous" and the "minor, mild and slight limitations" which are deemed insignificant by the No-Fault Law.

Id. at 207 (emphasis added).

> As Justice Victor aptly described — nearly a decade ago — the morass of conflicting No-Fault case law and conflicting statutory requirements, has led to an unworkable judicial conundrum,
>
> Depending upon which of the above reviewed appellate precedents this court chooses to accept as controlling, the plaintiff here will either succeed or fail...

Id. at 213 (emphasis added). In light of the conflict, and drawing all inferences in the plaintiff's favor, Justice Victor denied judgment as a matter of law. *Id*. at 214.

In this case, as surely many others, plaintiffs' case failed because the Court relied on one line of cases, rather than the other equally valid lines, which interpreted the same ambiguous statutory provisions of § 5102. Where there is such an ambiguity, the legislative clarification is instructive and should be consulted. *See Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007) (internal citations omitted) (holding that "[i]f the statutory language is ambiguous, however, we resort first to canons of statutory construction, and, if the statutory meaning remains ambiguous, to legislative history").

As a court sitting in diversity, the court is obligated to apply the law of the "forum state." Where, as here, the forum state law is perceived to be in flux, the court should not take sides in that flux; rather, the court should apply the law fairly to all litigants. The only way that can be done, even in the face of any perceived conflict of law, is that the jury should determine whether there is permanency and the amount of damages.

Because the courts have been wrong on many rulings regarding "serious injury," the New York Legislature has announced in the 2015-2016 legislative session its disapproval of such Draconian decisions:

> When the legislature originally passed N.Y.S. Ins. Law § 5102, it never intended that New York's citizens would be deprived of their constitutional right to a trial by jury where they actually sustained a serious injury. The judicial transformation and interpretation of this

statute has produced overwhelming obstacles never intended by the legislature and has clogged the courts with boilerplate "threshold motions" which monopolize judicial resources.

Over the past twenty years developments in technology have enabled medical practitioners to identify injuries to ligaments, tendons, tissue, nerves and other non-bony structures through the use of CT Scans, MRIs, EMGs and other methods. Prior to these advances in technology significant injuries would not have been revealed or adequately appreciated but they are now readily identifiable, and the seriousness of their effects are understood far better than ever before.

Unfortunately, current law has not kept pace with modern medicine. As a result numerous cases where a serious injury was clearly present have been dismissed because the existing law does not clearly and specifically list and identify such injuries as actionable, regardless of how the injury affected the accident victims' lives.

The proposed amendments would curtail summary dismissal of legitimate cases involving significant injuries not objectively verifiable when the law was originally enacted in 1977. The Courts

have been flooded with countless motions and extensive appellate practice on the issue of whether a serious injury was sustained, resulting in unfair and contradictory decisions and the dismissal of meritorious claims. Injured parties in one Judicial Department may have their case dismissed as "non-serious" while in another Judicial Department a case with similar facts is permitted to proceed.

In all of the following New York Cases, the courts ruled that based on the current definition and interpretation of "Serious Injury" that a jury was precluded from determining whether a serious injury was sustained and therefore the case was dismissed:

[citing cases]

These and countless other cases like them have all been dismissed by our courts for the same reason: despite clearly evident and debilitating injuries being present, these types of injuries have all been denominated as "non-serious" by current judicial interpretations of 5102(d) of the Insurance Law.

Moreover, the judiciary has seemingly usurped the authority of the Legislature by unilaterally imposing "requirements" for proof of a serious injury. While the existing statute does

> not require proof of contemporaneous quantitative testing or require non-stop medical treatment for all victims of vehicular negligence the judiciary has created these as additional hurdles for an injured person to leap over to prove that they are seriously injured.
>
> Decisional law has repeatedly provoked courts to dictate medical practices to physicians by imposing these requirements in to the vagaries of treatment every time a "threshold" motion is interposed. However, not all judges have approved of this judicial expansion into usurping the roles of the Legislature, physicians, and juries. The judiciary has repeatedly asked the Legislature for clarification of the statute and firm guidance as to its application, to ensure fairness and consistency in applying the "serious injury threshold" and ease the enormous burden the current law inflicts on the bench and upon citizens that have suffered serious injuries.

The amendments proposed by this Bill would remedy these problems by clarifying what qualifies as a "serious injury" and promote fairness and consistency in its application, taking into account modern medicine and technology which have enabled medical practitioners to identify with more specificity and clarity those injuries having real and serious consequences. The amendment would further call for

jury determinations on factual issues surrounding the nature and extent of the claims, rather than continuing to hamstring an already overburdened judiciary with myriad "threshold" motions. Most importantly, these amendments would promote fair, swift, consistent, rational, just and easily comprehensible results, in keeping with the intent of the original law.

Ja558-59 (emphasis added).

Furthermore, the Legislature is in the process of clarifying the statute so that the courts' ongoing mistakes are statutorily cured. *See* Proposed Amended Bill #2983, seeking an amendment of Section 5102(d) of the N.Y. Insurance Law, the most recent indication of the legislative intent:

> Section 1. Subsection (d) of section 5102 of the insurance law, as amended by chapter 955 of the laws of 1984, is amended to read as follows:
>
> (d) "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; *a partial or complete tear or impingement of a nerve, tendon, ligament, muscle or cartilage; injury to any part of the spinal column that results in injury to an intervertebral disc; impingement of the spinal cord, spinal canal, nerve, tendon or muscle*; loss of a fetus; permanent *total or partial loss* of use of a body

> organ, member, function or system; *any injury resulting in the need for a surgical procedure; any* permanent consequential limitation of use of a body organ [or], member, *function or system; any* significant limitation of use of a body organ, member, function or system; or [a] any medically determined injury or impairment of a *permanent or 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....

JA0362 (emphasis in original).

The Proposed Bill goes on to clarify, that a finding seriousness under any of categories, such a "resulting surgical procedure" or a "tear" — the injuries that plaintiffs suffered — shall be a "sufficient basis for an award of past and/or future damages," stating:

> occurrence of the injury or impairment. *A finding of serious injury under any of the above enumerated categories in this definition shall be a sufficient basis for an award for past and/or future damages.*

Id. (emphasis in original).

The proposed bill concludes with a specific point that the determination on the issue of seriousness is reserved for the trier of fact:

> § 2. The insurance law is amended by adding a new section 5102-a to read as follows:
>
> *§ 5102-a. Issues of fact and sufficiency of the evidence. Whether an injury qualifies as a serious injury pursuant to subsection (d) of section five thousand one hundred two of this article shall be a question of fact. Where evidence is offered as to (a) whether an injury qualifies as a serious injury pursuant to subsection (d) of section five thousand one hundred two of this article, or (b) the causation of such an injury, the sufficiency and weight of evidence offered, including but not limited to that pertaining to qualitative and/or quantitative assessment of injury, shall be reserved for the trier of fact.*
>
> § 3. This act shall take effect immediately and shall be applicable to: (I) all actions and proceedings commenced on or after the effective date of this act; and (ii) all actions and proceedings commenced prior to the effective date of this act and pending on the effective date of this act, where as of such date a trial of the issues thereon has not yet

> commenced and a dispositive motion has not yet been filed.

Id. (emphasis in original).

To the extent that the inter-departmental law among the judicial departments is in conflict, the Court should not have applied Second Department case law to plaintiffs' detriment as a means of removing this case from the jury's province on a Rule 50 motion. The Court should have done as Justice Victor in *Vidal*, supra, and permitted this matter to proceed to a jury's determination.

2. Plaintiffs neck and back injuries are also "serious" injury under New York case law

In addition to plaintiffs' knee injuries, which were "serious" injury under New York law, plaintiffs also each suffered neck and back herniations from the January 3, 2015 collision. These injuries were are also "serious" injury.

Eastern District courts have determined that lumbar and cervical spine injuries are "serious" injury. In *Connolly v. Peerless, Inc.*, 10-cv-0789 (ADS) (E.D.N.Y. July 10, 2012) (ADD-018), Judge Spatt discusses:

> In prior cases involving injuries to the plaintiff's lumbar and cervical spines, treating physicians diagnosis of permanency was sufficient to raise triable issues of fact involving "serious injury." In *Trigg v. Gradischer*, 6 A.D.3d 525, 774

N.Y.S.2d 391 (2d Dept. 2004), the rule was stated:

> In opposition, the plaintiffs submitted medical evidence that they each sustained herniated discs and decreased ranges of motion in their lumbar and cervical spines. The plaintiffs' treating physician affirmed that the plaintiffs' injuries were permanent and casually related to the subject motor vehicle accident. This evidence was sufficient to raise a triable issue of fact (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865; supra, *Acosta v. Rubin*, 2 A.D.3d 657, 768 N.Y.S.2d 642).

See also Franco v. Supreme Poultry, Inc., 91 A.D.3d 818, 819, 936 N.Y.S.2d 915 (2d Dept. 2012), a similar case decided recently, holding:

> The plaintiff alleged, inter alia, that as a result of the subject accident, he sustained certain injuries to his left shoulder. The

> defendants submitted competent medical evidence establishing, prima facie, that the alleged injuries to the plaintiff's left should did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (see Rodriguez v. Huerfano, 46 AD3d 794, 795). In opposition, however, the plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to his left shoulder constituted a serious injury under the permanent consequential limitation of use category or the significant limitation of use category of Insurance Law § 5102(d)
>
> (*see Perl v. Meher*, 18 NY3d 208 *5). Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint.

Id. at 19-20.

New Jersey cases are also instructive, since the "verbal threshold" standard under New Jersey No-Fault regime is substantially the same as the New York's. *See DiProspero v. Penn*, 874 A.2d 1039, 1054 (N.J., 2005) (noting that New Jersey's "verbal threshold was patterned after New York.").

Similarly, in New Jersey, where the no fault insurance statute contains identical "serious injury" language, it is settled law that a herniated disc satisfies the statutory threshold. *See*, e.g., *Moreno v. Greenfield*, 272 N.J. Super. 456, 462-63 (App. Div. 1994) (reversing grant of summary judgment because "the objective evidence of injury [was] clear" since the doctor "observed spasms in the [plaintiff's] cervical musculature and the thoraco/lumbosacral area over a two-year period" and "more important[ly]," that there was a "documented L5-S1 herniated disc and the attendant problems suffered by plaintiff"); *Bennett v. Lugo*, 368 N.J. Super. 466, 477 (App. Div.), certif. denied, 180 N.J. 457 (2004) (stating that "if a jury finds that plaintiff's disc herniation has been caused by the current accident, the jury can likewise reasonably find that the injury is serious and permanent."); *Martin v. Chhabra*, 374 N.J. Super. 387, 393 (App. Div. 2005) (holding that the trial court correctly determined that the verbal threshold's permanency requirement was satisfied since the "plaintiff submitted sufficient objective, credible evidence of permanent injury" by demonstrating the existence of a "central herniation of the L5-S1 disc" and a "L4-5 disc bulge").

C. Because Defendant Admitted That Plaintiffs Suffered Permanent "Serious" Injury,

Summary Disposition Was Further Precluded

This testimony was undisputed, and conceded, because defendant's orthopaedic surgery expert, Dr. Barschi determined that both plaintiffs suffered meniscus tears, and that the surgical procedure — a knee arthroscopy — requires that the torn, damaged portion of the meniscus tissue is excised and removed. JA1436 Thus, defendant's expert was essentially "in line" with plaintiff's' expert, as to the injuries that plaintiffs suffered; and in turn, only quibbled whether surgery was necessary, and the level of residual impairment or disability that afflict plaintiffs. The Courts have rejected such types of challenges as insufficient for judgment as a matter of law. *See Solis v. Aronholz*, 2009 NY Slip Op 518779 (U) (N.Y. Sup. Ct. August 31, 2009) (ADD-104) (citing *Caballero v. Fev Taxi Corp.*, 49 A.D.3d 387 (1st Dept. 2008) ("by failing to comment concerning pre-operative diagnosis of plaintiff's torn medical meniscus injury and surgery performed ... defendant's challenge to the viability of plaintiff's claim is without substance."); *Madubugwu v. Bonao Taxi, Inc.*, 2013 NY Slip Op. 33952 (U) (N.Y. Sup. Ct. August 8, 2013) (ADD-076) (where plaintiff suffered a torn meniscus leading to surgery, which defendant challenged as elective, judgment as a matter of law was denied).

Because there has never been any dispute that plaintiffs suffered serious injury, the Court should consider this testimony for the purposes of this motion. *See Connolly*, 10-cv-0789 (ADS), at *13 (citing *Scott v. Gresio*, 90 A.D.3d 736, 737 (2d Dept. 2011) (holding that defendant's assertion that plaintiff did not suffer serious injury was precluded where defendant's expert

did not support defendant's position). Defendants' expert has conceded that each plaintiff suffered serious injury. Even if the magistrate judge considered only plaintiffs' evidence, on the Rule 50 posture, she clearly erred by failing to accept plaintiff's expert's testimony and plaintiffs' testimony as true and in failing to construe the favorable inferences from these sources of evidence that plaintiffs' injuries were permanent, even though the degree of permanency was relatively mild.

The cases cited by the magistrate judge show that the lower court cherry picked adverse cases amid the unsettled and expanding nature of the State law in this field, so much so that the Legislature has announced that the judiciary has been wrongly imposing a requirement that was not contained in the statutory concept of "permanency" resulting in unfair dismissals of the kind committed by the magistrate judge.

As is settled law, a Court facing a Rule 50 motion is not permitted to resolve contested factual disputes properly reserved for the jury as the finder of fact. However, where factual matters are "uncontradicted or unimpeached" the Court is permitted to give weight to such evidence. See Reeves, supra, 530 U.S. at 150-51. Plaintiffs' prima facie case was uncontradicted and; it required the benefit of fair inferences; but the Court construed only a part of the evidence presented.

D. Plaintiffs Suffered Serious and Permanent Injury As a Matter of Law

Here, it was uncontradicted, either in trial or before, that plaintiffs' injuries were "serious" injuries. In fact, both plaintiffs' expert and defendant's expert agreed on

the essential fact that the injuries plaintiffs experienced from the collision would persist. In such a situation, the court should enter judgment as a matter of law.

In *McCormick v. Carrier*, 487 Mich. 180 (2010), under the Michigan no-fault insurance act, the state Supreme Court reversed the lower courts dismissal, and held as a matter of law that the plaintiff suffered a serious impairment of body function. The *McCormick* court explained that "under the facts of this case, [] that plaintiff has met the serious impairment threshold as a matter of law" and discusses:

> To begin with, there is no factual dispute that is material to determining whether the serious impairment threshold is met. The parties do not dispute that plaintiff suffered a broken ankle, was completely restricted from bearing weight on his ankle for a month, and underwent two surgeries over a 10-month period and multiple months of physical therapy. The parties do dispute the extent to which plaintiff continues to suffer a residual impairment and the potential for increased susceptibility to degenerative arthritis. Plaintiff has provided at least some evidence of a physical basis for his subjective complaints of pain and suffering,28 but defendant disputes whether there is persuasive evidence of impairment beyond plaintiff's subjective complaints. This dispute is not significant or essential

to determining whether the serious impairment threshold [487 Mich. 217] is met in this case, however, because plaintiff has not alleged that the residual impairment, to the extent that it exists, continues to affect his general ability to lead his pre-incident "normal life," 29 the third prong of the analysis. Moreover, it is not necessary to establish the first two prongs. Therefore, the dispute is not material and does not prevent this Court from deciding whether the threshold is met as a matter of law under MCL 500.3135(2)(a).

The other facts material to determining whether the serious impairment threshold is met are also undisputed.30 Before the incident, plaintiff's "normal life" consisted primarily of working 60 hours a week as a medium truck loader. Plaintiff also frequently fished in the spring and summer and was a weekend golfer. After the incident, plaintiff was unable to return to work for at least 14 months and did not return for 19 months. He never returned to his original job as a medium truck loader, but he suffered no loss in pay because of the change in job. He was able to fish at pre-incident levels by the spring of 2006 and is able to take care of his personal needs at the same level as before the incident. There is no allegation that the impairment of body function has

> affected his relationship with his significant other or other qualitative aspects of his life.

The *McCormick* case is on point with this case, since both plaintiffs' expert and defendant's expert agreed on the essential facts, although defendant's expert presented an inconsistent conclusion.

E. Defendant Negligently Caused the January 3, 2013 Collision As a Matter of Law

It was also indisputable, or incapable of reasonable dispute, that defendant negligently caused the collision. While defendant pressed a hail-mary defense to refute liability that plaintiff's headlights were not activated, this quibbling was immaterial, because defendant testified at her deposition — with such testimony as substantive evidence in plaintiffs' case in chief through deposition readings — that she looked left, then looked right, but failed to look left again before entering the intersection. Because defendant failed to look, no reasonable could have found that defendant was not liable for causing the collision.

CONCLUSION

For the foregoing reasons, certiorari should be granted and the lower courts' erroneous decisions dismissing the case should be reversed and remanded for trial.

Dated: April 20, 2018

Respectfully submitted,

Michael S. Kimm
Attorney for Petitioners

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UNITES STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HAE SUK BAE and YOUNG SUNG LEE,

Plaintiffs,

-against- 14 Civ.6001 (L.S.)

CATALAN M. HARVEY, JUDGMENT

Defendant.

Whereas the above entitled action having been assigned to the Honorable Lisa Margaret Smith, United States Magistrate Judge, by consent of the parties for a jury trial, and thereafter such trial on the claim of negligence as against CATALAN M. HARVEY and counterclaim of negligence as against He Sun BAE began on May 31, 2016, and continued through June 3, 2016; and whereupon the Court granted Defendant's motion for judgment as matter of law pursuant to Federal Rule of Civil Procedure 50, on June 3, 2016, it is,

ORDERED, ADJUDGED, AND DECREED: that Judgment is directed in favor of Defendant CATALAN M. HARVEY and, consequently in favor of counterclaim Defendant He Sun BAE; accordingly, the

claim and counterclaim are dismissed, and the matter is terminated.

Dated: June 6, 2015
White Plains, New York

Approved:

/s/ Lisa Margaret Smith, U.S.M.J

Clerk:

/s/ Ruby J. Krajick, Clerk of Court

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16-3198
Lee v. HARVEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
JOHN M. WALKER, JR.,
GUIDO CALABRESI,
Circuit Judges.

YOUNG SUNG LEE,

Plaintiff-Appellant,

HE SUN BAE,

Plaintiff-Counter-Claimant-Counter-Defendant-Appellant,

v.

No. 16-3198

CATALAN M. HARVEY,

Defendant-Counter-Claimant-Counter-Defendant-Appellee,

For Plaintiff-Appellant and Plaintiff-Counter-Claimant-Counter-Defendant-Appellant:

MICHAEL S. KIMM (Adam Garcia, *on the brief*) Kimm Law Firm, Englewood Cliffs, NJ.

For Defendant-Counter-Claimant-Counter-Defendant-Appellee:
WILLIAM A. FITZGERALD, DeCicco, Gibbons & McNamara, PC, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Smith, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Young Sung Lee and Plaintiff-Counter-Claimant-Counter-Defendant-Appellant He

Sun BAE ("plaintiffs") appeal from the judgment of the United States District Court for the Southern District of New York (Smith, *M.J.*) dated June 6, 2016, entering judgment in favor of defendant CATALAN M. HARVEY. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Plaintiffs, who are husband and wife, filed a tort action against the defendant based on alleged injuries arising out of a January 5, 2013 car accident. The case proceeded to trial and, following the conclusion of plaintiffs' case-in-chief, the defendant moved for judgment as a matter of law under Federal Rule of Civil Procedure 50. Magistrate Judge Smith granted the motion, concluding that plaintiffs had failed to introduce evidence establishing that they had sustained "serious injuries" as required by New York law or that their injuries were caused by the accident. This appeal followed.

Under New York's No-Fault insurance law for motor vehicle accidents, basic economic loss is to be covered by insurance "regardless of fault in an accident, and noneconomic loss (pain and suffering) [is] recoverable only thorough a personal injury claim against a tortfeasor," *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 878 N.E.2d 583, 587 (N.Y. 2007), and only when the plaintiff has suffered a "serious injury," *id.* (quoting N.Y. Ins. Law § 5104(a)). As the New York Court of Appeals has explained, the "legislative intent underlying the No–Fault Law was to weed out frivolous claims and limit recovery to significant injuries." *Dufel v. Green,* 647 N.E.2d 105, 107 (N.Y. 1995).

Plaintiffs advance two arguments on appeal. First, they claim that the district court erred in holding that judicial estoppel did not preclude defendant from contesting whether plaintiffs suffered "serious injur[ies]." With this argument, which was raised in a motion *in limine*, plaintiffs contend that defense counsel conceded liability at the final pre-trial conference. In support, plaintiffs cited to the minute entry from the pre-trial conference, which references "[a] 4-day damages-only jury trial." App. 211. The district court orally denied the motion and permitted defendant to contest liability at trial.

We conclude that the district court did not abuse its discretion by denying the motion *in limine*. *See Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 133 n.9 (2d Cir. 2012). As plaintiffs acknowledge, the pre-trial conference was not recorded so there is no record of defendant's alleged concession and the district court judge, who was present for the pre-trial conference, does not appear to have been persuaded that this concession occurred or that the minute entry accurately reflected the scope of issues for trial. In addition, even if defense counsel had conceded liability, this concession would not have precluded defendant from contesting the seriousness of plaintiffs' injuries because "serious injury" is not an element of liability. *See Kilakos v. Mascera*, 862 N.Y.S.2d 529, 530 (N.Y. App. Div. 2008) ("The defendant conceded liability and the matter proceeded to trial on the issue of whether the plaintiff sustained a 'serious injury' . . . .").

Plaintiffs' second argument is that the magistrate judge presiding over the trial erred by entering

judgment as a matter of law based on plaintiffs' failure to establish prima facie evidence of a "serious injury."[1] "We review *de novo* a district court's grant or denial of judgment as a matter of law under Rule 50." *Stevens v. Rite Aid Corp.*, 851 F.3d 224, 228 (2d Cir. 2017). In doing so, we apply the same standard as the district court: "Judgment as a matter of law may not properly be granted under Rule 50 unless the evidence, viewed in the light most favorable to the opposing party, is insufficient to permit a reasonable juror to find in her favor." *Galdieri– Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998).

Under New York's Insurance Law, there is no right of recovery in tort unless a covered person sustained a "serious injury," defined as:

> [A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from

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[1] Plaintiffs do not specify which clause of the "serious injury" statute is applicable to their injuries but, because their argument emphasizes the permanency of their injuries, we assume they are alleging that they suffered "permanent consequential limitation of use of a body organ or member," N.Y. Ins. Law § 5102(d).

> 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-and-eighty days immediately following the occurrence of the injury or impairment.

N.Y. Ins. Law § 5102(d). In establishing the existence of a serious injury, a "[p]laintiff must present objective proof of injury, as subjective complaints of pain will not, standing alone, support a claim for serious injury." *Yong Qin Luo v. Mikel*, 625 F.3d 772, 777 (2d Cir. 2010).
"[T]o prove the extent or degree of physical limitation" a plaintiff can offer either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "[a]n expert's *qualitative* assessment of a plaintiff's condition," provided that the qualitative assessment "has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v. Avis Rent A Car Sys. Inc.,* 774 N.E.2d 1197, 1200 (N.Y. 2002). The New York Court of Appeals
has concluded that "the court should decide the threshold question of whether the evidence would warrant a jury finding that the injury" qualifies as a "serious injury." *Licari v. Elliott*, 441 N.E.2d 1088, 1092 (N.Y. 1982).

Both plaintiffs allege that they suffered herniated discs in their necks and lower backs, as well as meniscus tears in their left knees, and both underwent

arthroscopic surgery on their knees within thirteen months of the accident. The objective evidence introduced by plaintiffs at trial consisted of testimony by Dr. Drew Stein, an expert in orthopedic surgery hired by plaintiffs to conduct an independent evaluation of their injuries, and records from Nyack Hospital, where plaintiffs were treated immediately following the accident. Plaintiffs did not introduce testimony from their treating physicians or any other medical records. The Nyack Hospital records indicate that BAE and Lee both complained of neck pain and were diagnosed with neck sprains. Dr. Stein testified that 2013 MRI films of both plaintiffs revealed herniated discs in their necks and lower backs and meniscus tears in their left knees. Assessing the plaintiffs two-and-a-half years later, Dr. Stein concluded that both plaintiffs exhibited "permanent mild orthopedic disabilities." App. 1218:1-14, 1245:20-25. In reaching this conclusion, Dr. Stein relied heavily on plaintiffs' subjective complaints of pain and their representations that they were unable to engage in leisure activities, such as hiking and biking, and that they struggled to stand for long periods of time.

When asked about his objective findings, Dr. Stein testified that, according to his July 16, 2015 evaluation, BAE had an objectively normal left knee with full range of motion and negative results on all orthopedic tests. With respect to the herniated discs in Bae's neck, although Dr. Stein testified that these were visible in the 2013 MRI films, he determined that as of 2015 she had full range of motion in her neck with no objective orthopedic findings of any injury. As to the lower back, Dr. Stein testified that BAE had a 10 percent restriction in range of motion—meaning that

she was unable to touch her toes when she bent at the waist—but he admitted that he had no way of knowing how flexible BAE was prior to the accident, therefore the 90 percent range of motion might not represent a limitation. In addition, Dr. Stein acknowledged that BAE did not report pain during tests used to determine whether a herniated disc was compressing a nerve, exhibited no pain when rotating her torso, and did not experience a back spasm during the examination.

Dr. Stein also conducted an independent examination of Lee but his testimony focused primarily on the results of the 2013 MRI, which showed herniated discs and a meniscus tear. He did not testify as to the residual effects of Lee's alleged injuries, including range of motion or Lee's responses to objective orthopedic tests. The only other objective medical evidence of Lee's
injuries was the Nyack Hospital record from the night of the accident.

Although plaintiffs insist that meniscus tears are necessarily serious injuries under applicable New York case law, the magistrate judge properly concluded that this evidence was insufficient to establish a serious injury. As an initial matter, the plaintiffs have pointed to no precedent holding that it is appropriate to submit a case to the jury notwithstanding testimony from a plaintiff's own expert that the plaintiff had full range of motion and negative results on all orthopedic tests following surgery. In addition, New York courts have generally held that "[a] tear in tendons, as well as a tear in a ligament, or a bulging disc is not evidence of a serious injury in the absence of objective evidence of

the extent of the alleged physical limitations resulting from the injury and its duration." *See, e.g.*, *Little v. Locoh*, 897 N.Y.S.2d 183, 185 (N.Y. App. Div. 2010); *see also Mulligan v. City of New York*, 993 N.Y.S.2d 24, 26 (N.Y. App. Div. 2014). This conclusion is consistent with the plain text of the statute which requires a showing of a "permanent consequential *limitation of use* of a body organ or member." N.Y. Ins. Law § 5102(d) (emphasis added). Here, neither BAE nor Lee adduced any objective evidence of a limitation of use with respect to their left knees. And, although Dr. Stein identified a 10 percent restriction in the range of motion of Bae's lower back, this does not constitute a serious injury because New York law requires "more than a minor limitation of use." *Licari*, 441 N.E.2d at 1091; *see also Hodder v. United States,* 328 F. Supp. 2d 335, 356 (E.D.N.Y. 2004) ("While there is no set percentage for determining whether a limitation in range of motion is sufficient to
establish 'serious injury,' the cases have generally found that a limitation of twenty percent or more is significant for summary judgment purposes."). Indeed, plaintiffs' own expert described their injuries as "mild," App. 1218:1-14, 1245:20-25, and the New York Court of Appeals has held that "minor, mild or slight limitations of use" do not satisfy the requirements of § 5102(d). *Licari*, 441 N.E.2d at 1091. In the absence of objective evidence establishing that plaintiffs experienced permanent consequential limitations of use, the magistrate judge properly entered judgment in favor of the defendant.[2]

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[2] The magistrate judge also concluded that the plaintiffs had failed to establish that the January 5, 2013 accident was the cause of the

We have considered all of plaintiffs' contentions on appeal and have found in them no basis for reversal. For the reasons stated herein, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit Seal

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alleged injuries. Because plaintiffs' failure to demonstrate a serious injury is sufficient to decide this case, we need not reach the question of causality.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of January, two thousand eighteen.

YOUNG SUNG LEE,

Plaintiff - Appellant,

HE SUN BAE,

Plaintiff- Counter-Claimant-Counter-Defendant- Appellant,

v.

ORDER
Docket No: 16-3198

CATALAN M. HARVEY,

Defendant- Counter-Claimant-Counter-Defendant- Appellee.

Appellants, Young Sung Lee and Haw Sun BAE, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the

Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk