McLeod v Metropolitan Transp. Auth.

2015 NY Slip Op 50705(U)

Decided on May 7, 2015

Supreme Court, New York County

Stallman, J.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on May 7, 2015
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Godwin McLeod, Plaintiff,

against

Metropolitan Transportation Authority, MTA CAPITAL CONSTRUCTION, MTA NEW YORK CITY TRANSIT AUTHORITY, MTA BRIDGES AND TUNNELS, MTA LONG ISLAND RAILROAD, MTA LONG ISLAND BUS, MTA METRO-NORTH RAILROAD, THE CITY OF NEW YORK, URS CORPORATION-NEW YORK, PB AMERICAS INC., PARSONS BRINCKERHOFF AMERICAS, P.C., PARSONS TRANSPORTATION GROUP INC., PARSONS TRANSPORTATION GROUP OF NEW YORK, INC., STV GROUP, INC., A JOINT VENTURE OF PB AMERICAS, STV AND PARSONS TRANSPORTATION GROUP, NEW YORK and SCHIAVONE CONSTRUCTION CO., LLC, Defendants.

105945/2011

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Michael D. Stallman, J.

In this action alleging violations of the Labor Law, defendants move for an order to compel [*2]plaintiff: (1) to provide authorizations for the release of medical records; (2) to appear for a further deposition related to medical records sought in this motion; (3) to appear for a further medical examination before a vascular surgeon for a pulse volume recording (PVR) test and duplex examination; and (4) to pay the fees associated with the further medical examination. Defendants also seek an order of preclusion against plaintiff from offering evidence at trial of any injuries due to plaintiff's refusal to provide authorizations and to submit to the PVR test and duplex examination.

The dispute over the authorizations that plaintiff must provide presents an issue which the Appellate Divisions have treated differently: whether a plaintiff has waived the physician-patient privilege as to his or her entire medical history by asserting claims for loss of enjoyment of life, future lost earnings and total disability due to permanent physical injuries.

I.

On June 14, 2010, plaintiff, a 56 year old male, was allegedly injured while working as a sandhog on the East Side Access Project, in a tunnel 60 feet below ground. According to the bill of particulars dated August 28, 2012, plaintiff was working and traveling in a muck car, a type of train car. (Glazer Affirm., Ex G [Bill of Particulars] ¶¶ 14-15.) The motor car of the train allegedly stopped violently and abruptly when it struck a pipe that had fallen onto the train tracks, causing plaintiff to be thrown forward and backward. (Id.)

The bill of particulars alleges that plaintiff suffered the following permanent injuries as a result of his accident on June 14, 2010:

(a) low back pain radiating to right leg with numbness and tingling in feet and toes;
(b) fatigue, difficulty sleeping, difficulty concentrating and performing activities of daily living;
(c) lumbosacral neuritis radiculopathy;
(d) lumbar disc displacement;
(e) right shoulder rotator cuff syndrome;
(f) pelvic pain;
(g) vascular disruption of the anterior vascular arteries leading into the lower extremities requiring surgery including a decompressive lumbar laminectomy and lumbosacral spinal fusion at the L5-S1 segment;
(h) severe progressive low back pain with severe progressive left lower extremity pain and weakness;
(i) exacerbation of prior asymptomatic vascular condition;
(j) sensory motor axonal and demyelinating peripheral polyneuropathy dysfunction affecting the bilateral lower extremities confirmed by EMG study taken on December 7, 2010;
(k) tenderness to the bilateral paraspinal muscles and over the lumbar spinous process;

(l) abdominal pain;
(m) numbness to right thigh with pins and needles to right calf and foot and pain of the right foot requiring a cane to assist with ambulation;
(n) right lower extremity trauma to the veins and arteries;
(o) increased swelling/lymphedema of the right lower extremity secondary to vascular bypass;
(p) trauma to the abdomen causing multiple thrombi of the bilateral lower extremities and abdomen;
(q) right lower extremity weakness and atrophy with profound edema;
(r) acute lumbar spine musculoligamentous sprain/strain with radiculopathy;
(s) right leg contusion/trauma;
(t) L5-S1 posterior left paracentral disc herniation contacting the descending left S1 nerve root;
(u) anterolisthesis and/or facet arthrosis."

(Bill of Particulars ¶¶ 2-3.) The bill of particulars also state, in boilerplate fashion, "The injuries have resulted in pain, deformity, disability, stiffness, tenderness, tingling sensation, weakness and limitation and have further prevented the plaintiff from enjoying the normal fruits of his activities, including but not limited to social, economic, and educational." (Id.)

Defendants demanded particulars as to any periods of total disability and partial disability, and the length of time incapacitated from employment. (See Glazer Affirm., Ex F [Demand for Verified Bill of Particulars] ¶¶ 4, 8.) Plaintiff responded:

(4) As a result of the within occurrence plaintiff GODWIN MCLEOD has been totally disabled from the date of his accident June 14, 2010 to present and continuing.

* * *

(8) As a result of the within occurrence plaintiff GODWIN MCLEOD has been totally incapacitated from his employment from the date of his accident June 14, 2010 to present date and continuing."

(Bill of Particulars ¶¶ 4, 8.)

A.

At his deposition in August 2013, plaintiff was asked about his prior medical history. According to plaintiff, in 1972 when he was 19 years old, he had surgery in Grenada, which involved a graft of his small intestines, because plaintiff had run into the tail light of a parked car, which struck his belly. (Glazer Affirm., Ex M [McLeod EBT], at 305.)

Plaintiff testified that he had a heart condition which was first diagnosed in 2007, when he suffered a "mild heart attack." (Id. at 300.) According to plaintiff, stents were placed in 2007. (Id. at 276.) He stated that, in November 2011, he was taken to the hospital for treatment of a blockage in his heart, where another two stents were placed. (Id. at 360-361.)

According to plaintiff, he was also diagnosed with high blood pressure, when the stents were [*3]placed, and he takes prescription medication for that condition. (Id. at 297-298.) Plaintiff also stated that he had been a smoker, smoking "half a pack a day for about 11 years", but that he quit shortly after his mild heart attack. (Id. at 302.)

Plaintiff testified that, after the accident on June 14, 2010, his doctors told him that he should consider retirement due to his heart condition. Plaintiff testified as follows:

"Q. Did any of your doctors tell you that work through Local 147 after your 2007 heart attack was potentially harmful to your heart?

A. Yes.

Q. Did they tell you that you should consider retiring after you suffered a heart attack in 2007?

A. Yes.

Q. What doctors told you that?

A. Dr. Nosad and Dr. Andrea Henzark.

Q. Did you treat with Dr. Andrea Henzark before the accident?

A. No.

Q. She told you after the accident that the heart condition that you suffered from before the accident was a reason to consider retirement?

A. Yes.

(McLeod EBT, at 420.)

Plaintiff also testified at his August 2013 deposition that he was diagnosed as having "borderline diabetes" "a year ago", a condition for which he takes prescription medication. (Id. at 298-299.) Plaintiff also stated that, about eight months ago, he was admitted to New York Community Hospital for a week, where he was treated for a small bowel impaction. (Id. at 350.)

Plaintiff was asked if he had been in any motor vehicle accidents. He testified that he was in a motor vehicle collision that occurred in April or May 2011, and "the car was totaled." (Id. at 263-264.)

When plaintiff was asked, "What are you no longer able to do as a result of the accident you were involved in, in June of 2010?", plaintiff answered that he was no longer able to play soccer (which he said he used to play every evening), ride his bicycle (which he said he used to ride every other day), play steel drums, and cook his own meals. (Id. at 407-410, 413, 424.) Plaintiff also testified that he had difficulty going up and down the steps to his home since the accident, and that he suffered from erectile dysfunction. (Id. at 410, 421.)

B.

By demands dated March 20, 2013, August 21, 2013, September 27, 2013, and November 18, 2013, defendants sought authorizations from plaintiff seeking 38 categories of records, the majority of which sought medical records from medical providers who treated plaintiff before and after the alleged accident. (Glazer Affirm., Exs H-K.)

Plaintiff served a response dated February 4, 2014, which purported to respond to defendants' demands for authorizations dated August 21, 2013, September 27, 2013, and November 18, 2013. (Glazer Affirm., Ex L.) With respect to defendants' demands dated August 21, 2013 and September 27, 2013, plaintiff purportedly annexed authorizations for the records demanded, and objected to item 5 of the demand dated September 27, 2013, which sought records from plaintiff's health insurance/multiplan.

With respect to defendants' demands dated November 18, 2013, plaintiff objected to four demands (items 3, 4, 5, and 9) on the ground that the records demanded would be covered under an [*4]authorization that was previously provided. (Id.) For the other items, plaintiff neither provided an authorization nor objected to the demand, but responded instead, "Please provide additional information such as a physician name, type of treatment, and/or date of service so we may continue to investigate this demand and provide a supplemental response." (Id.) In a supplemental response dated July 25, 2014, plaintiff objected to items 10, 11, 12, and 16 of the November 18, 2013 demands, on the grounds that those providers did not treat plaintiff for any of the injuries that he sustained as a result of the June 14, 2010 accident, and that the demands were "irrelevant, and not reasonably calculated to lead to the discovery of relevant evidence." (Porper Opp. Affirm., Ex 4.)

C.

On October 11, 2013, plaintiff appeared for a medical examination before Dr. Elizabeth Harrington, a vascular surgeon designated by defendants. Plaintiff was accompanied by counsel. In her report, Dr. Harrington noted, "The patient had difficulty walking as documented for several years prior to his accident. The plaintiffs [sic] representative at my office would not allow me to measure the circulation in his feet by pulse volume recording or duplex examination and this impeded my exam." (Glazer Affirm., Ex N.)

II.

"It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue."

(Cynthia B. v New Rochelle Hosp. Med. Ctr., 60 NY2d 452, 456-457 [1983] [citations and footnote omitted]; Dillenbeck v Hess, 73 NY2d 278 [1989]; Koump v Smith, 25 NY2d 287 [1969].)

"This waiver is called for as a matter of basic fairness: [A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim.'"

(Arons v Jutkowitz, 9 NY3d 393, 409 [2007], quoting Dillenbeck, 73 NY2d 278.) Thus, the scope of the waiver is not limited to those records that the plaintiff is expected to put into evidence at trial.[FN1]

"[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court [*5]in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition."

(Matter of Farrow v Allen, 194 AD2d 40, 45-46 [1st Dept 1993].) For those conditions that the plaintiff affirmatively placed at issue, the plaintiff "may not insulate from disclosure material necessary to the defense concerning that condition." (Hoenig v Westphal, 52 NY2d 605, 610 [1981].)

However, it is equally well-settled that "[t]he waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments." (Barnes v Habuda, 118 AD3d 1443, 1444 [4th Dept 2014] [internal quotation marks omitted]; McLane v Damiano, 307 AD2d 338, 338 [2d Dept 2003]; Iseman v Delmar Med.-Dental Bldg., 113 AD2d 276 [3d Dept 1985].)

As a threshold matter, the Court notes that, in his response to defendants' various demands for authorizations, plaintiff raised privilege only with respect to defendants' demand for an authorization to obtain records from plaintiff's health insurance/multiplan. (See Porper Affirm., Ex 3.) However, in opposing defendants' motion, plaintiff relies upon various cases involving waiver of the physician-patient privilege. Defendants do not assert that plaintiff failed to raise privilege as to the authorizations sought, but rather take the position that the physician-patient privilege was already waived as to plaintiff's entire medical history because (1) plaintiff seeks to recover damages for loss of enjoyment of life; (2) plaintiff asserts "broad allegations of physical injury and mental anguish"; and (3) plaintiff alleges that he is totally disabled and unable to return to work.

The parties disagree as to which physical conditions plaintiff affirmatively placed at issue in this action. Consequently, the parties disagree as to whether medical treatment that plaintiff received in the past was either related or unrelated to the condition(s) placed at issue. The question of related treatment is somewhat complicated by the fact that, although records indicate that plaintiff received medical treatment, plaintiff himself claims that he does not recall the purpose of some of the visits or treatments he received.

As discussed above, determining whether the physician-patient privilege is waived with respect to the medical records of a particular provider is a function of (1) the condition affirmatively placed at issue by the patient-party; and (2) whether the records sought are "related" to the condition affirmatively placed at issue. Thus, the scope of the waiver can vary, depending on how broadly or narrowly the "condition at issue" is defined, and how broadly or narrowly "relatedness" to the "condition at issue" is defined.

A.

Appellate courts have not defined the concept of "relatedness." The Appellate Division, Fourth Department has consistently applied the "material and necessary" standard of CPLR 3101. (See e.g. Donald v Ahern, 96 AD3d 1608 [4th Dept 2012]; Boyea v Benz, 96 AD3d 1558 [4th Dept 2012]; Goetchius v Spavento, 84 AD3d 1712 [4th Dept 2011]; Bozek v Derkatz, 55 AD3d 1311 [4th Dept 2008]; Wachtman v Trocaire Coll., 143 AD2d 527 [4th Dept 1988].) Some cases of the Appellate Division, Second Department appear to indicate that "relatedness" is relevance to the physical injuries. (Romance v Zavala, 98 AD3d 726 [2d Dept 2012] ["the injured plaintiff waived the physician-patient privilege with respect to his relevant prior medical history concerning those physical conditions"]; Gill v Mancino, 8 AD3d 340 [2d Dept 2004] ["plaintiff Robert Gill waived the physician-patient privilege with respect to his relevant past medical history"].

The Appellate Division, First Department has also applied the standard of relevance "to the mental and physical conditions that plaintiffs placed in controversy." (Shamicka R. v City of New York, 117 AD3d 574, 575 [1st Dept 2014].) However, the Appellate Division, First Department has also stated, "[a]

defendant is entitled to discovery to determine the extent, if any, that plaintiff's claimed injuries and damages are attributable to accidents other than the one at issue here." (McGlone v Port Auth. of NY & N.J., 90 AD3d 479, 480 [1st Dept 2011] quoting Rega v Avon Prods., Inc., 49 AD3d 329 [1st Dept 2008].)

With that in mind, where the "condition at issue" asserted in the complaint or bill of particulars is a physical injury, such as an injured body part or organ, the "condition at issue" is easily defined, and the law is fairly settled as to what has been considered "related" and "unrelated" to the physical injury at issue.

"The waiver extends not only to records of postaccident treatment, but also to records of preaccident treatment of the same anatomical parts to which plaintiff claims injury." (Geraci v National Fuel Gas Distrib. Corp., 255 AD2d 945, 946 [4th Dept 1998]; Dantzler v 2727 Realty LLC, 62 AD3d 412 [1st Dept 2009] [plaintiff, who allegedly injured her right knee injury in an accident, must provide authorizations for records of treatment for a prior injury to her right knee].)

Any records of treatment to other body parts or organs have been considered unrelated. (See e.g. Noble v Ackerman, 216 AD2d 140 [1st Dept 1995] [defendants' request for medical authorizations pertaining to a knee operation was properly denied because plaintiff did not claim that his knee was injured in the accident or that his prior knee injury was aggravated]; Iseman v Delmar Med.-Dental Bldg., 113 AD2d 276 [plaintiff did not waive physician-patient privilege with respect to information obtainable from her ophthalmologist, in action in which she claimed injuries to head, neck, hip and leg as a result of a fall on stairs].) Key to this determination is the assumption that records of treatment of a body part that is not allegedly injured would have no bearing on a "full and fair picture" about the allegedly injured organ or member.

Where the "condition at issue" asserted in the complaint or bill of particulars is a body system or a bodily function, the law is also fairly clear as to what has been considered "related." In Romance v Zavala (98 AD3d 726), the injured plaintiff alleged that, as a result of an accident, he had difficulty urinating. Applying the relevance standard, the Appellate Division, Second Department ruled that "medical records concerning any treatment of the injured plaintiff's polycystic kidney disease were sufficiently related to the claimed conditions so as to be covered by the waiver." (Id. at 727.) Romance illustrates another kind of relatedness—medical records concerning the treatment of a body organ or member is "related" to a bodily function placed at issue because that body part or organ plays a role in that bodily function. An illness or dysfunction of a body part, organ or member results in an impairment to the body system or bodily function.

Otherwise, the defendant must show, by expert proof, a link between the alleged physical injuries and the illness or treatment of other conditions for which discovery of medical records is sought. (See Tomaino v 209 E. 84 St. Corp., 68 AD3d 527 [1st Dept 2009] ["the only basis articulated for defendant's request for records relating to plaintiff's fracture of her ring finger in 2002 is that those records may shed some light on plaintiff's heart condition"]; Manley v New York City Hous. Auth., 190 AD2d 600 [1st Dept 1993] [defendants not entitled to plaintiff's entire medical records for 15 years preceding accident; defendants' motions did not contain any affidavits from medical experts attesting to even a potential link between plaintiff's neurological condition and plaintiff's alleged history of chronic alcoholism].)

In some cases, appellate courts have ruled that an in camera inspection is necessary to [*6]determine the potential relevance of the records sought. (Shamicka R., 117 AD3d 574; Sadicario v Stylebuilt Accessories, 250 AD2d 830 [2d Dept 1998].)

B.

Where the plaintiff asserts claims for loss of enjoyment of life or for lost future earnings due to a permanent disability, the physical or mental conditions that are affirmatively placed at issue are not readily apparent, which complicates the determination as to what would be "related" to the "condition at issue."

A claim for loss of enjoyment of life is not a separate item of recoverable damages, but rather part of the damages recoverable for pain and suffering; it includes not only the suffering from the physical pain caused by injuries, but also encompasses "the frustration and anguish caused by the inability to participate in activities that once brought pleasure." (McDougald v Garber, 73 NY2d 246, 257 [1989].) Thus, a claim for loss of enjoyment of life can place at issue not only a physical condition, such as physical pain or a physical inability to perform daily activities, but also frustration and anguish.

A claim for loss of enjoyment of life can also place at issue the physical condition of a plaintiff's life expectancy. Although life expectancy might not be not among the physical conditions that first come to mind when evaluating a claim for loss of enjoyment of life, life expectancy is one of the things the jury must take into consideration if the jury finds that the injuries or disabilities alleged are permanent. (PJI 2:281.) Thus, the plaintiff's life expectancy is a condition affirmatively placed at issue because the plaintiff is seeking to recover damages for loss of enjoyment of life, and plaintiff has the burden of proof of life expectancy for these damages.[FN2]

When the "condition at issue" is life expectancy, the scope of the waiver of the physician-patient privilege would be broad. As discussed above, the Appellate Division, Fourth Department has consistently applied the "material and necessary" standard of CPLR 3101, while the Appellate Division, Second Department applies a standard of relevance. It can be reasonably argued that virtually anything in a personal injury plaintiff's entire medical history might be relevant, or reasonably calculated to lead to admissible evidence as to the plaintiff's life expectancy.

Similarly, when a personal injury plaintiff seeks future damages for lost earnings or lost earning capacity, the scope of the waiver of the physician-patient privilege would also be broad. By seeking future lost earnings, the plaintiff affirmatively places at issue the plaintiff's health and ability to work, and the plaintiff's work life expectancy had the accident not occurred. (PJI 2:290.) Again, it can be reasonably argued that virtually anything in plaintiff's entire medical history might be relevant, or reasonably calculated to lead to admissible evidence as to the plaintiff's overall health and work life expectancy.

In sum, by pleading loss of enjoyment of life or future lost wages or lost earning capacity based on permanent, disabling physical injuries, the plaintiff would be deemed to have waived the physician-patient privilege for his or her entire medical history.

1.

Thus, in Vanalst v City of New York (276 AD2d 789 [2d Dept 2000]) the Appellate Division, Second Department ruled that records of prior treatment or injury to a body part that was not at issue in the lawsuit were discoverable, because the plaintiff asserted a claim for loss of enjoyment of life for the injuries at issue. In Vanalst, the plaintiff alleged that he suffered an injury to his left knee, and the Appellate Division, Second Department ruled that defendants were entitled to records of plaintiff's previous back injuries. The Appellate Division reasoned,

"the nature and severity of the plaintiff's previous back injuries may have an impact upon the amount of damages, if any, recoverable for a claimed loss of enjoyment of life because of his current knee injury. Therefore, the requested records and reports are material and necessary to the defense, and the Supreme Court erred in denying that branch of the appellant's cross motion which was for disclosure."

(Vanalst, 276 AD2d at 789.)

Citing Vanalst, the Appellate Division, Second Department has consistently upheld discovery of medical records of prior treatment or prior injuries to body parts and organs that were not pleaded in the action, so long as the plaintiff claimed loss of enjoyment of life from the alleged injuries. (See e.g. Graziano v Cagan, 105 AD3d 701 [2d Dept 2013]; Cristiano v York Hunter Servs., Inc., 99 AD3d 751 [2d Dept 2012]; Abdalla v Mazl Taxi, Inc., 66 AD3d 803 [2d Dept 2009]; Amoroso v City of New York, 66 AD3d 618 [2d Dept 2009]; Orlando v Richmond Precast, Inc., 53 AD3d 534 [2d Dept 2008]; Weber v Ryder TRS, Inc., 49 AD3d 865 [2d Dept 2008]; Diamond v Ross Orthopedic Group, P.C., 41 AD3d 768 [2d Dept 2007].)

Under Vanalst and its progeny, the test of whether an illness or treatment is "related" to a condition at issue no longer has any practical significance. Many—if not virtually all—bills of particulars in personal injury cases contain "loss of enjoyment of life" as boilerplate allegations. (David P. Horowitz, More "Enjoyment of life" (Part I), 83 NY St BJ 45 [Jan. 2011].) Thus, as a practical matter, in the Appellate Division, Second Department, the personal injury plaintiff has waived the physician-patient privilege as to his or her entire medical history with these boilerplate allegations. As one commentator observed, "The Door is Wide Open in the Second Department." (Id.)

2.

The Appellate Divisions of the other judicial departments have not been consistent on the issue of the scope of the waiver of physician-patient privilege when loss of enjoyment of life is claimed. (See David P. Horowitz, More "Enjoyment of life" (Part I), 83 NY St BJ 45; David P. Horowitz, More "Enjoyment of life" (Part II), 83 NY St BJ 16 [Feb. 2011].)

In Geraci v National Fuel Gas Distributors Corp. (255 AD2d 945), the Appellate Division, Fourth Department, ruled that the injured plaintiff placed his entire medical history at issue by allegations of "injury, pain, emotional upset, confinement to bed and house, and loss of enjoyment of life." (Geraci, 255 AD2d at 946.) However, in 2009, citing Geraci, the Appellate Division, Fourth Department ruled the opposite, stating,

"Contrary to defendants' contentions, the allegations in the bill of particulars that plaintiff sustained, inter alia, mild cachexia and anorexia, loss of enjoyment of life, disability, disfigurement, fear of death, and extensive pain and suffering do not constitute such broad allegations of injury' that they place plaintiff's entire medical history in controversy."

(Tabone v Lee, 59 AD3d 1021 [4th Dept 2009] [emphasis supplied]; see also Bozek v Derkatz, 55 AD3d 1311 [although plaintiff pleaded loss of enjoyment of life, the defendants failed to establish that the records sought "related to any physical or mental conditions affirmatively placed in controversy"].)

In 2012, the Appellate Division, Fourth Department returned to Geraci and Vanalst:

"Although plaintiff is no longer asserting a separate claim for emotional distress as a result of the

accident, many of her broad allegations of injury, including her alleged limited ability to perform normal daily functions and social activities, as well as her alleged inability and limited ability to engage in life's enjoyments and loss of employment and career,' could have resulted from physical injuries sustained in the accident, her preexisting mental condition or some combination thereof (see Tirado v Koritz, 77 AD3d 1368, 1370 [2010]; see generally Geraci v National Fuel Gas Distrib. Corp., 255 AD2d 945, 946 [1998]; Kenyon v Caruso Dev. Co., 167 AD2d 966, 966-967 [1990]). Further, plaintiff's previous allegation that she was unable to work may be relevant to her current claim of loss of employment and career' (see generally Kenyon, 167 AD2d at 967). Finally, plaintiff's preexisting mental condition may be relevant insofar as she seeks damages for, inter alia, her inability to lead a normal life, permanency, pain and suffering[and] future lost earnings' (see Vanalst v City of New York, 276 AD2d 789 [2000]; Geraci, 255 AD2d at 946)."

(Boyea v Benz, 96 AD3d at 1560.) Three years later, the Appellate Division, Fourth Department stated,

"Contrary to defendants' contention, the allegations in the bill of particulars that plaintiff sustained [ ]loss of enjoyment of life; disability; and pain and suffering' do not constitute such broad allegations of injury' that they place plaintiff's entire medical history in controversy.'"

(Reading v Fabiano, 2015 WL 1381574, 126 AD3d 1523 [4th Dept 2015] [internal citations omitted].)

Neither has the Appellate Division, First Department taken a consistent approach. In Caplow v Otis Elevator Co. (176 AD2d 199 [1st Dept 1991]), the Appellate Division ruled,

"while plaintiff has not placed the condition of his lower extremities in controversy, it does appear that he was treated for gout and cellulitis at various times subsequent to the June 1987 accident, and thus medical records pertaining to these conditions, as they affected plaintiff subsequent to June 1987, might be useful in determining to what extent his claim for lost wages is attributable thereto, and not to the lower back injury he attributes to the June 1987 accident."

(Id. at 200 [emphasis supplied].) However, citing Caplow, the Appellate Division, First Department [*7]later ruled,

"In this action for personal injuries where plaintiff has alleged, inter alia, a claim for lost earnings, the IAS court properly granted appellant's motion to the limited extent of ordering an in camera inspection of post-accident hospital records of treatment received by plaintiff for an undisclosed medical condition which plaintiff maintains is unrelated to the injuries claimed in the action. Appellant has failed to date to show that these records are material and necessary to its defense of plaintiff's claim for lost earnings."

(Ciancio v Woodlawn Cemetery Assoc., 210 AD2d 9, 10 [1st Dept 1994] [emphasis supplied].)

Recently, the Appellate Division, First Department split on the issue of waiver in Gumbs v Flushing Town Center III, L.P. (114 AD3d 573 [1st Dept 2014]). In Gumbs, the plaintiff alleged orthopedic injuries, along with a permanent inability to work and permanent or long lasting loss of enjoyment of life. By a 3-2 decision, the Appellate Division affirmed the motion court's denial of the defendants' motion to strike the complaint, due to the plaintiff's failure to provide authorizations for the release of medical records. The court below had denied the motion because defendants had not shown that the records sought were related to the claimed injuries.

The majority ruled,

"Discovery determinations rest with the sound discretion of the motion court. This Court is nonetheless vested with a corresponding power to substitute its own discretion for that of the motion court. Notwithstanding our own discretion, deference is afforded to the trial court's discretionary determinations regarding disclosure.' Unlike the dissent, we find no abuse of the court's discretion given the paucity of support for the motion in the first instance. Specifically, defendants' argument regarding the relevance of Gumbs's medical history as set forth in his deposition was improperly made for the first time in their reply papers. Accordingly, the denial of defendants' motion was reasonable and supported by law."

(Id. at 574-575.) The majority then opined, in dicta,

"Gumbs's waiver of his physician-patient privilege is limited in scope to those conditions affirmatively placed in controversy.' Gumbs did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries"

(Id. at 575 [emphasis supplied].)

The dissent stated,

"[P]laintiff, by claiming that his enumerated injuries have resulted in his permanent inability to work and permanent or long lasting loss of enjoyment of life, has placed his general health and medical history at issue.

* * *

I also disagree with the majority to the extent it concludes that the medical records sought by defendants are not discoverable because plaintiff claims to have suffered ankle, knee and shoulder injuries and the requested records do not pertain to those specific injuries. I believe the medical records sought by defendants directly relate to plaintiff's sweeping, broad and encompassing claims of permanent disability and loss of enjoyment of life, and it was an abuse of discretion for the trial court to fail to consider these categories of damages in fashioning the scope of discovery.

* * *

When a plaintiff seeks future lost earnings, he or she squarely puts his or her prior medical history [*8]at issue because his or her overall health directly bears on the question of how many years the plaintiff realistically could have continued to work had no accident occurred.

* * *

Likewise, when a plaintiff also seeks damages for the permanent loss of his or her ability to enjoy life, the jury must take into consideration the period of time that the plaintiff can be expected to live. Although statistical life expectancy tables are useful, juries are routinely instructed that the tables are not binding and they may also consider evidence of a plaintiff's actual health condition, habits and activities in making this evaluation. Consequently, such evidence should be discoverable. Plaintiff's medical records shed light on whether he suffered from other conditions, having nothing to do with this accident, which may have impacted upon his ability to enjoy life and/or life expectancy.

Plaintiff's argument, which the motion court accepted and this Court now affirms, that the requested medical records must be relevant and directly correlate to a specific physical condition he has put at issue, meaning his ankle, knee and shoulder injuries, is too narrow an interpretation of this case where plaintiff is seeking broad categories of damages."

(Gumbs, 114 AD3d at 574-75 [Gische, J., dissenting] [internal citations omitted].)

3.

As plaintiff indicates, several cases from the Appellate Division, First Department do not follow the framework of Koump/Dillenbeck at all, and do not follow the test of whether an illness or treatment is related to a condition affirmatively placed at issue. Rather, in those cases, the alternative test is whether defendants have demonstrated a "particularized need for inquiry into matters not directly at issue in this action." (Elmore v 270 Concourse Assocs. L.P., 50 AD3d 493 [1st Dept 2008]; Felix v Lawrence Hosp. Ctr., 100 AD3d 470 [1st Dept 2010].)

The "particularized need" test apparently originated in Monica W. v Milevoi (252 AD2d 260 [1st Dept 1999]), which involved the issue of whether, in an action alleging infant plaintiffs' exposure to lead paint, the defendant was entitled to discovery of the medical histories of the infant plaintiffs' parents and siblings, who were non-parties. The Appellate Division, First Department reasoned that the defendants were not entitled to such discovery. Citing Koump and Dillenbeck, the appellate court reasoned that, unlike the infant plaintiffs who had implicitly waived their privilege against disclosure of their medical records, their parents and siblings had not waived privilege. "In the absence of waiver, this material is privileged, and the nonparties' privilege against disclosure, which is personal to them, cannot be defeated by defendants' assertion that it is material and necessary to their defense." (Id. at 262-263.) The appellate court also indicated, "Defendants have presented no affidavit by any expert to demonstrate that the extent to which the adverse effects of lead exposure contributed to the mental and physical condition of the infant plaintiffs cannot be ascertained by reference to objective clinical criteria and expert testimony." (Id.)

When the same issue was presented in Mendez v Equities By Marcy (24 AD3d 138 [1st Dept 2005]), the Appellate Division, First Department simply stated,

"The court correctly refused to compel answers to the questions concerning the medical history of the mother and other family members other than the infant plaintiff, given defendants' failure to offer any expert evidence establishing a particularized need for inquiry into such matters not placed at issue by the complaint."

(Mendez, 24 AD3d at 138 [emphasis supplied]; see also Vazquez v New York City Hous. Auth., 79 AD3d 623 [1st Dept 2010].) In these cases, the "matters not placed at issue by the complaint" referred to the medical histories of the non-parties.

The Appellate Division, First Department applied the "particularized need" standard in Elmore v 2720 Concourse Associates, L.P. (50 AD3d 493) and Felix v Lawrence Hospital Center (100 AD3d 470), which did not involve the issue of the medical records and histories on non-parties. Elmore "involved discovery demands for a mother's records regarding her psychiatric history, although she had not put that history at issue in the action." (Gumbs, 114 AD3d at 578 [Gische, J., dissenting].) Felix involved medical malpractice which allegedly resulted in a stillborn birth. The only injuries alleged subsequent to

the malpractice were emotional and psychological injuries, but defendants sought discovery of records of obstetrical treatment subsequent to the alleged medical malpractice.

C.

Defendants argue that this Court should find that plaintiff waived the physician-patient privilege as to his entire medical history; plaintiff urges the Court to follow the "particularized need" test in Elmore and Felix.

The "particularized need" test arose in cases where the discovery was sought as to non-parties, and thus covered "matters not placed at issue by the complaint", i.e., a condition not affirmatively placed at issue, and conditions that are unrelated to conditions placed at issue. However, in this case, defendants contend that the medical records that they seek are related to conditions that plaintiff has affirmatively placed at issue. The "particularized need" test does not speak to this contention.

Second, the "particularized need" test does not follow Koump/Dillenbeck. The "particularized need" test appears to place the burden upon the defendant to demonstrate, by expert evidence, a particularized need for discovery, even though "[t]he burden is on the proponent of the privilege to prove that the privilege was not waived." (New York Times Newspaper Div. of NY Times Co. v Lehrer McGovern Bovis, 300 AD2d 169, 172 [1st Dept 2002]; John Blair Communications v Reliance Capital Group, 182 AD2d 578 [1st Dept 1992]; Corbey v Allam, 58 AD3d 667 [2d Dept 2009].) Indeed, these "particularized need" cases would appear to suggest that, rather than demonstrating relatedness, a defendant need only demonstrate a "particularized need" to obtain discovery of unrelated illness and treatments. This would conflict with Koump and Dillenbeck, which hold that the privilege against disclosure "cannot be defeated by defendants' assertion that it is material and necessary to their defense." (Monica W., 252 AD2d at 263.) Put differently, Koump/Dillenbeck would seem to indicate that the defendants' need, particularized or otherwise, cannot overcome the physician-patient privilege asserted by the plaintiff.

Therefore, plaintiff's reliance on the "particularized need" test is misplaced.

Vanalst and its progeny cannot be reconciled with Appellate Division cases from the Fourth and First Departments, such as Tabone or Bozek, or dicta in the majority's decision in Gumbs. Appellate cases distinguish Vanalst and its progeny only in result, merely stating that the plaintiff has not placed his or her entire medical history by pleading a claim for loss of enjoyment of life. (See e.g. Schiavone v Keyspan Energy Delivery NYC, 89 AD3d 916, 933 [2d Dept 2011].) This distinction is specious.

Even assuming, for the sake of argument, that a claim for loss of enjoyment of life or for future lost earnings does not affirmatively place the plaintiff's entire medical history at issue, the inquiry cannot end there. Even if the plaintiff's entire medical history is not affirmatively placed [*9]"at issue", the physician-patient privilege would nevertheless be waived as to the plaintiff's entire medical history if the entire medical history would be "related" to conditions that the plaintiff has affirmatively placed at issue.

It is the interplay between the conditions affirmatively placed at issue when these claims are alleged and the notion of relatedness that operates as a waiver of the plaintiff's entire medical history. So long as a claim for loss of enjoyment of life or future lost earnings is considered as affirmatively placing at issue the plaintiff's life expectancy, work life expectancy, and general health, and so long as appellate courts continue to define "relatedness" as "material and necessary" or "relevant", this Court is constrained to conclude that plaintiff in this case has therefore waived the physician-patient privilege as to his entire medical history. It bears repeating that virtually anything in plaintiff's entire medical history might be

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relevant to, or reasonably calculated to lead to admissible evidence as to the plaintiff's overall health and work life expectancy.[FN3]

Here, according to a claims history of plaintiff's union medical benefits, defendants sought records from providers who treated plaintiff for preglaucoma, diabetes, angina, coronary atherosclerosis, hypertension, volume depletion disorder, and chest pain, among other things. (See Glazer Affirm., Ex C.) Those medical conditions are all relevant to plaintiff's overall health and life expectancy.

D.

Even if the Court were to assume, for the sake of argument, that plaintiff's claims for loss of enjoyment of life and future lost earnings did not amount to waiver of the physician-patient privilege as to his entire medical history, plaintiff also alleges that he has been "totally disabled" and "totally incapacitated" since the date of his accident. (Bill of Particulars ¶¶ 4, 8.)

By pleading "total disability", plaintiff has affirmatively placed at issue his physical ability to work in any capacity. (See Burns v Varriale, 9 NY3d 207 [2007] [As used in workers' compensation, "when an employee is classified as having a permanent total disability, there is no expectation that he or she will rejoin the work force."]; Rega, 49 AD3d 329 ["Plaintiff voluntarily placed his physical condition in issue by averring in his bill of particulars that it was aggravated or exacerbated by his injuries in this action, and that he was permanently, albeit partially, disabled as a result"].) Defendants are entitled to discovery to determine the extent, if any, that plaintiff's inability to work in any capacity is attributable to causes or circumstances other than the alleged accident. (McGlone, 90 AD3d at 480; Rega, 49 AD3d 329.)

Virtually anything in plaintiff's entire medical history might be relevant, or reasonably calculated to lead to admissible evidence as to the plaintiff's inability to work in any capacity. Indeed, plaintiff testified at his deposition that his doctors told him that he should consider retiring after he had suffered a heart attack in 2007. (McLeod EBT, at 420.)

Therefore, by pleading "total disability", plaintiff has waived the physician-patient privilege as to his entire medical history.

In light of the Court's determination, the Court does not reach defendants' remaining argument that plaintiff placed his entire medical history at issue by pleading "broad allegations" of physical injury. (See Bravo v Vargas, 113 AD3d 577 [2d Dept 2014]; Avila v 106 Corona Realty Corp., 300 AD2d 266 [2d Dept 2002].)

E.

Plaintiff has waived the physician-patient privilege as to his entire medical history, because virtually anything in plaintiff's entire medical history might be relevant, or reasonably calculated to lead to admissible evidence as to the plaintiff's life expectancy, work life expectancy, and inability to work in any capacity. However, that is not to say that plaintiff's entire medical history is discoverable.

It is well-settled that once the physician-patient privilege is waived "for a particular purpose, the privilege was destroyed for all purposes." (People v Martinez, 22 AD3d 318 [1st Dept 2005].) Nevertheless, courts have denied discovery of medical records that were once privileged if the plaintiff withdraws those injuries or claims that initially triggered waiver of the privilege when they were placed

at issue. (Salazar v 521-533 W. 57th St. Condominium, 84 AD3d 927, 928 [2d Dept 2011] ["Salazar's mental health and substance abuse treatment were not discoverable inasmuch as they were privileged under CPLR 4504 and 4507, and Salazar withdrew any claims for injuries relating to those conditions"]; Keith v Forest Labs., Inc., 72 AD3d 519 [1st Dept 2010] [withdrawal of plaintiff's loss of consortium claim thereby precluded disclosure of her mental health/social work records]; Goldberg v Fenig, 300 AD2d 439 [2d Dept 2002] ["once the plaintiff withdrew any claim for psychiatric or psychological injuries, his psychiatric records were not subject to disclosure because [his] psychological condition was not at issue"']; Kohn v Fisch, 262 AD2d 535 [2d Dept 1999].) Here, plaintiff has not withdrawn his claims for loss of enjoyment of life, future lost earnings and total disability.

Second, Public Health Law § 2785 permits disclosure of confidential HIV-related information in a civil proceeding only upon an application that shows "compelling need" for such disclosure. (Del Terzo v Hospital for Special Surgery, 95 AD3d 551 [1st Dept 2012]; Catherine D. v Judy, 38 AD3d 258 [1st Dept 2007].) In addition, "records concerning substance abuse treatment are confidential and are not subject to disclosure unless certain requirements are met (see e.g. 42 USC § 290dd—2 [a], [b]; Mental Hygiene Law §§ 22.05, 33.13[c])." (L.T. v Teva Pharms. USA, Inc., 71 AD3d 1400, 1401 [4th Dept 2010]; Del Terzo, 95 AD3d at 552.) There is no indication that HIV-related information or records of substance abuse treatment exist or are being sought here.

Third, defendants are not entitled to authorizations for the release of the entire medical file from every physician or hospital that ever treated plaintiff since birth. "Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party." (Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954 [1998] [quotation marks and citation omitted].) It would be unduly burdensome upon the plaintiff to track down every physician or hospital that treated plaintiff since birth.

Abdur-Rahman v Pollari (107 AD3d 452 [1st Dept 2013]) is instructive. Abdur-Rahman was an action for wrongful death, and the defendants moved to compel the plaintiff, the estate representative, to provide records of treatment of the decedent by any and all medical providers within 10 years of his death. The Appellate Division, First Department, stated,

"It is well settled that, in determining the types of material discoverable by a party to an action, whether something is material and necessary' under CPLR 3101 (a) is to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.' Under that broad standard, defendants are entitled to records shedding light on decedent's health at the time of his death and prior thereto. One of the factors in determining fair and just compensation is the decedent's health and life expectancy at the time of death. Accordingly, it is appropriate for defendants to have access to records reflecting decedent's health condition in the months and years prior to his death. At the same time, plaintiff is entitled to some reasonable restriction on the scope of the records. Defendants have made no showing why 10 years of records are material and necessary to the defense of this action. A limitation in scope to records preceding decedent's death by five years is far more reasonable under the circumstances."

(Abdur-Rahman, 107 AD3d at 454 [internal citations omitted].)

Thus, "the defendants' request that the authorization to obtain these records be unrestricted as to date was not reasonable." (Romance, 98 AD3d at 727; Carter v Fantauzzo, 256 AD2d 1189 [4th Dept 1998] ["the court, in compelling the production of all records from the beginning of time', abused its discretion"].)

Authorizations should be reasonably limited to the records of treatment that occurred during the five-year period prior to the date of this accident, June 14, 2010, and up to the present time. (Abdur-Rahman, 107 AD3d at 454; Romance, 98 AD3d at 727; DeStrange v Lind, 277 AD2d 344 [2d Dept 2000].)

Defendants' request for "any other primary care physician that has treated plaintiff in the last 15 years other than Dr. Sheridan or Dr. Nozad", in their demand dated March 20, 2013, is denied. Plaintiff testified at his deposition that Dr. Nozad is "my family doctor" since 2007 (McLeod EBT, at 277), and that, for three years prior to Dr. Nozad (i.e., from 2004), his family doctor was Dr. Sheridan. (Id. at 318). Defendants have not identified any particular primary physician for whom authorizations are sought, whose treatment falls within the five-year period before June 14, 2010.

Defendants' request for records set forth in items 1, 2, 6, 7, 8, 9, and 10 of defendants' demand dated March 20, 2013 are denied as academic. Plaintiff states that these authorizations were provided. (Porper Affirm. ¶ 21.) Defendants do not dispute plaintiff's assertion that plaintiff provided an authorization for New York Community Hospital, and that New York Community Hospital is affiliated with New York Presbyterian Hospital. Defendants' demand for all materials in plaintiff's possession related to the 2011 motor vehicle accident, such as photographs, is denied. Plaintiff already provided authorizations to obtain insurance records regarding the 2011 motor vehicle accident. (Glazer Affirm., Ex L.)

As to defendants' demands dated August 21, 2013 and September 27, 2013, defendants do not dispute that almost all of these authorizations were provided. (See Glazer Affirm., Ex L.) With respect to defendants' request for an authorization for plaintiff's health insurance/multiplan, defendants are entitled to an authorization for the release of these records for the five-year period prior to the date of this accident, June 14, 2010, and up to the present time.

Defendants' demand for authorizations "for all medical treatment provided to plaintiff following the 2011 motor vehicle accident and related to said accident" is denied, with leave to renew. This demand does not seek authorizations from a specific, identified provider. To the extent that plaintiff appears to assert that these authorizations were already provided (Porper Opp. Affirm. [*10]¶¶ 18, 20), it cannot be determined from the present record that plaintiff failed to comply. Defendants may renew their demands for additional authorizations for the release of records from specific, identified providers following their review of the records to be released from plaintiff's health insurance/multiplan.

As to their demands dated November 18, 2013, defendants sought authorizations for the release of medical records from providers whom the plaintiff claimed he could not recall. (See Glazer Affirm., Ex K, items 1, 2, 7-16.) The claims history of plaintiff's union medical benefits indicates that the treatment by these providers mostly occurred within the five-year period prior to plaintiff's alleged accident on June 14, 2010, or occurred thereafter. (See Glazer Affirm., Ex C, at 6-14, 16-17, 19-23, 25-27, 31-32, 34, 38-39.) For two providers, Sunrise Medical Labs and Joseph Blok, MD, treatment occurred in 1998, twelve years before plaintiff's alleged accident. In the Court's discretion, defendants' demand for these records of these two providers is denied.

Defendants are otherwise entitled to authorizations from the providers sought in their demand dated November 18, 2013. Although plaintiff asserts that University Physicians of Brooklyn and University Hospital of Brooklyn are part of SUNY Downtstate Medical Center, and that he had previously provided authorizations for the release of records from SUNY Downstate Medical Center, University Physicians of Brooklyn appears to be a hospital-based physicians' practice program. Because physician's office records are not ordinarily part of hospital records, and it is unclear that the subject records are not

separately maintained, plaintiff must provide an authorization for these records. It is not clear that University Hospital of Brooklyn is operated separately from SUNY Downstate Medical Center; therefore, plaintiff must provide an authorization for these records as well.

Similarly, plaintiff must provide an authorization for Dmitri Feldman, MD. Although plaintiff asserts that Dr. Feldman treated him only at New York Presbyterian Hospital, and that an authorization for the release of records from New York Presbyterian Hospital was provided, it is similarly unclear whether Dr. Feldman's records are separately maintained from the hospital records of New York Presbyterian Hospital.

Defendants' demand for an authorization for the release of records from "New York Press. Hospital" is denied. There is no such hospital in New York City; this provider does not appear in the claims history of plaintiff's union medical benefits. (See Glazer Affirm., Ex C.) In defendants' demand dated November 18, 2013, the address of "New York Press. Hospital" is "PO 9305, New York, NY 10087." (Glazer Affirm., Ex K.) According to the claims history of plaintiff's union medical benefits, this address corresponds to New York Presbyterian Hospital. (Glazer Affirm., Ex C, at 9.) Defendants do not dispute plaintiff's assertion that an authorization for New York Presbyterian Hospital was already provided.

III.

Defendants seek an order compelling plaintiff to submit to a further medical examination before Dr. Elizabeth Harrington, so that Dr. Harrington can perform a pulse volume recording (PVR) test and a duplex examination.

As plaintiff's counsel indicates, "an examination should not be required if it presents the possibility of danger to [his] life or health. (Lefkowitz v Nassau County Med. Ctr., 94 AD2d 18, 21 [2d Dept 1983].) Thus, a plaintiff may not be compelled to undergo objective testing procedures when it is established that the tests are invasive, painful and harmful to the person's health. (D'Adamo v Saint Dominic's Home, 87 AD3d 966 [2d Dept 2011].) The plaintiff bears the initial [*11]burden of showing that the proposed test is prima facie potentially dangerous, and once the showing is made, the burden then shifts to the party seeking the test to demonstrate its safety. (Lefkowitz, 94 AD2d at 21.)

Plaintiff does not assert that the PVR test and duplex examination are invasive, or that these tests present the possibility of danger to plaintiff's life or health. Rather, plaintiff's attorney indicates that she mistakenly believed that the PVR tests and duplex examination were invasive procedures. (Porper Affirm. ¶ 6.) Plaintiff's attorney argues that defendants waived their right to conduct the PVR test and duplex examination because Dr. Harrington did not explain their nature and necessity to plaintiff's attorney, and that Dr. Harrington did not contact defendants' attorney so that the parties' counsel could confer with Dr. Harrington. (Id. ¶¶ 6-8.)

Defendants have demonstrated entitlement to a PVR test and duplex examination of plaintiff. The bill of particulars alleges that the alleged accident caused "exacerbation of prior asymptomatic vascular condition", thereby placing this "vascular condition" at issue. Plaintiff did not meet his prima facie burden of showing that the PVR test and duplex examination were invasive, or harmful to plaintiff's life or health. Meanwhile, Dr. Harrington states, in relevant part:

"During the course of my examination I sought to perform a pulse volume recording (PVR) and a duplex examination, both of which are non-invasive tests of arterial circulation (i.e., blood flow). Plaintiff's counsel was present during my entire examination and would not allow me to perform either a PVR or duplex examination.

While I was able to examine plaintiff's lower extreme circulation, the tests that I sought to perform are more accurate and allow a vascular surgeon to obtain precise information with respect to circulation.

A PVR is a test that shows the arterial flow in all levels in the leg, and provides information with respect to whether there are any chronic blockages within the leg, and also provides information assess [sic] plaintiff's response to the surgery that was performed. The PVR test is similar to a blood pressure test. The entire PVR test lasts approximately 20 minutes.

A duplex examination is performed to determine if there are any calcifications with the arteries or if there is atherosclerotic disease (a build-up of calcium and/or cholesterol deposits within the legs). The duplex examination is performed with a Doppler and uses sonogram imaging to depict arteries and veins (i.e., this is a hand held probe that is connected to a machine which has a screen that transmits in image). A duplex examination takes approximately 40 minutes.

A PVR test and a duplex examination are routine tests performed by vascular surgeons to evaluate, assess, treat, and/or diagnose patients. I have been able to assess some of plaintiff's vascular conditions but to perform a complete and meaningful examination of plaintiff, a duplex examination and a PVR tests are necessary."

(Glazer Affirm., Ex O [Harrington Affirm.] ¶¶ 2-6.) Dr. Harrington's affirmation amply establishes that further medical evaluation is required.

Plaintiff's argument of waiver is without merit.

Defendants have not demonstrated entitlement to costs of a further medical examination. Defendants' reliance on CPLR 3124 is misplaced. CPLR 3124 does not authorize the court to order [*12]payment of the costs of the additional medical examination. Under CPLR 3126, the court "may make such orders with regard to the failure or refusal" to obey an order for disclosure "as are just", and courts have directed reimbursement for the missed IME appointments that were billed to a defendant or defendants' counsel. (Flynn v Debonis, 246 AD2d 852 [3d Dept 1998]; Renford v Lizardo, 104 AD2d 717 [4th Dept 1984].) However, nothing in the record establishes that the conduct of plaintiff's counsel at the medical examination was willful, contumacious, or in bad faith.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion is granted as follows:
Within 35 days, plaintiff shall provide HIPAA-compliant authorizations for the release of all medical records (excluding records of HIV treatment and alcohol and substance abuse treatment, if any), for the period of June 14, 2005 to the present, from the following:

(1) Plaintiff's current health insurance/multiplan;
(2) Highway Radiology Assoc;
(3) Highway Radiology LLP
(4) University Ophthalmic Consultants;
(5) Peter Okin, MD;
(6) Paul Kligfield, MD;
(7) Parirokh Nozad, MD;

(8) Gabriel Spergel, MD PC;
(9) Accurate Diagnostic Labs;
(10) Flatlands Medical and Urgent Care;
(11) Isaac M. Novick, MD;
(12) Shiel Medical Laboratory;
(13) Diamond Medical Associates PC;

(14) Plaza Foot Care PC;
(15) New York Network Management;
(16) Linden Pathology Associates;
(17) University Physicians of Brooklyn;
(18) University Hospital of Brooklyn;
(19) Dmitri Feldman, MD;

and it is further

ORDERED that, within 120 days after the authorizations directed above are provided, plaintiff shall appear for a further deposition; and it is further

ORDERED that, within 60 days of the date of this order, plaintiff shall appear for a further medical examination by a vascular surgeon designated by defendants for a PVR test and duplex examination; and it is further

ORDERED that the defendants' motion is otherwise denied.

Dated: May 7, 2015

New York, New York

ENTER:

/s/

J.S.C.

Footnotes

Footnote 1: Rule 202.17 (b) (2) of the Uniform Rules for the New York State Trial Courts provides that, at least 20 days before the date of a physical examination, the party to be examined must serve and deliver

"duly executed and acknowledged written authorizations permitted all parties to obtain all hospital records and such other records as may be referred to and identified in the reports of those medical providers who have treated or examined the party seeking recovery."

(22 NYCRR 202.17 [b] [2] [emphasis supplied.])

Footnote 2:In wrongful death actions, the jury is instructed to consider to life expectancy as well as the health and age of a distributee in determining the amount of damages. (PJI 2:320.) One might similarly expect that a plaintiff-distributee has placed his or her own life expectancy at issue, and therefore has

waived the physician-patient privilege as to his or her own medical history. However, the Appellate Division, Second Department reached the opposite result.

In Scalone v Phelps Memorial Hospital Center (184 AD2d 65 [2d Dept 1992]), the defendants sought the medical records of the plaintiff, a distributee, on the ground that, by commencing the wrongful death action, the plaintiff-distributee placed her own health, age, and circumstances in controversy. They argued that the plaintiff's medical history and records were relevant to the extent that they can vary the application of the life expectancy tables on the durational measurement of the plaintiff's claim.

The Appellate Division, Second Department ruled, "in the instant case, the mere fact that the plaintiff has commenced this action as a personal representative and distributee is insufficient to effect a waiver of her privilege." (Scalone, 184 AD2d at 73.)

Footnote 3:Thus, an in camera review of the records of plaintiff's entire medical history is not practicable. In camera review under these circumstances presents the very real risk that some tidbit of information or notation contained in the medical records is directed to be redacted as irrelevant, but a medical expert would actually consider such information relevant to life expectancy, work life expectancy, general health, and ability to perform daily tasks. Moreover, because the scope of disclosure is greater than the test of admissibility at trial, disclosure does not foreclose an appropriate application to the trial court to limit the admission of parts of the medical records.

# # #