

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

MELANIE JOSEPH,

Plaintiff,

- against -

ROBERT HUMMEL and MICHAEL JOSEPH,

Defendants.

INDEX NO. 23017/2006

MOTION

DATE July 29, 2008

MOTION

CAL. NO. 9

MOT. SEQ.

NUMBER

The following papers numbered 1 to 11 read on this motion by the defendant Michael Joseph for summary judgment dismissing the plaintiff's complaint for failure to establish the existence of a "serious injury" pursuant to Insurance Law §5102[d]. The defendant Robert Hummel cross-moves for identical relief.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Notice of Cross Motion/Affid(s) in Opp.-Exhibits...	5 - 8
Affid(s) in Opp.-Exhibits.....	9 - 10
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Upon the foregoing papers the motion and cross-motion are determined as follows:

The defendants' moving papers establish that the plaintiff was involved in an automobile accident on July 25, 2005 and commenced this action to recover for her alleged injuries. The defendants contend that the plaintiff's injuries do not meet the serious injury threshold set forth by New York Insurance Law §5102[d] and her complaint should therefore be dismissed.

In support of the motion, the defendants submitted affirmations from Edward A. Toriello, M.D., an orthopedic surgeon, Monette G. Basson, M.D., a neurologist, and Sondra J. Pfeffer, M.D., a radiologist. Drs. Toriello and Basson performed physical examinations of the plaintiff on behalf of the defendants. The defendants' examining physicians both averred, inter alia, they made observations of the range of motion the plaintiff purportedly displayed in her cervical and lumbar spines. Both physicians offered opinions as to the same types of movement in the cervical and lumbar spines, to wit right and left lateral bending, right

and left rotation, flexion and extension. Drs. Toriello and Basson each quantified the ranges of motion they observed in degrees and compared that numerical finding to what each doctor believed to be normal range of motion. Other than opining in degrees what constitutes normal range of motion, neither Dr. Toriello nor Dr. Basson expressed any substantiating factors underlying the reasoning underlying their opinions of normal range of motion.

Concerning the plaintiff's cervical and lumbar spines, Dr. Toriello opined that the plaintiff had the following ranges of motion and offered corresponding opinions as to normal range of motion:

Cervical

Right and left lateral bending:	45 degrees	(45 degrees normal)
Right and left rotation:	80 degrees	(80 degrees normal)
Flexion:	70 degrees	(70 degrees normal)
Extension:	60 degrees	(60 degrees normal)

Lumbar

Right and left lateral bending:	30 degrees	(30 degrees normal)
Right and left rotation:	70 degrees	(70 degrees normal)
Flexion:	90 degrees	(90 degrees normal)
Extension:	20 degrees	(20 degrees normal)

Dr. Basson opinions regarding the plaintiff's range of motion and corresponding normal ranges of motion in her cervical and lumbar spines were as follows:

Cervical

Right and left lateral bending:	45 degrees	(45 degrees normal)
Right and left rotation:	80 degrees	(80 degrees normal)
Flexion:	45 degrees	(45 degrees normal)
Extension:	45 degrees	(45 degrees normal)

Lumbar

Right and left lateral bending:	30 degrees	(30 degrees normal)
Right and left rotation:	30 degrees	(30 degrees normal)
Flexion:	90 degrees	(90 degrees normal)
Extension:	30 degrees	(30 degrees normal)

In the eight above ranges of motion, Drs. Toriello and Basson offer conflicting opinions in half of the categories, two each in the cervical and lumbar regions. More importantly, not only do the defendants' physicians disagree as to the actual range of motion the plaintiff displayed, they contradict one another as to what constitutes normal range of motion. The discrepancies of opinion between the defendants' physicians are significant. In terms of percentage, the difference between Dr. Toriello and Dr. Basson opinions are as follows: Cervical: Flexion, 36%; Extension, 25%; Lumbar: Right and left rotation, 33%; Extension, 133%.

The disparate opinions offered by the defendants' physicians as to what constitutes normal range of motion is fatal to the defendants' attempt to establish, prima facie, that the plaintiff's injuries were not "serious" within the meaning of the Insurance Law. These are not simple fact irregularities or inconsistencies that can be reconciled by the court, but rather expert opinions proffered by a party in a contested litigation that constitute "informal judicial admissions" (See, Djetoumani v Transit, Inc., 50 AD3d 944, 946). The court can not take judicial notice of or "speculate" as to what normal range of motion is in an allegedly affected body part (See, Frey v Fedorciuc, 36 AD3d 587; Powell v Alade, 31 AD3d 523). In the absence of any explanation of the reasoning underlying the defendants' experts opinions as to normal range of motion from which the court could potentially harmonize these discrepant views, finding a prima facie case would entail, impermissibly, guessing which opinion is correct.

Analyzing this evidence from the defendants' examining physicians in a light most favorable to the plaintiff, as the court must on a motion for summary judgment (See e.g., Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), a reasonable conclusion that may be drawn is that the defendants' physicians have demonstrated the plaintiff has diminished range of motion in both her cervical and lumbar spines. For instance, Dr. Toriello opined that normal rotational range of motion in the lumbar spine is 70 degrees. However, Dr. Basson found the plaintiff displayed maximum rotational motion in the lumbar spine of 30 degrees. Taken together, this is evidence of a significant loss of range of motion that defeats the defendants' prima facie case (See, Zamaniyan v Vrabeck, 41 AD3d 472; Sullivan v Johnson, 40 AD3d 624; Smith v Delcore, 29 AD3d 890; Sano v Gorelik, 24 AD3d 747; Spuhler v Khan, 14 AD3d 693; Omar v Bello, 13 AD3d 430; Scotti v Boutureira, 8 AD3d 652; Papadonikolakis v First Fid. Leasing Group, Inc., 283 AD2d 470; Meyer v Gallardo, 260 AD2d 556).

Accordingly, as relates to the plaintiff's cervical and lumbar spines, the defendants have failed to demonstrate, as a matter of law in the first instance, that plaintiff has not sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" (Insurance Law §5102[d]).

The defendants have also failed to establish a prima facie case on the issue of causation with the submission of the report from their radiologist, Sondra J. Pfeffer, M.D. Although the plaintiff claims in her bill of particulars she sustained injuries to her cervical spine, Dr. Pfeffer does not comment on this claim (See e.g., Rodriguez v J&K Taxi, Inc., 12 AD3d 434). In any event, even if the defendants demonstrated that the plaintiff's injuries were not causally related to the accident with Dr. Pfeffer's opinion that the abnormalities in the plaintiff's spine were degenerative in origin (See, Lorthe v Adeye, 306 AD2d 252; see also, Ginty v McNamara 300 AD2d 624; Narducci v McRae 298 AD2d 443), the plaintiff raised an issue of fact with the affirmation

from her radiologist, Dennis Rossi, M.D., who opined that the trauma of the accident, not the degenerative conditions in the plaintiff's spine, were the cause of her injuries.

Accordingly, the defendants' motion and cross-motion for summary judgment dismissing the plaintiff's complaint are denied.

Dated: September 5, 2008

Peter J. Kelly, J.S.C.