

**Tarhan v Kabashi**

2006 NY Slip Op 30381(U)

June 15, 2006

Supreme Court, Kings County

Docket Number: 0004042/2004

Judge: Laura Lee Jacobson

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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of June, 2006.

P R E S E N T:

HON. LAURA LEE JACOBSON

Justice.

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CANIP TARHAN, NESLINUR TARHAN AND NURCIN TARHAN, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS BY HER MOTHER AND NATURAL GUARDIAN, NESLINUR TARHAN, Plaintiffs,

- against -

Index No. 4042/04

KRIST KABASHI AND RAIF YIGIT, Defendants.

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The following papers numbered 1 to 32 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-11 12-19</u>
Opposing Affidavits (Affirmations)_____	<u>20-23 24-27</u>
Reply Affidavits (Affirmations)_____	<u>28-31 32</u>
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Raif Yigit (Yigit) moves, and defendant Krist Kabashi (Kabashi) cross-moves, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the ground that plaintiffs Canip Tarhan, Nurcin

Tarhan and Neslinur Tarhan, failed to sustain a serious injury within the meaning of Insurance Law § 5102 (d).<sup>1</sup>

### ***Background***

This personal injury action stems from a July 5, 2003 Nassau County motor vehicle accident that allegedly occurred about 9:25 PM approximately 200 feet west of the Fairway Drive entrance ramp on the westbound Long Island Expressway in Lake Success, New York. A vehicle owned and operated by defendant Kabashi and a vehicle owned and operated by defendant Yigit, the brother-in-law of plaintiff Canip Tarhan, collided with a vehicle that Mr. Tarhan owned and operated. Mr. Tarhan, a 51 year-old cleaner at the time of the accident, alleges principally suffering a serious injury to his back. Plaintiff Neslinur Tarhan, the front-seat passenger in the vehicle her husband operated and a 48 year-old housewife at the time of the accident, alleges suffering a serious injury to her neck and right shoulder. The Tarhans' daughter, plaintiff Nurcin Tarhan, a 16 year-old student at the time of the accident

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<sup>1</sup>That provision defines "serious injury" as including:

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 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.

who was resting, unrestrained, in the floor area behind the driver and front passenger seats that her parents occupied, alleges suffering a serious injury to her neck and back.

### ***The Parties' Positions***

#### ***Moving and Cross-Moving Defendants' Positions***

Moving defendant Yigit relies upon the affirmed medical reports of Dr. Edward A. Toriello a board-certified orthopedist, Dr. Burton S. Diamond a board-certified neurologist and Dr. Stephen W. Lastig, a board-certified radiologist in support of his summary judgment motion and cross-moving defendant Kabashi relies upon both those reports and the affirmed medical reports of Dr. Eduardo V. Alvarez, a board-certified orthopedist and Dr. Richard Lechtenberg, a board-certified neurologist in support of his cross motion. Each doctor evaluated each plaintiff as follows:

#### ***Plaintiff Canip Tarhan***

Dr. Toriello, the moving defendant's orthopedist, examined Mr. Tarhan on April 21, 2005 and found no range of motion restriction regarding the lumbosacral spine,<sup>2</sup> no paralumbar muscle spasm and no loss of normal lumbar lordosis. He described Mr. Tarhan's straight leg raising as bilaterally full and pain free. Dr. Toriello saw no impairment and no evidence of disability from any orthopedic injury stemming from the accident. He diagnosed Mr. Tarhan as presenting a resolved low back strain.

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<sup>2</sup>More specifically, Dr. Toriello found lumbosacral spine flexion of 90 degrees with 90 degrees normal, extension of 20 degrees with 20 degrees normal, bilateral lateral bending of 30 degrees with 30 degrees normal and bilateral rotation of 70 degrees with 70 degrees normal.

Dr. Alvarez, the cross-moving defendant's orthopedist, subsequently examined Mr. Tarhan on October 14, 2005 and also found no spasm in the paraspinal area, preservation of the lumbosacral lordosis and straight leg raising negative at 90 degrees bilaterally in the sitting position.<sup>3</sup> He, too, saw no objective evidence of any ongoing orthopedic disability and diagnosed Mr. Tarhan as presenting a resolved sprain/strain of the lumbosacral spine.

Dr. Diamond, the moving defendant's neurologist, examined Mr. Tarhan on June 23, 2005 and separately found range of motion within normal limits in both the cervical and lumbar spine.<sup>4</sup> Other findings included no paravertebral spasm and negative straight leg raising. He saw no neurological impairment and, like the two orthopedists above, similarly diagnosed Mr. Tarhan as presenting a resolved lumbar sprain.

Dr. Lechtenberg, the cross-moving defendant's neurologist, examined Mr. Tarhan on November 14, 2005 and equally found a fully normal range of motion for both the cervical

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<sup>3</sup>However, Dr. Alvarez's failure to compare his lumbosacral range of motion findings regarding Mr. Tarhan against a normal standard prevents using that information (*Forlong v Faulton*, AD3d , 2006 NY Slip Op 04044 [2006]; see also *Kennedy v Brown*, 23 AD3d 625, 626 [2005]).

<sup>4</sup>More specifically, Dr. Diamond's cervical spine findings showed flexion of 40 degrees with 40 degrees normal, extension of 40 degrees with 40 degrees normal and right and left rotation of 80 degrees with 70 degrees normal.

Lumbar spine findings showed flexion of 80 degrees with normal ranging from 75 to 90 degrees, extension of 25 degrees with 25 degrees normal and right and left lateral bending of 30 degrees with 30 degrees normal.

and lumbar spine.<sup>5</sup> He reported no pain on straight leg raising, a negative Romberg sign<sup>6</sup> and “no permanent neurologic injuries sustained that might reasonably be considered causally related to the accident.” Instead, Dr. Lechtenberg concluded from his physical examination that Mr. Tarhan “may have sustained spine sprains at the time of the accident of 7/5/03, but currently he has no objective neurologic deficits.” Hence, he diagnosed Mr. Tarhan as presenting post cervical and lumbar spine sprains.

Dr. Lastig, who reviewed Mr. Tarhan’s August 4, 2003 lumbar MRI films as referenced in his report, dated October 13, 2005, saw “multilevel degenerative disc disease and multilevel disc desiccation [i.e., dehydration], as well as disc space narrowing at the L1-L2 and L5-S1 levels.” Consequently, he concluded that the “multilevel disc pathology is most likely degenerative in origin and therefore, unrelated to the accident of 7/5/2003.”

***Plaintiff Neslinur Tarhan***

Dr. Toriello also examined Mrs. Tarhan on April 21, 2005 and found no range of motion restrictions regarding her cervical spine and right shoulder.<sup>7</sup> He saw no evidence of

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<sup>5</sup>More specifically, Dr. Lechtenberg’s cervical spine findings showed forward flexion of 60 degrees with 60 degrees normal, extension of 50 degrees with 50 degrees normal, lateral flexion of 40 degrees with 40 degrees normal and lateral rotation of 80 degrees with 80 degrees normal.

Lumbar spine findings showed forward flexion of 90 degrees with 90 degrees normal, extension of 30 degrees with 30 degrees normal, lateral flexion of 30 degrees with 30 degrees normal and lateral rotation of 30 degrees with 30 degrees normal.

<sup>6</sup>A test determining one’s balance or steadiness as described in Stedman’s Medical Dictionary, 28<sup>th</sup> ed., p 1771.

<sup>7</sup>More specifically, Dr. Toriello’s cervical spine findings showed flexion of 70 degrees with 70 degrees normal, extension of 60 degrees with 60 degrees normal, bilateral lateral bending of 45 degrees with 45 degrees normal and bilateral rotation of 80 degrees with 80 degrees normal.

(continued...)

paracervical muscle spasm or atrophy, or shoulder girdle muscle atrophy or right shoulder instability. He also reported a negative impingement sign for the right shoulder. Dr. Toriello concluded that Mrs. Tarhan showed no impairment and no evidence of disability from any orthopedic injury attributable to the accident. He diagnosed her as presenting a “resolved cervical hyperextension injury and [a] resolved right shoulder strain.”

Dr. Alvarez subsequently examined Mrs. Tarhan on October 14, 2005, found no bony or soft tissue tenderness in the cervical/thoracic areas as well as no intrinsic muscle weakness of the cervical spine and reported a negative tissue compression test.<sup>8</sup> He further found both her shoulders symmetrical with no evidence of any atrophy, and palpation revealed no areas of tenderness, swelling or hardening. He, too, saw no objective evidence of any ongoing orthopedic disability and diagnosed Mrs. Tarhan as presenting resolved sprains/strains of several areas including the cervical and thoracic spine.

Dr. Diamond examined Mrs. Tarhan on June 23, 2005 and separately found, as pertinent herein, cervical spine range of motion within normal limits<sup>9</sup> and no atrophy of any

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<sup>7</sup>(...continued)

Right shoulder findings likewise showed abduction and flexion of 170 degrees with 170 degrees normal, internal rotation to T12 with normal to T12, external rotation of 90 degrees with 90 degrees normal and adduction of 45 degrees with 45 degrees normal.

<sup>8</sup>Dr. Alvarez’s failure to compare his cervical and shoulder range of motion findings regarding Mrs. Tarhan against a normal standard again prevents using that information, *see Forlong*, 2006 NY Slip Op 04044 [2006], cited in fn 2.

<sup>9</sup>More specifically, Dr. Diamond’s cervical spine findings showed flexion of 40 degrees with 40 degrees normal, extension of 40 degrees with 40 degrees normal and right and left rotation of 80 degrees with 70 degrees normal.

muscle group. He saw no neurological impairment and diagnosed Mrs. Tarhan as presenting a resolved cervical sprain.

Dr. Lechtenberg examined Mrs. Tarhan on November 14, 2005 and equally found a fully normal range of motion for several areas including both the cervical spine and shoulders.<sup>10</sup> He reported “no neurologic injuries sustained that might reasonably be considered causally related to the accident.” Instead, Dr. Lechtenberg concluded from his physical examination that Mrs. Tarhan, like Mr. Tarhan, “may have sustained spine strains at the time of the accident on 7/5/03, but currently she has no objective neurologic deficits.” Hence, he diagnosed Mrs. Tarhan as presenting post cervical and lumbar spine sprains.

Dr. Lastig reviewed Mrs. Tarhan’s August 4, 2003 cervical MRI films as referenced in his report, dated October 13, 2005, and saw no focal disc herniations or annular bulges and no evidence of cord compression. He concluded that “this is a normal MRI study of the cervical spine . . . and there are no findings on this study . . . causally related to the reported accident of 7/5/2003.”<sup>11</sup>

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<sup>10</sup>More specifically, Dr. Lechtenberg’s cervical spine findings showed forward flexion of 60 degrees with 60 degrees normal, extension of 50 degrees with 50 degrees normal, lateral flexion of 40 degrees with 40 degrees normal and lateral rotation of 80 degrees with 80 degrees normal.

Shoulders findings showed flexion of 90 degrees with 90 degrees normal, extension of 45 degrees with 45 degrees normal, abduction of 180 degrees with 180 degrees normal, internal rotation of 55 degrees with 55 degrees normal, external rotation of 45 degrees with 45 degrees normal and adduction of 45 degrees with 45 degrees normal.

<sup>11</sup>Dr. Lastig regarded the observed straightening of the cervical spine as a nonspecific finding possibly related to muscle spasm or to patient positioning by the technologist in the MRI unit during the examination.

***Plaintiff Nurcin Tarhan***

Dr. Toriello completed his examination of the Tarhan family on April 21, 2005 by then examining Ms. Tarhan. He found no range of motion restriction regarding her cervical and lumbosacral spines,<sup>12</sup> no paracervical nor paralumbar muscle spasm and no loss of the normal lumbar lordosis. He described Ms. Tarhan's straight leg raising as bilaterally full and pain free. Dr. Toriello saw no impairment and no evidence of disability regarding Ms. Tarhan from any orthopedic injury attributable to the accident.

Dr. Alvarez subsequently examined Ms. Tarhan on October 14, 2005 and also found no spasm along her paraspinal muscles and recorded her straight leg raising as negative at 90 degrees bilaterally in the sitting position.<sup>13</sup> He, too, saw no objective evidence of an orthopedic disability and diagnosed her as presenting a resolved sprain/strain of the lumbosacral spine and a sprain/strain of the cervical and thoracic spine with residual complaints of subjective pain.<sup>14</sup>

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<sup>12</sup>More specifically, Dr. Toriello found cervical spine flexion of 70 degrees with 70 degrees normal, extension of 60 degrees with 60 degrees normal, bilateral lateral bending of 45 degrees with 45 degrees normal and bilateral rotation of 80 degrees with 80 degrees normal.

Lumbosacral spine findings showed flexion of 90 degrees with 90 degrees normal, extension of 20 degrees with 20 degrees normal, bilateral lateral bending of 30 degrees with 30 degrees normal and bilateral rotation of 70 degrees with 70 degrees normal.

<sup>13</sup>Dr. Alvarez's failure to compare his cervical and lumbosacral range of motion findings regarding Ms. Tarhan against a normal standard again prevents using that information (*see Forlong*, 2006 NY Slip Op 04044 [2006]) cited in fn 2.

<sup>14</sup>He observed in this regard that "[h]er subjective complaints taken in the absence of any objective findings noted in this examination do not constitute a disability."

Dr. Diamond examined Ms. Tarhan on June 23, 2005 and separately found range of motion within normal limits in both the lumbar and cervical spine.<sup>15</sup> Other findings concerning Ms. Tarhan included no paravertebral spasm and negative straight leg raising. He saw no neurological impairment and diagnosed Ms. Tarhan as presenting a resolved cervical and lumbar sprain.

Dr. Lechtenberg examined Ms. Tarhan on November 14, 2005 and equally found a fully normal range of motion for both the cervical and lumbar spine.<sup>16</sup> He reported no pain on straight leg raising, a negative Romberg sign<sup>17</sup> and “no neurologic injuries sustained that might reasonably be considered causally related to the accident.” Instead, Dr. Lechtenberg concluded from his physical examination that Ms. Tarhan, like her parents, “may have sustained spine sprains at the time of the accident of 7/5/03, but currently she has no objective neurologic deficits.” Hence, he diagnosed Ms. Tarhan as presenting post cervical and lumbar spine sprains.

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<sup>15</sup>More specifically, Dr. Diamond’s cervical spine findings showed flexion of 40 degrees with 40 degrees normal, extension of 40 degrees with 40 degrees normal and right and left rotation of 80 degrees with 70 degrees normal.

Lumbar spine findings showed flexion of 80 degrees with normal ranging from 75 to 90 degrees, extension of 25 degrees with 25 degrees normal and right and left bilateral bending of 30 degrees with 30 degrees normal.

<sup>16</sup>More specifically, Dr. Lechtenberg’s cervical spine findings showed forward flexion of 60 degrees with 60 degrees normal, extension of 50 degrees with 50 degrees normal, lateral flexion of 40 degrees with 40 degrees normal and lateral rotation of 80 degrees with 80 degrees normal.

Lumbar spine findings showed forward flexion of 90 degrees with 90 degrees normal, extension of 30 degrees with 30 degrees normal, lateral flexion of 30 degrees with 30 degrees normal and lateral rotation of 30 degrees with 30 degrees normal.

<sup>17</sup>See fn 8.

Dr. Lastig reviewed Ms. Tarhan's August 4, 2003 cervical and August 11, 2003 lumbar MRI films, as referenced in his report, dated October 13, 2005. He saw no focal disc herniations or annular bulges and no evidence of cord compression regarding the cervical spine. He concluded that "this is a normal MRI study of the cervical spine . . . [and] there are no findings on this study which are causally related to the accident of 7/5/2003."<sup>17</sup>

Dr. Lastig saw evidence of degenerative disc disease with disc space narrowing and desiccation at the L5-S1 level regarding Ms. Tarhan's lumbar spine. He thus concluded that the disc protrusion at this level which borders the thecal sac "is most likely degenerative in origin and, therefore, unrelated to the accident of 7/5/2003."

### ***Plaintiffs' Position***

Plaintiffs oppose summary judgment by submitting their deposition testimony, the reports of Dr. Eric Lubin, a board-certified radiologist, the reports of Dr. Grigory Shtender, who specializes in physical medicine and rehabilitation,<sup>18</sup> the reports of Dr. Victor Sasson, a board-certified orthopedic surgeon,<sup>19</sup> and the affirmed reports of Dr. Huseyin Emre

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<sup>17</sup>Dr. Lastig once again regarded the mild reversal of Ms. Tarhan's cervical lordosis, like the observed straightening of her mother's cervical spine (see n 10), as a nonspecific finding possibly related to muscle spasm or patient positioning by the technologist in the MRI unit during the examination.

<sup>18</sup>Dr. Shtender's reports fail to provide his specialty but the 2005-2006 Medical Directory of New York State (Medical Directory), Vol LXIX, pp 136 and 853 list him as specializing in physical medicine and rehabilitation.

<sup>19</sup>Dr. Sasson's reports fail to clearly provide his specialty but Medical Directory, pp 129 and 550 list him as board certified in orthopedic surgery

Tuncel,<sup>20</sup> who initially and successively evaluated them following the accident. Dr. Tuncel examined each plaintiff on July 18, 2003, reexamined them on other 2003 dates<sup>21</sup> and thereafter examined each plaintiff only on December 21, 2005, more than two years afterwards and in response to defendants' summary judgment motion. Plaintiffs say in their deposition testimony that they stopped seeing Dr. ~~Tuncel~~<sup>Tuncel</sup> when their insurance payments ended.

In addition, each plaintiff summarizes the accident's effects in their deposition. Mr. Tarhan complains about pain in his lower back and claims that his injuries have limited his employment to lighter job duties. Mrs. Tarhan alleges that she stopped working in view of her shoulder pain which together with her neck pain allegedly prevents her from working for long periods and carrying with her right hand. She also states that she needs to receive a massage to alleviate the pain from performing cleaning and cooking chores. Ms. Tarhan claims that the injuries to her neck and back prevented her from participating in gym programs and curtailed her soccer and volleyball activities.

### ***Plaintiff Canip Tarhan's Medical Opposition***

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<sup>20</sup>Dr. Tuncel's reports fail to mention his specialty and the Medical Directory contains no listing regarding him. However, the information services unit of the Medical Society of the State of New York, which publishes the aforementioned Medical Directory, reports that available information on file specifies a specialty of Clinical and Atomic Pathology. In addition, the New York State Physician Profile website, nydoctorprofile.com, specifies Family Practice as Dr. Tuncel's field of medicine.

<sup>21</sup>Dr. Tuncel reevaluated Mr. Tarhan on August 27, October 8 and November 21, 2003, reevaluated Mrs. Tarhan on September 10 and October 8, 2003 and reevaluated Ms. Tarhan on September 5, 2003.

Dr. Tuncel recounts that Mr. Tarhan experienced pain on range of motion of the lumbosacral spine in all directions when first examined on July 5, 2003, that positive Braggard's, Ely's and Nachlas' tests then resulted indicating lumbar nerve root injury and that a positive Laseque Straight Leg Raising test also occurred at about 30 degrees. Dr. Lubin, the board-certified radiologist who took an MRI of Mr. Tarhan's lumbar spine on August 4, 2003, reported a straightening and mild reversal of the lumbar lordosis and bulging discs at L1-2, L2-3, L3-4, L4-5 and L5-S1. The L4-5 bulging discs, he found, flattened and deformed the thecal sac with impingement upon both L4 nerve roots.

Dr. Shtender, who saw Mr. Tarhan on September 15, 2003 for rehabilitation evaluation of his injuries, noted paraspinal muscle spasm with restricted range of motion in both horizontal and vertical planes. He also reported a positive Straight Leg Raising test on the left side at 45 degrees, no electrical evidence of lumbar radiculopathy<sup>22</sup> and no significant or minor root/nerve damage if compressive radiculopathy existed.

Dr. Tuncel's December 21, 2005 examination of Mr. Tarhan revealed several lumbar spine range of motion losses upon measuring with an arthroidal protractor: an 11% loss on forward flexion, a 33% loss on extension, a 25% loss on left and right lateral flexion and a 33% loss on right rotation. These findings, then-positive Nachlas' test and the MRI study led Dr. Tuncel to conclude that Mr. Tarhan "has sustained consequential limitation of function of his musculoskeletal system."

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<sup>22</sup>Defined as spinal nerve root disorder, Stedman's Medical Dictionary, 28<sup>th</sup> ed., p 1622.

Dr. Tuncel regards Mr. Tarhan's physical condition as causally related to the motor vehicle accident and references problems with bending, lifting, prolonged sitting or standing as significantly impacting Mr. Tarhan's daily living activities. Hence, Dr. Tuncel contends that Mr. Tarhan has sustained significant limitation of his spinal function. "Any further treatment beyond his course of therapy was and is not of significant value," according to Dr. Tuncel. However, he believes that Mr. Tarhan's injuries "will form the basis for degenerative joint diseases in the future" and that Mr. Tarhan needs further medical attention.

***Plaintiff Neslinur Tarhan's Medical Opposition***

Dr. Tuncel recounts that Mrs. Tarhan experienced pain on motion of the cervical spine and showed a positive Impingement Syndrome test on her right shoulder with abduction limited to 100 degrees when he reevaluated her on September 10, 2003 following MRI studies of her cervical spine and right shoulder. Dr. Lubin's cervical spine MRI on August 4, 2003 had shown a straightening of the cervical lordosis and a bulging disc at C5-6. An MRI of her right shoulder on August 14, 2003<sup>23</sup> revealed a possible labral tear and bursitis according to Dr. Sasson, plaintiffs' orthopedist, and Dr. Tuncel in their September 5 and September 10 reports, respectively.

Dr. Tuncel concluded upon reviewing those findings in his December 21, 2005 evaluation of Mrs. Tarhan that the July 5, 2003 accident caused the noted injuries. He further

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<sup>23</sup>Dr. J.J. Gottesman, a board-certified radiologist according to the Medical Directory, pp 55 and 387, interpreted Ms. Tarhan's right shoulder MRI taken on August 14, 2003 according to Dr. Tuncel's December 21, 2005 report.

opined that “any trivial physical exertion to the shoulder including lifting, pulling, pushing, twisting, etc. will cause aggravation of symptoms and worsening of injuries.”

***Plaintiff Nurcin Tarhan’s Medical Opposition***

Dr. Tuncel recounts that Ms. Tarhan experienced pain on motion of the cervical and lumbar spine in all directions when first examined on July 5, 2003, that positive Soto Hall, Foramina Compression, Cervical Distraction and Shoulder Depression tests then resulted indicating cervical nerve root injury and that Braggard’s, Kemp’s, Ely’s and Nachlas’ tests then resulted indicating lumbar nerve root injury. Dr. Lubin, who took Ms Tarhan’s cervical spine MRI on August 4, 2003 and her lumbar spine MRI on August 11, 2003, reported straightening and mild reversal of the cervical lordosis, bulging discs at C4-5, C5-6, C6-7 and L4-5 and a herniated disc at L5-S1 with impingement upon the left L5 nerve root.

Dr. Tuncel’s December 21, 2005 examination of Ms. Tarhan revealed several cervical spine range of motion losses: a 10% loss on forward flexion, an 8% loss on extension, a 31% loss on right rotation and a 44% loss on left rotation; and several lumbar spine range of motion losses: a 28% loss on forward flexion, a 33% loss on extension, a 37.5% loss on left lateral flexion; a 50% loss on right lateral flexion; a 17% loss on left rotation and a 33% loss on right rotation. These findings using an arthroidal protractor, then-positive Foramina Compression and Spurling tests in Ms. Tarhan’s cervical spine, then-positive Ely’s, Nachlas’ and Braggard’s tests bilaterally in her lumbar spine, a then mildly positive Patrick’s test, a then-positive Laseque Straight Leg Raising test bilaterally at about 30 to 40 degrees as well

as the August 2003 MRI studies led Dr. Tuncel to conclude that Ms. Tarhan “has sustained consequential limitation of function of her musculoskeletal system.”

Dr. Tuncel regards Ms. Tarhan’s physical condition as causally related to the motor vehicle accident and references problems with bending, lifting, prolonged sitting or standing as significantly impacting her daily living activities. Hence, Dr. Tuncel contends that Ms. Tarhan, like her father, has sustained significant limitation of her spinal function. “Any further treatment beyond her course of therapy was and is not of significant value,” according to Dr. Tuncel. However, he again believes that Ms Tarhan’s injuries, like her father’s, “will form the basis for degenerative joint disease in the future” and that she needs further medical attention.

### *Discussion*

#### *(a)*

The affirmed reports of defendants’ doctors which identify the negative results of objective tests, such as the straight leg raising test, and which establish that plaintiffs have a full range of motion and no disabilities causally related to the accident enable defendants to meet the initial burden of making a prima facie showing that each plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) despite evidence of bulging and herniated discs (*see Gaddy v Eyley*, 79 NY2d 955, 956-957[1992]; *Kearse v New York City Transit Authority*, 16 AD3d 45 [2005]; *Bernabel v Perullo*, 300 AD2d 330, 331 [2002]). The burden thus shifts to plaintiffs to present sufficient evidence in admissible form

demonstrating the existence of a triable factual issue about each plaintiff's alleged serious injury (*Grossman v Wright*, 268 AD2d 79, 84 [2000]).

The Court of Appeals explained in this regard in *Toure v Avis Rent A Car System, Inc.* (98 NY2d 345, 350 [2002], *rearg denied sub nom Manzano v O'Neil*, 98 NY2d 728 [2002]) that “we have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold (*see e.g. Dufel [Green]*, 84 NY2d [795] at 798 [1995]; *Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyley*, 79 NY2d 955, 957-958 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).” Indeed, even “[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury” (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

The Appellate Division, Second Department had similarly outlined in *Grossman* (268 AD2d at 84) the essential information needed to successfully oppose a serious injury summary judgment motion. “Physical examinations personally conducted by the person making the affidavit or affirmation are sufficient [citations omitted]. However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRI's, straight leg or Laseque tests, and any other similarly-recognized tests of quantitative results based upon neurological examinations [citations omitted]” (*id.*). In addition, “[t]he mere existence of a bulging or herniated 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 disc injury and its duration’ (*Arisier v Thibiu*, AD3d , 2006 NY Slip Op 03526 at \*1 [2006] [internal citations omitted]).<sup>24</sup>

Here, Dr. Tuncel’s December 21, 2005 affirmed report in part impermissibly seeks to rely upon findings from unsworn reports and, in one instance, an unsubmitted report created by other doctors. The Appellate Division, Second Department has repeatedly negated such an approach (*Dominguez-Gionta v Smith*, 306 AD2d 432, 432 [2003] [“plaintiff’s physician improperly relied upon the unsworn magnetic resonance imaging report of another physician”]; *Phillippe v Ivory*, 297 AD2d 666, 666 [2002] [“affirmation of the injured plaintiff’s physician improperly relied upon unsworn medical reports prepared by other physicians”]; *Trent v Niewierowski*, 281 AD2d 622, 623 [2001] [“plaintiff’s physician improperly relied upon unsworn medical reports and test results of other physicians in reaching his conclusions”]; *Merisca v Alford*, 243 AD2d 613, 614 [1997] [“treating physician’s diagnosis appears to have been based upon his review of an unsworn report prepared by another doctor, upon which plaintiff cannot rely, since a sworn copy of this report was not attached to the treating physician’s affirmation”]).

Hence, Dr. Tuncel’s reference and reliance upon the unsworn and unaffirmed MRIs of Dr. Lubin, the unsworn and unaffirmed reports of Dr. Shtender and Dr. Sasson and the

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<sup>24</sup>Consequently, the various positive objective tests cited by Dr. Tuncel as indicating cervical nerve root injury (e.g., the Soto Hall, Foramina Compression, Cervical Distraction and Shoulder Depression tests) and lumbar nerve root injury (e.g., the Braggard’s, Kemp’s, Ely’s and Nachlas’ tests) alone insufficiently refute the motion and cross-motion without other objective and admissible proof quantifying the extent or duration of the resulting physical limitation(s).

unsubmitted, let alone unsworn and unaffirmed, MRI report of Dr. Jottesman fail to meet the requisite standard of utilizing objective evidence in admissible form.<sup>25</sup>

In addition, Dr. Tuncel failed to specifically quantify each plaintiff's range of motion limitations when he initially examined plaintiffs on July 18, 2003 or at any time immediately after the July 5, 2003 accident thereby making his subsequent limitation findings meaningless. Appellate Division, Second Department case law has repeatedly found no serious injury where "plaintiff failed to proffer any competent medical evidence that was contemporaneous with the subject accident showing any initial range of motion limitations in his spine" (*Bell v Rameau*, AD3d , 2006 NY Slip Op 04026 at \*1 [2006]) [internal citations omitted]; *see also Li v Woo Sung Yun*, 27 AD3d 624, 625 [2006] ["plaintiff did not submit medical proof in admissible form that was contemporaneous with the accident showing any initial range of motion restrictions in her spine or left knee"] [internal citations omitted]; and *Ranzie v Abdul-Massih*, 28 AD3d 447, 2006 NY Slip Op 02514 at \*2 [2006] ["plaintiff failed to provide any medical proof that was contemporaneous with the subject accident which showed range of motion limitations in her left ankle"] [internal citations omitted]).

Hence, Dr. Tuncel's cryptic reference to Mr. Tarhan and Ms. Tarhan experiencing pain in all directions on range of motion when he first examined them on July 18, 2003 and his similar characterization about Mrs. Tarhan upon her September 10, 2003 reevaluation

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<sup>25</sup>The same analysis equally applies to the unsubmitted reports of Dr. M. Paker, PhD regarding the psychological evaluation of each plaintiff on September 3, 2003 which Dr. Tuncel simply referenced in his reports.

fails to provide needed admissible medical proof regarding their initial range of motion restrictions. This absence of proof negates Dr. Tuncel's subsequent range of motion limitation findings.<sup>26</sup>

(b)

The Court of Appeals *Toure* decision (98 NY2d at 350-351) additionally advised that “an expert’s *qualitative* assessment of a plaintiff’s condition may also suffice, provided that the evaluation 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 (*see Dufel*, 84 NY2d at 798).” The *Bent* decision (15 AD3d at 49-50), discussed in the footnote below, similarly reiterated that “plaintiffs may also establish a significant limitation of range of motion if the doctor describes the qualitative nature of the patient’s limitations based on normal, function, purpose and use.”

However, Dr. Tuncel inadequately complies with this standard by stating that Mr. Tarhan’s injuries and his daughter’s injuries “have had a significant impact on his [or her]

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<sup>26</sup>However, expressing those later findings as a percentage loss complies with applicable case law, and defendants err in suggesting that Dr. Tuncel needed to make findings only comparable against a normal standard. “[T]o prove the extent or degree of physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury” (*Toure*, 98 NY2d at 350). The very case defendants cite, *Bent v Jackson* (15 AD3d 46, 49 [2005]), itself explains that plaintiffs may present “a specific percentage of the *loss* of range of motion . . . [There], plaintiffs failed to establish the extent of physical limitation by designating a numeric percentage to range-of-motion *loss* or by providing normal range-of-motion degrees in order to ascertain the percentage of this patient’s restriction of movement” (emphasis added). The failure to properly express initial range of motion restrictions contemporaneous to the accident, though, moots this point and also arguments about the propriety of the two year gap in treatment.

activities of daily living” and that Mrs. Tarhan’s injuries now place her in an “injury-prone” condition. Citing their general problems with “bending, lifting, prolonged sitting or standing” or “pulling, pushing, [and] twisting” fails to suffice. A statement by a plaintiff’s expert that permanent problems in standing, sitting, bending and lifting resulted from the sustained injuries constitutes a minor, mild or slight limitation, insufficient to qualify as a serious injury within the definition of the no-fault statute (*Arjona v Calcano*, 7 AD3d 279, 280 [2004]; *see also Bent* [15 AD3d at 50] stating that the opinion of a plaintiff’s doctor that “the injured plaintiff’s limitation of range of motion and permanency affect ‘his daily living as well as his employment’ and will cause ‘ensuing functional disabilities [a]ffecting [plaintiff] for the rest of his life’ is conclusory and is clearly tailored simply to meet statutory requirements”). Here, Dr. Tuncel’s opinion mirrors such other defective statements.

In addition, the same evidentiary defects concerning the absence of objectively-determined injuries equally creates a failure to submit competent medical evidence showing each plaintiff’s inability to perform substantially all of his or her daily activities for not less than 90 out of the first 180 days as a result of the accident ( *Vita v Enterprise Rent-A-Car*, 8 AD3d 558, 559 [2004]; *Ersop v Variano*, 307 AD2d 951, 952-953 [2003]).<sup>27</sup> Accordingly, it is

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<sup>27</sup>Mr. Tarhan, himself in any event, also testified at his deposition that he remained employed following the accident, albeit performing light duties; his wife acknowledged at her deposition that she still performed household chores and hired no help after the accident and Ms. Tarhan testified at her deposition that she continued to attend high school, though curtailing gym activities, and completed a college program.

ORDERED and ADJUDGED that the summary judgment motion of defendant Kabashi and the summary judgment cross motion of defendant Yigit are granted and the complaint of each plaintiff is dismissed as against each of the defendants.<sup>28</sup>

The foregoing constitutes the decision, order and judgment of this court.

ENTER,  
J. S. C.  
HON. LAURA JACOBSON

A handwritten signature in black ink, appearing to read 'L. Jacobson', is written over the printed text 'ENTER, J. S. C. HON. LAURA JACOBSON'.

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<sup>28</sup>This disposition moots determining whether to dismiss just plaintiffs' claims for economic loss as defendants separately sought.