SHORT FORM ORDER

INDEX No. 04-11339
CAL. No. 06-01842-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon EMILY PINES
Justice of the Supreme Court

MOTION DATE 11/14/06
ADJ. DATE 1/8/07
Mot. Seq. # 001 - MG; CASEDISP

JOANNA R. FOLLMAN, an infant under eighteen (18) years of age, by her parent and natural guardian, MICHAEL FOLLMAN, Plaintiffs, - against - TOWN OF HUNTINGTON and MARTIN J. WILLIAMS, Defendants.	MICHAEL G. LoRUSSO, ESQ. Attorney for Plaintiffs 316 Jackson Avenue Syosset, New York 11791 LEWIS JOHS AVALLONE AVILES, LLP Attorneys for Defendants 425 Broad Hollow Road, Suite 400 Melville, New York 11747

Upon the following papers numbered 1 to 35 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 20 - 32; Replying Affidavits and supporting papers 33 - 35; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint on the ground that infant plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for serious injuries allegedly sustained by infant plaintiff Joanna Follman as a result of a motor vehicle accident that occurred on McKay Road at its intersection with Oakwood Road, Town of Huntington, New York on April 11, 2003. The accident allegedly happened when the vehicle operated by defendant Martin Williams and owned by the Town of Huntington collided with the vehicle operated by plaintiff. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion, and defendants have filed a reply.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of their motion, defendants submit, inter alia, the pleadings; plaintiff's verified bill of particulars; plaintiff's Huntington Hospital emergency room, x-ray and CT-Scan records; the two unsworn reports of plaintiff's treating radiologist, Melissa Sapan, M.D.; the unsworn report of the plaintiff's other treating radiologist, Michael A. Shapiro, M.D.; the affirmed report of plaintiff's no-fault examining chiropractor, Pierre H. Thodin, D.C.; the affirmed report of defendants' examining orthopedist, Arthur M. Bernhang, M.D.; the affirmed report of defendants' examining neurologist, Frederick S. Mortati, M.D.; and the plaintiff's deposition testimony.

Plaintiff claims in her bill of particulars that she sustained, among other things, straightening of normal cervical lordosis; a limited range of motion of the lumbosacral spine; cervical and lumbar strains; a laceration requiring one staple to the right scalp; a post-concussion syndrome; depression; mental anxiety; and loss of mental acuity. Plaintiff also claims that she was confined to her bed for about three days and to her home for approximately two weeks. Additionally, plaintiff claims a serious injury in the categories of a permanent consequential limitation, a significant limitation, and a non-permanent injury.

Plaintiff's hospital emergency room records on the date of the accident show that she was complaining of nausea. The attending physician examined the plaintiff and noted that her neck was supple and that she was neurologically intact. The physician also noted that she had a small occipital laceration which was closed with one staple and dressed. X-rays performed at the hospital show that plaintiff's trachea was midline. Additionally, a hospital CT-Scan of the plaintiff's head showed no evidence of cerebral hemorrhage

In her report dated May 8, 2003, Dr. Sapan states that she performed MRI studies of the plaintiff's lumbosacral spine on May 6, 2003, and her findings include no disc herniations or bulges, and no foraminal compromise. While she observed that plaintiff had levoscoliosis, she also noted that there was a normal lumbar lordosis. In her report dated May 19, 2003, Dr. Sapan states that she performed MRI studies of the plaintiff's cervical spine, and her findings include no disc herniations; no foraminal compromise; and no spinal cord abnormalities. She also noted that there was straightening of normal cervical lordosis, but that this was otherwise an unremarkable study.

In his report dated March 13, 2004, Dr. Shapiro states that he performed MRI studies of the plaintiff's brain on March 13, 2004, and his findings include ventricles of normal size and placement; no signal abnormality; and no evidence of neoplasm or demyelinating disease. He opined that these studies were normal.

In his report dated September 19, 2003, Dr. Thoden states that he performed a no-fault chiropractic examination of the plaintiff on that date and his findings include normal ranges of motion of the cervical and lumbar spine with no paraspinal muscle spasms or myofascial trigger points; negative cervical compression; and a negative straight leg raising test. He opined that plaintiff had sustained cervical and lumbar sprains/strains which had resolved. Dr. Thoden also concluded that plaintiff was not disabled but capable of performing the normal activities of her daily living with no restrictions.

In his report dated December 19, 2005, Dr. Mortati states that he performed an independent neurological examination of the plaintiff on that date and his findings include intact cranial nerves; intact muscle strength; DTR's that were "2+" and symmetrically active; a normal sensory system; and no spasm of the posterior cervical or lumbar paraspinal muscles. He opined that this was a normal neurological examination. Dr. Mortati also concluded that plaintiff had sustained a cerebral concussion which had resolved and that her complaints of headaches were atypical for a postconcussion syndrome.

In his report dated December 30, 2005, Dr. Bernhang states that he performed an independent orthopedic examination of the plaintiff on that date and his findings include symmetrical reflexes at the elbow; a negative Spurling's test for cervical radiculopathy; no palpable fibromyalgia, trigger points or spasm about the neck; and a normal straight leg raising test bilaterally. He also observed that her cervical flexion, extension and lateral flexion were 60, 65 and 50/40 degrees with the normal ranges being 38, 38 and 43 degrees. Additionally, he noted that plaintiff was able to maintain both of her legs off the examining table in an extended position, essentially ruling out active lumbar discogenic disorder. Dr. Bernhang opined that whatever injuries the plaintiff had sustained as a result of the accident had resolved without residuals.

Plaintiff testified that she was taken to the hospital by ambulance and released a few hours later. She

missed three days of school but then regularly attended and graduated. While in high school, she took part in a drama program, however, she was able to perform a role in a play about two weeks after the accident. After graduation, she attended the University of Delaware as a full-time student. Plaintiff further testified that during her school breaks and holidays she visited her chiropractor.

By their submissions, defendants made a prima facie showing that infant plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; ***Spevak v Spevak***, 213 AD2d 622, 624 NYS2d 232 [2d Dept 1995]). Plaintiff's examining no-fault chiropractor found, upon his examination performed about six months after the accident, that plaintiff had a normal range of motion of the cervical and lumbar spine with no palpable muscle spasm. Additionally, defendants' examining physicians found that plaintiff had a normal/negative straight leg raising test bilaterally, and that there was no palpable spasm of the cervical or lumbar paraspinal muscles. In addition, defendants' examining physicians each opined that plaintiff's injuries had resolved. Furthermore, the defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (*see, **Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Dongelewic v Marcus***, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, among other things, the unsworn report of infant plaintiff's treating neurologist, K. R. Shetty, M.D.; the personal affidavit of infant plaintiff's clinical neuropsychologist, Stephen Honor, Ph.D.; and the infant plaintiff's personal affidavit. Initially, the Court notes that the report of Dr. Shetty, that was submitted by defendants' in support of the motion, is admissible and has been considered (*see*, ***Kearse v NY City Transit Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Dr. Shetty states that he performed a neurological examination of the plaintiff on May 15, 2003, and his findings include tenderness in the cervical and lumbar areas with some limitation of movement; and a decreased bicep reflex on the right. He also noted, however, that her cranial nerves were within normal limits and that her gait was normal. Dr. Shetty opined that plaintiff had sustained cervical and lumbar radiculitis and a post concussion syndrome.

Dr. Honor avers, inter alia, that he performed an initial clinical neuropsychological examination of the plaintiff on October 7, 2003, and his findings include subtle errors in punctuation and word tense upon a task of spontaneous written language and neurobehavioral difficulties secondary to head injury. He opined that plaintiff's complaints were a direct result of the accident. Additionally, Dr. Honor avers that plaintiff's deficits "suggested" a partially disabling condition which "appeared to affect" her ability to work or function, however, he could not definitively assess her prognosis at the time of the examination.

Plaintiff avers, among other things, that she was unable to play tennis or help her mother with household chores such as vacuuming and lifting heavy objects due to her injuries. She is currently unable to play tennis or perform certain household chores because these activities continue to cause her back pain. Plaintiff further avers that she has difficulty concentrating and sleeping.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Paton v Weltman***, 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]; ***Sothiros v Pinello***, 209 AD2d 687, 619 NYS2d 319 [2d Dept 1994]). The report of Dr. Shetty, that is based upon an examination performed more than three and one-half years ago, is without probative value as to the serious injury categories of a permanent consequential limitation and a significant limitation (*see*, ***Tudisco v James***, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]; ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]). Similarly, the personal affidavit of Dr. Honor, that is equivocal and based upon an examination which was conducted three years before the filing of this motion, is without probative value with respect to plaintiff's allegations of an emotionally injury (*see generally*, ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). In any event, Dr. Honor has not provided an adequate explanation for the end of his treatments rendered to plaintiff in 2003 (*see generally*, ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]). Plaintiff's four-year gap in treatment was, in essence, a cessation of treatment which she has failed to adequately address by way of competent medical proof (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). While plaintiff has submitted an affidavit listing various physical ailments and limitations, her subjective complaints of pain do not constitute a significant injury within the meaning of the statute (*see*, ***Felix v New York City Transit Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]).

Additionally, the proof submitted by plaintiff is insufficient to raise a triable issue of fact that she sustained a medically determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Bycinthe v Combos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Gjelaj v Ludde***, 281 AD2d 211, 721 NYS2d 643 [1st Dept 2001]). Although plaintiff alleges that she no longer plays tennis and that she refrains from certain household activities because they give her back pain, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendants' motion for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: April 4 2007

Emily Pines
HON. EMILY PINES J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**