Short Form Order

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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

P R E S E N T:
HON. PAUL J. BAISLEY, JR., J.S.C.

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LISA ARQUER, an infant under the age of 14 years by her mother and natural guardian, LINDA ARQUER, JACQUELINE ARQUER, an infant over the age of 14 years by her mother and natural guardian, LINDA ARQUER, LINDA ARQUER, individually and LOUIS ARQUER,

Plaintiff,s

-against-

CHASING OSPRAYS, INC. and TAMMI BLAUBERG,

Defendants.

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INDEX NO.: 28110-2003

CALENDAR NO.: 200602151MV

MOTION DATE: December 18, 2006
ADJ. DATE: March 13, 2007

MOT. NO.: 005 MOT D

PLAINTIFFS' ATTORNEY:
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Upon the following papers numbered 1 to 28 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18-26; Replying Affidavits and supporting papers 27-28; it is,

ORDERED that this motion by the defendants for summary judgment dismissing the claim for damages on behalf of plaintiffs, LINDA ARQUER and JACQUELINE ARQUER, because of their failure to meet the serious injury threshold as defined under the Insurance Law §5102(d) as well as to dismiss the claim for punitive damages is considered under CPLR 3212 and is decided as follows:

This action is for personal injuries suffered in a rear end collision by LINDA ARQUER and her daughters, JACQUELINE and LISA. Defendants allege that LINDA and JACQUELINE have failed to establish a serious injury as defined under the Insurance Law. LINDA and JACQUELINE ARQUER each claim that they were unable to perform substantially all of the material acts which constitute their daily activities for 90 days during the 180 days immediately following the accident; that they each suffered a permanent loss of use of a body function or system; and or a significant limitation of use of a body function or system.

LINDA ARQUER took herself to the hospital emergency on the day of the accident, October 23, 2003, complaining of back and neck pain. X-rays and CT scans were taken and she was released. She treated with Dr. Bernhard Sengstock, a chiropractor, twice a week until April 15, 2004. She also treated with a physical therapist, a physiatrist, an orthopedist, and an acupuncturist. She received a

lumbar MRI on November 24, 2003 which revealed a posterior bulging L5-S1. An MRI of the cervical spine performed on December 1, 2003 revealed a reversal of the normal cervical lordosis, and disc bulging at C3-4. She was confined to her bed for two days after the accident. She complains that ever since the accident, when she is menstruating, she is unable to perform her daily activities due to back pain.

Defendants counter with the sworn report of an examining orthopedist. The examination took place on March 1, 2006. His diagnosis was resolved cervical and lumbar sprain. He noted that he reviewed the MRIs but did not comment on the results. Defendant also submits the sworn report of an examining neurologist who saw LINDA ARQUER on March 13, 2006. He found no neurological injury. He also had reviewed the MRIs without comment.

Plaintiff proffers the sworn MRI reports of the cervical and lumbar spine; the sworn report of her treating chiropractor, who states that she sustained a permanent partial disability as a result of her underlying causally related structural disc injuries; as well as his sworn report of an examination which took place on February 7, 2007 which recites the range of motion tests which were performed. He found a 13% restriction in the cervical spine and a 6% restriction in the lumbar spine and recommended treatment 2 -3 times a month.

Under the law in an action to recover for personal injuries resulting from an automobile accident, plaintiff has the burden to set forth a *prima facie* showing of serious injury within the meaning of the Insurance Law §5102 (d). Whether the burden has been met is initially a matter of law for determination by the court (*Licari v. Elliott* 57 N.Y.2d 230, 455 N.Y.S.2d 570). As the moving party, a defendant initially has the burden to establish that the plaintiff did not sustain a serious injury within the meaning of the statute. A defendant who submits admissible proof that a plaintiff has a full range of motion and that he or she suffers from no disabilities has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), despite the existence of an MRI report which shows herniated or bulging discs (*Meely v. 4 G's Truck Renting Co., Inc.*, 16 A.D.3d 26, 789 N.Y.S.2d 277). This holding naturally follows from the rule that the 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. The case law requires objective proof of both the pain and the limitation of movement. Proof of a disc herniation alone without objective proof of limitation of movement is insufficient to meet the threshold (*Uber v. Heffron*, 286 A.D.2d 729, 730 N.Y.S.2d 174; *Descovich v. Blieka*, 279 A.D.2d 499, 718 N.Y.S.2d 870); as is a doctor's observations of pain accompanying by reduced flexion unless accompanied by objective proof such as x- rays, MRIs, straight-leg or Laseque tests, and any other similarly recognized tests or quantitative results based on a neurological examination (*Grossman v. Wright,* 268 A.D.2d 79, 707 N.Y.S.2d 233).

With respect to LINDA ARQUER, the defendants met their initial burden shifting the burden to the plaintiff. Plaintiff's presentation of the sworn MRI reports and the affidavit of her treating chiropractor is sufficient to raise an issue of fact with respect to a permanent partial disability. The fact that there is a gap in treatment from April 2004 until the recent examination in February 2007 is explained by a cessation of insurance coverage and the palliative nature of continued treatment (*Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380, 830 N.E.2d 278). However, plaintiff does not present any proof to raise an issue of fact that she was incapacitated for 90 days immediately following the accident (*Toure v. Avis Rent A Car Systems, Inc.* 98 N.Y.2d 345,746 N.Y.S.2d 865, 774 N.E.2d 1197). Her testimony as to her intermittent incapacity does not substantiate her inability

to perform substantially all of her daily activities for at least 90 days.

JACQUELINE ARQUER did not seek hospital care after the accident but instead sought treatment for neck, middle back and left shoulder pain from Dr. Howard C. Green and Dr. Bernhard Sengstock, chiropractors at Universal Health & Rehabilitation, beginning on November 5, 2003. She treated with them until March 31, 2004. It is stated that treatment was discontinued due to the cessation of no fault benefits and because further treatment would no longer be beneficial. She was examined by Dr. Ahmed Elemam, a physiatrist, on January 20, 2004, who opined myofascial pain syndrome, cervical area; possible cervical disk herniations; and bilateral shoulder sprain/sprain. He recommended that an MRI of the cervical spine be done. She saw Dr. Jonathan E. Dashiff, an orthopedist, on November 19, 2004. Jacqueline testified that following the accident she was confined to her home for one or two days and does not remember missing school. No reports of X-rays or MRIs are included, though the medical reports suggest that such tests were recommended and performed.

Defendants present the sworn report of their examining orthopedist who examined Jacqueline on March 1, 2006 and who opines resolved cervical, lumbrosacral strain and resolved bilateral shoulder contusion. The sworn report of defendants examining neurologist which exam took place on March 13, 2006 opines that there are no neurological injuries. Accordingly, defendants have met their initial burden. Plaintiff's submissions fail to raise an issue of fact as she has not submitted the results of any MRIs or X-rays to corroborate her chiropractor's finding of limitation of movement. Neither does she submit any proof that she was unable to engage in substantially all of the material acts which constitute her usual and customary daily activities. Accordingly, summary judgment dismissing her claim is granted.

Regarding the request for punitive damages, it is admitted that defendant driver of the other vehicle, TAMMI BLAUBERG, pled guilty to driving while intoxicated as a result of this accident. Further, defendant testified that this was her second conviction for driving while intoxicated within a two-year period. Punitive damages may be awarded when the defendant's conduct has a high degree of moral culpability. The conduct need not be intentional and it is sufficient if it is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others *(Rinaldo v. Mashayekhi*, 185 A.D.2d 435, 585 N.Y.S.2d 615). While driving while intoxicated is insufficient by itself to justify the imposition of punitive damages (*Deon v. Fortuna,* 283 A.D.2d 388, 724 N.Y.S.2d 450), the trier of the facts may consider the level of intoxication, the speed of the vehicle and the circumstances of the accident when determining to award punitive damages.

Here, the only proof proffered is that defendant pled guilty to driving while intoxicated. This is insufficient to support a claim for punitive damages. Accordingly, defendants have met their initial burden on a motion for summary judgment. It is noted that her blood alcohol was not taken at the scene by the police and there is no testimony that she was behaving erratically. Plaintiffs have not met their burden to submit proof in admissible form to raise an issue of fact that defendant's conduct was in fact reckless. The claim for punitive damages is dismissed.

Date: May 16, 2007

HON. PAUL J. BAISLEY, JR.
J.S.C.

_____ **FINAL DISPOSITION** __X___ **NON-FINAL DISPOSITION**