SHORT FORM ORDER

INDEX No. 02-18720
CAL. No. 06-02853-MV

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-6-07
ADJ. DATE 3-29-07
Mot. Seq. # 001 - MD

STEPHANIE LYNN CICCONI, Plaintiff, - against - CHARLES K. JOHNSON, DUSTIN P. JOHNSON and ENEBI RAMOS, Defendants.	ROSENBERG & GLUCK Attorneys for Plaintiff 1176 Portion Road Holtsville, New York 11742 ABAMONT & ASSOCIATES Attorneys for Defendants Johnson 200 Garden City Plaza, P.O. Box 9250 Garden City, New York 11530-9250 ENEBI RAMOS, Pro Se 102 7th Avenue Holtsville, New York 11742

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 14 - 25; Replying Affidavits and supporting papers 26 - 27; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendants Charles K. Johnson and Dustin P. Johnson pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint of plaintiff Stephanie Lynn Cicconi, on the issue of liability based upon the emergency doctrine, and on the issue that, pursuant to Insurance Law § 5102(d), plaintiffs' injuries do not meet the serious injury threshold, opposed by plaintiff, is denied in its entirety.

This is an action premised upon the alleged negligence of defendants arising out of an automobile accident which occurred on September 4, 1999 at 1:30 a.m. on Express Drive South, Town of Brookhaven. Dustin Johnson was the operator of the motor vehicle registered to Charles Johnson at the time of the accident (plaintiff's exhibit A). Plaintiff was a passenger seated in the rear of the vehicle and defendant Enebi Ramos was a passenger seated in the front passenger seat of the vehicle at the time of the accident.

Defendants Charles K. Johnson and Dustin P. Johnson seek an order granting summary judgment on the issue of liability, arguing that they are entitled to an order dismissing the complaint against them in that there was an emergency that caused the accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented ***(Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment ***(Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***(Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact." (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form ***(Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790[1979]).

In support of their request for summary judgment on the issue of liability, defendants have submitted unsigned, unsworn copies of the deposition transcripts of plaintiff and defendant Dustin Johnson; copy of the summons and complaint, answer and demands served by the Johnson defendants; copy of the verified bill of particulars; a video tape; plaintiff's discovery response; copy of the reports of orthopedist Frank D. Oliveto, M.D., dated June 28, 2006; examination report of Dental Consulting of New York, dated November 6, 2006; and the Islandia MRI report dated March 29, 2005.

In reviewing defendants' submissions, it is determined by this Court that defendants have not met their burden of demonstrating by admissible evidence that they are entitled to an order granting summary judgment on the issue of liability based upon the emergency defense, or otherwise. Testimony given by defendant Dustin's Johnson at his examination before trial (defendants' exhibit J) on July 26, 2004 differs from the statements in the MV 104 Police Accident report and sworn statements made by defendants Dustin Johnson and Enebi Ramos at the time of the accident (plaintiff's exhibit A). These inconsistencies raise factual issues and preclude an order granting summary judgment on the issue of liability.

The MV 104 Police Accident Report sets forth that "Operator states he was eastbound on Express Drive South in the left lane when he came upon a tree branch in the road. States he swerved around it, went into a spin and skidded off roadway into trees and brush." In his sworn statement dated September 3, 1999, defendant Dustin Johnson wrote the following, " I was driving in the left lane and I couldn't see until about 20 yards in front of me a branch about three feet in length. My reaction was to immediately swerve and the girl in the passenger seat besides me had grabbed the wheel and I had jammed the brakes

and swerved around the branch and did a complete 180 degrees into the trees and bushes and I ended up completely facing the other way deep into the bushes."

However, the following testimony was given by defendant Dustin Johnson on July 26, 2004, at his examination before trial (defendant's exhibit E):

at page 18:

Q. But at the time the accident occurred, your vehicle left the roadway?
A. Yes.
Q. Before that occurred, just before that occurred, did anyone else in the vehicle do anything that contributed to the happening of the accident?
A. Enebi had pulled my arm and the steering wheel.
Q. When you say she pulled your arm, which arm did she pull?
A. My right arm.
Q. Did she say anything before she pulled your right arm?
A. I recall her saying, "Let me drive, let me drive."

at p. 20:

Q. When she pulled on your right arm, what if anything, did you do?
A. I jammed on the brakes because the steering wheel had been pulled pretty forcefully.
Q. When you say the steering wheel was pulled forcefully, was the steering wheel pulled forcefully to the right?
A. Clockwise. I guess to the right.
Q. Did she say anything to you while she pulled on your right arm?
A. No.
Q. For how long a period of time did you feel her pulling on your right arm?
A. A split second.

at page 21:

Q. What if anything happened to your vehicle when she pulled on your arm?
A. It began to--spun out immediately after hitting the brake.
Q. When you say you hit the brakes, I think you used the word jammed on the brakes?
A. Yes.
Q. Does that mean you applied the brakes as forcefully as you could?
A. Yes.
Q. When you applied the brakes as forcefully as you could, did the car skid at all?
A. It immediately spun out as I hit the brakes.
Q. When you say it "spun out," can you tell me which direction the car spun?
A. Counterclockwise.
Q. Can you tell me, using degrees or however you can describe it, how far the car spun counterclockwise before something else happened?
A. Two 360s.

at page 20-21:

Q. As the car spun around counterclockwise doing those 360s did it leave the roadway?
A. Yes

at page 24:

Q. Did your vehicle impact with anything before it came to a rest?
A. A tree and the fence.
Q. How would you describe the impact with the tree; light, medium, heavy, or something else?
A. Pretty heavy.

Further into the examination before trial, defendant Dustin Johnson was asked if he gave a statement at the scene of the accident (p.31). He answered, "Yes." When asked if there was anything that obstructed his vision out the front of your vehicle that night, he answered, "No, there was not" (p.31). When asked if there was a branch out in the roadway, he answered, "No" (p.31). When asked if he swerved his vehicle to the left, he replied, "No" (p.31). When asked if he told the policeman verbally that there was a branch on the roadway, he replied, "I don't remember" (p.31). When asked if he told the policeman that he could only see 20 yards in front of you, he replied, "I don't remember" (p.31). When asked, "Did you ever tell the policeman that you removed the tree branch from the roadway, he replied, "Yes"' (p.31).

Plaintiff testified at her examination before trial on July 26, 2004. When she was asked (p.19):
Q. From the time you left your home up until the time the accident occurred, did you see any altercations between Dustin and/or Enebi?
A. No.
Q. Did you ever hear her make any comments that she wanted to drive the car?
A. No.
Q. Did you ever see her reach over and attempt to grab the steering wheel?
A. Yes.
Q. Did she give any indication as to why she was grabbing the steering wheel?
A. Yes.
Q. Why?
A. We were talking about one of my friends, who recently passed away, and she said nothing was going to happen, and she thought she was being funny and grabbed the steering wheel.

Defendant Enebi Ramos gave a signed statement on September 4, 1000 (plaintiff's exhibit A), which states "We were driving down the road when out of no where a bag of leaves or something with leaves coming out of it appeared. Justin went and tried to go around it and somewhat lost control of the car. Out of reaction when he lost control, I grabbed the wheel to regain control of the car and all I remember is hearing the brakes and screams. We flew into a bunch of trees. Dustin got us all out of the car and drove the car out of the bushes. When the accident happened, even wearing my seat belt I hit the dashboard and window and injured my right leg and chest."

New York has long recognized the "emergency doctrine" which provides that when a person is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, he or she will not be held liable upon a finding that he or she took reasonable and

prudent action in the emergency context. While it is often a jury question whether a person's reaction to an emergency was reasonable, summary resolution is possible when the individual presents sufficient evidence to support the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate issue of fact on the issue (***Ward v Cox,*** 2007 NY Slip Op 2026; 2007 NYApp Div, Lexis 2883).

In the instant action, summary resolution is not possible as there are factual issues concerning how the accident actually happened based upon the inconsistencies in defendant Dustin Johnson's statement and his testimony at his examination before trial, the statement of defendant Enebi Ramos, and the testimony of plaintiff at her examination before trial. Defendant Ramos's statement set forth that Dustin Johnson somewhat lost control of the car when he went around the leaves on the road. She then states she grabbed the wheel to regain control of the car. In this scenario, defendant driver lost control of the car prior to defendant Ramos grabbing the wheel when he was avoiding the leaves or branch, if the branch or leaves did in fact exist on the roadway. Defendant driver states she grabbed his right arm and the wheel and said "Let me drive, let me drive." This would possibly have him losing control because of her grabbing the wheel. There are additional factual issues concerning, but not limited to, defendant Dustin Johnson's actions, such as the reasonableness of jamming on the brakes and whether this caused the car to spin out of control, and his actions concerning how he handled the vehicle before it began to spin, and when it began to spin. Defendant Dustin Johnson has not presented any evidence to support the reasonableness of his actions to demonstrate entitlement to an order granting summary judgment due to the existence of factual issues on how the accident even happened, and due to credibility issues based upon conflicting stories. These factual and credibility issues are to be determined by the trier of fact, and preclude summary judgment.

Accordingly, that part of motion (001) by defendants Charles Johnson and Dustin Johnson which seeks an order granting summary judgment on the issue of liability based upon the emergency doctrine is denied.

Defendants also seek an order granting dismissal of the complaint, arguing plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

Plaintiff has pleaded the following injuries, inter alia, resulting from the within accident: cervical strain; chronic cervical pain with radicular symptoms; cervical radiculopathy; chronic right shoulder pain/tendonitis; myalgia and myositis NOS; upper arm trauma; shoulder trauma; lumbar radiculopathy; lumbar strain; chronic postraumatic myofascitis; myofascitis chronic pain syndrome; fibromyalgia myofasc (sic); pain in the left knee.

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which results in 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."

The term "significant" as it appears in the statute has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [2nd Dept 1982]).

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 "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 [2nd Dept 1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***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]).

In support of this part of their application, defendants have submitted, *inter alia*, a copy of the pleadings; verified bill of particulars; transcripts of the examination before trial of plaintiff, and defendant Dustin Johnson; a surveillance tape; response to stipulation; reports of orthopedist Frank Oliveto, M.D.; report of Dental Consulting of New York; MRI report of the lumbar spine.

The report of Dr. Oliveti, dated October 6, 2004, submitted by defendants, indicates in part, that plaintiff is a twenty two year old female who is 5 feet tall and weighs 120 pounds, that she was a passenger wearing a seat belt involved in a motor vehicle accident in which the automobile struck trees and poles. She was taken to the hospital and injured her neck, right shoulder, mid and lower back and left knee. She sees her physician and was treated with therapy 2-3 times a week for 2 years, is followed monthly by her neurologist and is treated with anti-inflammatory medication including Bextra and Tylenol. She states complaints of left temporal headaches, neck pain with motion and no radiation of pain, right shoulder pain with motion with pain radiating to the right upper extremity, upper and lower back pain accentuated with bending and lifting, and occasional left knee pain with weight bearing. She had physiotherapy for six weeks for the left knee pain.

Dr. Oliveti performed a physical examination. With regard to the cervical spine, he set forth that there was full range of motion on flexion, extension, right and left lateral rotation, right and left lateral flexion, however, he did not quantify his findings and did not set forth the normal. He found no weakness

in grasp in either upper extremity, and found the biceps, triceps, brachial radialis reflexes were equal and symmetrical with no motor or sensory deficit.

Examination of the right shoulder revealed full range of motion on flexion, extension, abduction and adduction, internal and external rotation, but he did not quantify his findings or set forth the normals. He did state that the claimant stated complaints of some subjective discomfort with motion of the right shoulder, and neurologically, she was intact.

Examination of the left shoulder revealed full and painless range of motion on flexion, extension, abduction and adduction, internal and external rotation, but he did not quantify his findings or set forth the normals. Examination of plaintiff's mid back revealed full range of motion on flexion, extension, right and left lateral rotation, right and left lateral flexion of the thoracic spines with no spasm or tenderness or discomfort in the mid-back area with motion of the mid-back. However, he did not quantify his findings or set forth the normals.

Examination of plaintiff's lower back revealed full range of motion of the lumbosacral spine with full flexion, extension, right and left lateral rotation, right and left lateral flexion of the lumbosacral spine with no spasm or tenderness, but the claimant did state complaints of subjective right paralumbar spinal musculature discomfort with motion of the lower back. Again, the findings were not quantified and normals were not set forth.

Examination of the left knee revealed full flexion, extension, with negative McMurray, negative drawer sign, no laxity, no neurovascular deficit, no palpable masses, no patellofemoral grating with motion of the left knee.

Dr. Oliveti's final orthopedic diagnosis was that of cervical and thoracolumbosacral strain, contusion of the right shoulder, and contusion of the right knee, objectively resolved and healed. He commented that she sustained the foregoing as a result of the accident of September 4, 1999, and that she is able to resume normal activities with no restrictions.

Another examination was performed by Dr. Oliveti on June 28, 2006 (moving defendants' exhibit G), who indicated plaintiff was being seen by a neurologist every three months, and is on Mobic, Ultracet, Kepra and Flexeril. She complained of neck pain with motion with pain radiating to both upper extremities, right shoulder pain with motion, upper and lower back pain accentuated with exertion which is not relieved in the supine position and not accentuated with coughing and sneezing and the pain does radiate to both lower extremities. She also states her left knee gives way occasionally, and she has discomfort with walking.

Upon examination of the cervical spine, he found the range of motion to be subjectively limited to 80% of normal and that she stated complaints of subjective paracervical spinal muscular discomfort with motion. There was no tenderness or spasm noted and flexion was noted to be 60 degrees (75 degrees normal), extension 30 degrees (40 degrees normal), right lateral flexion 35 degrees (45 degrees normal), left lateral flexion 35 degrees (45 degrees normal), right rotation 35 degrees (70 degrees normal), left rotation 55 degrees (70 degrees normal). Biceps, triceps, brachioradialis reflexes were equal and

symmetrical with no motor or sensory deficits of either upper extremity. There was no weakness in grasp of either upper extremity with no thenar, hypothenar or interosseous atrophy of either upper extremity. Bilateral arm and forearm measurements were taken and were equal.

Examination of the right shoulder revealed subjective guarding with motion with flexion at 90 degrees (170 normal), abduction 90 degrees (170 degrees normal), adduction 30 degrees (30 degrees normal), external rotation 90 degrees (90 degrees normal).

Examination of the left shoulder revealed full and painless range of motion with findings quantified.

Examination of the thoracic spine revealed range of motion to be subjectively limited to 80% normal with subjective parathoracic muscular discomfort with motion with no tenderness or spasm noted, and flexion 60 degrees (75 degrees normal), extension 30 degrees (40 degrees normal), right lateral flexion 25 degrees (30 degrees normal), left lateral flexion 25 degrees (30 degrees normal), right rotation 30 degrees (35 degrees normal), and left rotation 30 degrees (35 degrees normal). Patellar and Achilles reflexes were equal and symmetrical with no motor or sensory deficit of either lower extremity, and negative straight leg raising of both lower extremities, with no evidence of atrophy of either lower extremity with equal bilateral measurements.

Examination of the left knee revealed full range of motion with subjective discomfort with flexion 150 degrees (150 degrees normal), extension 0 degrees (0 degrees normal), with no patellofemoral grating and no effusion or masses.

Examination of the right knee revealed full and painless range of motion with flexion 150 degrees (150 normal), extension 0 degrees (0 degrees normal), negative McMurray, negative drawer sign, no laxity or effusion and no palpable masses or patellofemoral grating with motion of the right knee.

Dr. Oliveti's final orthopedic diagnosis was cervical and thoracolumbosacral strain syndrome secondary to motor vehicle accident of September 4, 1999, objectively resolved and healed; contusion right shoulder and left knee secondary to the motor vehicle of September 4, 1999, objectively resolved and healed. Dr. Oliveti found no evidence of disability and no need for further treatment or follow up care. He stated her prognosis is excellent and she is able to resume normal activities with no restrictions. There were no pre-existing conditions noted.

The report of defendants' examining dentist, John G. Esposito, DDS (defendants' exhibit H), revealed there was a negative oral and maxillofacial examination, but she did have a history of a neurological diagnosis of trigeminal neuralgia, diagnosed by Dr. Mendelsohn and treated with Keppra 500 mg b.i.d. with success.

There were no neurological reports of any examining neurologist submitted by the moving defendants.

Defendants' exhibit I contains the report of the MRI of the lumbar spine dated March 29, 2005 and

reveals posterior disc bulges at the L 2-3, L3-4 and L4-5 levels, each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally. There are no reports submitted by defendants commenting on the MRI reports.

The video tape of plaintiff (defendants' exhibit D) is submitted to show plaintiff was involved in lyrical, tap dance, ballet, hip hop and jazz in June 1998; and tap dance, hip hop, jazz, ballet in June 1999; and ballet, lyrical, tap dance in June 2000, before and after the accident. It is axiomatic that summary judgment requires issue-finding rather than issue determination and that resolution of issues of credibility is not appropriate (***Heller v Trustees of the Town of East Hampton,*** 166 AD2d 554, 560 NYS2d 836 [2nd Dept 1993]) By asking this Court to consider the video and determine that plaintiff does not have a serious injury, defendants are asking this Court to make a factual determination or resolve the issue of whether plaintiff sustained serious injury. In that this Court is limited to issue finding rather than issue determination, this Court cannot make that issue determination by reviewing the tape. The tape also goes to the issue of credibility, and this Court is not to make determinations of credibility on a motion for summary judgment, as set forth above.

Although counsel for defendants argues plaintiff did not seek medical care for a period of two weeks after the accident, it is noted that plaintiff testified at her examination before trial (defendants' exhibit C) that after the accident her parents took her to Stony Brook Hospital, where she presented with complaints of pain in her right shoulder, her neck, back, a concussion, and left knee pain. She was given a cervical collar to wear, which she stated she wore daily for a month, including when she slept, following the accident. She then followed up with Dr. Studley. After the accident she was prescribed Bextra, Flexeril, Vioxx and Celebrex. At the time of the deposition, she was taking Bextra every day. After the accident, she was confined to home for about three weeks to a month. Prior to this accident, she never injured any parts of her body that were injured in this accident, and since the accident, she has not reinjured any parts of her body that were injured in the accident. She testified that she has pain in her neck on a daily basis, back on a daily basis, in her right shoulder on a daily basis, and her left knee occasionally.

Plaintiff also testified that following the accident, she could no longer dance and perform the way she had been able to before the accident. She was an amateur dancer who performed in shows and dance contests. The accident affected her dancing in that she's not as mobile, can't do most of the moves, has to sit out, can't enjoy it the way that she used to. Prior to the accident she performed in about seven or eight shows a year, three or four in the year following the accident, and one that year of her deposition. She performed ballet, lyrical, tap, jazz and hip hop. However, she has since stopped dancing.

In reviewing defendants' submissions, it is determined that defendants have demonstrated prima facie entitlement to an order granting summary judgment on the issue of whether plaintiff sustained serious injury. The burden now shifts to plaintiff to demonstrate the existence of material issues of fact.

In opposing the motion, plaintiff has submitted, inter alia, a copy of the MV 104 Police Accident Report with annexed statements of defendants Johnson and Ramos; MRI report of plaintiff's lumbar spine, dated March 29, 2005; affirmation of neurologist Dr. Frederic Mendelsohn, M.D.; report of Dr. Mitchell Ehrlich, M.D.; report of Dr. Shafi Wani; and deposition transcript of plaintiff dated September

25, 2005.

Dr. Ehrlich has affirmed his letter to Dr. Dowd (plaintiff's exhibit G) wherein he advises Dr. Dowd that Stephanie Cicconi was seen in his office on September 10, 1999 for an initial physical therapy evaluation for diagnosis of cervical and lumbar sprains as well as possible internal derangement of the left knee. Upon examination, her cervical range of motion was grossly 25% throughout, lumbar range of motion 25% throughout, reflexes 2+ all four extremities, strength 4/5 throughout with the exception of the right and left iliopsoas which equals 3+/5 and the left quadriceps which equal 3+/5. Left knee revealed a positive valgus stress test with an audible clunk noted during testing. On gait, it is noted patient does not heel strike on left and walks with a flexed knee. Physical therapy records are contained in this exhibit as well.

Dr. Wani performed an neurological consultation and plaintiff has submitted the report dated October 10, 2000, and electrodiagnostic studies of October 12, 2000 and October 18, 2000 (plaintiff's exhibit H). Dr. Wani sets forth that there is no prior history of trauma. Examination revealed 2+ stiffness and tenderness of the right cervical, shoulder, chest and arm muscles on the right side, 1+ stiffness and tenderness on the left side, neck motion rotation right 45/70, left 30/70, extension 45/90, and flexion normal. Examination also revealed 1+ stiffness and tenderness of the right lumbar and right lower extremity muscles, 2+ stiffness and tenderness of left lumbar and left lower extremity muscles noted. Left lateral knee tenderness is also present. Straight leg raising: supine-right 60/90, left 60/90; sitting-right 70/90, left 70/90. League sign was difficult to evaluate. Lumbar motion: flexion 45/90, extension 15/45, lateral flexion-right 15/45, left 15/45.

The affirmation of Dr. Frederic Mendelsohn, M.D. (plaintiff's exhibit C), sets forth that Ms. Cicconi was an accomplished dancer at the time of the accident, dancing in recitals and group competitions, and after the accident, she had to limit her participation and eventually gave up dancing in 2003 due to her neck, back and right shoulder injuries. She presented to Dr. Mendelsohn on March 14, 2005, having been followed by Dr. Wani since the accident for her complaints of low back pain, neck pain, left knee pain, right shoulder pain and pain radiating down her left leg. Dr. Mendelsohn sets forth that Dr. Wani consistently found limited range of motion of Ms. Cicconi's lumbar spine and cervical spine and positive straight leg raising tests over a four year period following the accident. Upon examination, Dr. Mendelsohn found her muscle strength and power in the right upper extremity was 4 over 5 with a give-way quality due to shoulder pain. Straight leg raising was positive on the left. Examination of the extremities revealed a positive Tinel's and Phalen's right more than left, evidencing a mechanical injury to Ms. Cicconi's right shoulder. Her deep tendon reflexes were decreased in the left ankle reflex, which constituted objective evidence of either a disc herniation or bulge in the lumbar spine. He concluded there was a mechanical injury to her right shoulder with a possible brachial plexus injury and entrapment. He also concluded that due to her positive straight leg raising and decreased left ankle reflexes that Ms. Cicconi sustained either disc herniations or bulges, which to a reasonable degree of medical certainty, were causally related to the accident. Due to her failure to respond to treatment, Dr. Mendelsohn stated he sent her for MRI's of her lumbar spine on March 25, 2005 which revealed posterior disc bulges at L 2-3, L 3-4, L 4-5 with encroachment on the thecal sac. There was no evidence of degeneration or any pre-existing conditions as the discs were well-hydrated and their height well-maintained, establishing that these disc bulges were traumatic in nature. An EMG on April 5, 2005 revealed bilateral C 5-6

radiculopathy and bilateral L 5-S1 radiculopathy. It is Dr. Mendelsohn's opinion based upon a reasonable degree of medical certainty that these injuries are causally related to the accident , and the limited range of motion of the cervical spine is directly correlated with her bilateral C 5-6 radiculopathy, as is the limited range of motion of the lumbar spine and positive straight leg raising tests directly correlated with her disc bulges at L 2-3, L 3-4, and L4-5 and bilateral L 5-S1 radiculopathy.

On January 31, 2007, Dr. Mendelsohn again examined plaintiff and set forth quantified findings as follows: lumbar spine-flexion 60 degrees with pain (normal 80 degrees), extension 15 degrees with pain (normal 20-30), side bending right 15 degrees with pain (normal 20-30 degrees), side bending left 15 degrees with pain (normal 20-30 degrees), rotation right 20 degrees with pain (normal 30-45 degrees), rotation left 30 degrees (normal 30-45). Dr. Mendelsohn stated this testing was objective and the results of this testing demonstrated a significant impairment of Ms. Cicconi's lumbar range of motion and to a reasonable degree of medical certainty, are directly correlated wit her disc bulges at L 2-3, L 3-4, L 4-5 and the bilateral L5-S1 radiculopathy. Examination of the cervical spine on that day revealed the following quantified findings: flexion 40 degrees with pain (normal 60 degrees), extension 15 degrees with pain (normal 30 degrees), side bending right 25 degrees (normal 30 degrees), side bending left 20 degrees with pain (normal 30 degrees), rotation right 50 degrees (normal 90 degrees), and rotation left 60 degrees (normal 90 degrees). Dr. Mendelsohn stated that the testing was objective and the results demonstrated a significant impairment of Ms. Cicconi's cervical range of motion and to a reasonable degree of medical certainty, are directly correlated with her bilateral C 5-6 radiculopathy. Examination of her right shoulder reveal the following quantified findings: flexion 120 degrees (normal 180 degrees), abduction 90 degrees (180 normal), internal rotation 65 degrees (normal 70 degrees), external rotation 60 degrees (normal 70 degrees).

Dr. Mendelsohn stated the objective findings at this examination, including significant limited range of motion of the cervical and lumbar spine, the MRI report of the lumbar spine, and EMG studies of the upper and lower extremities further confirm to a reasonable degree of medical certainty the causal relationship between Ms. Cicconi's lumbar disc bulges, lumbar radiculopathy and cervical radiculopathy and the accident of September 4, 1999. He also stated that her continuing limited range of motion of the cervical and lumbar spine and symptomatology, which has persisted now for approximately 7½ years since the accident further confirm to a reasonable degree of medical certainty that Ms. Cicconi's lumbar disc bulges, lumbar radiculopathy and cervical radiculopathy are permanent in nature.

A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (***Hussein et al v Harry Littman et al,*** 287 AD2d 543, 731 NYS 2d 477 [2nd Dept 2001]). Disc bulges have been set forth by Dr. Mendelsohn at L 2-3, L 3-4, L 4-5 as well as bilateral L5-S1 radiculopathy. Dr. Mendelsohn has made objective quantified limitation of motion of plaintiff's cervical and lumbar spine and right shoulder as set forth above, and has opined with a reasonable degree of medical certainty that the injuries set forth in his report were causally related to the accident of September 4, 1999, and that based upon their being present for seven and one half years, that they are permanent injuries. Therefore, plaintiff has met her burden of coming forth with evidence in admissible form which raises factual issues with the findings set forth by defendants' examining physician, Dr. Oliveti on the issue that plaintiff has sustained serious and permanent injury.

Accordingly, that portion of defendants' motion (001) which seeks an order granting summary judgment on the issue of whether plaintiff sustained serious injury within the meaning of Insurance Law 5102(d) is denied.

Dated: MAY 2 1 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**