SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

CHARLINA GRANDISON, as mother and natural guardian of infant, ROYAL GRANDISON, CHARLINA GRANDISON, as mother and natural guardian of the infant, JOYAL GRANDISON and CHARLINA GRANDISON, individually,

Plaintiff,

-against-

RNJIT SING, PETER SMITH and THE METROPOLITAN SUBURBAN BUS AUTHORITY,

Defendants.

SUBMISSION DATE: 9/20/07
INDEX No.: 15079/05

MOTION SEQUENCE #3,4

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	XX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by defendants, Peter Smith and the Metropolitan Suburban Bus Authority, for an Order of this Court, awarding them summary judgment dismissing the complaint of the plaintiffs', Charlina Grandison, Royal Grandison and Joyal Grandison, on the grounds that there are no triable issues of fact as to liability is granted.

Cross motion by defendant, Ranjit Singh, for an Order of this Court, awarding him summary judgment and dismissing the complaint on the grounds that plaintiffs have not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is also granted.

This action arises out of an accident that occurred on September 27, 2004 at approximately 2:50 p.m. at the intersection of Old Country Road and County Seat Drive, in Mineola, New York. Plaintiff, Charlina Grandison, and her children, the infant

plaintiffs, Royal and Joyal Grandison, were passengers on a bus owned by defendant, Metropolitan Suburban Bus Authority ["Bus Authority"] and operated by defendant, Peter Smith ["Smith"]. The accident occurred as the bus on which plaintiffs were traveling [the "subject bus"] was involved in a collision with a vehicle owned and operated by defendant, Ranjit Singh ["Singh"]. Defendant Singh testified at deposition that he parked his car on Old Country Road. Approximately, 15-20 seconds later, as he opened the door to exit his car, the car door came into contact with the subject bus (*Singh Tr.*, pp. 13, 17-19). Singh testified that at the time of the collision, his body was not entirely outside his vehicle. He stated that the car door was opened just enough for one man to exit (*Id.*, pp.19-20). At deposition, defendant Singh described the impact as "some light scratch happened. It was not that much heavy" (*Singh Tr.*, p. 20). He stated that he never the saw the subject bus at any time prior to the impact, or at the time of the impact (*Id.*, p. 54). Significantly, although defendant could not recall what part of the bus was struck, he testified that at the time of impact the entire length of the bus has already passed his vehicle (*Id.*, p. 23).

Defendant, Peter Smith, testified at his deposition that he was traveling west in the right lane of Old Country Road. He stated that he did not feel any type of impact as a result of the collision (*Smith Tr.*, p. 19). He stated that he was traveling 5-10 miles per hour and learned of the impact after, having passed Singh's vehicle, he checked his mirrors and saw that the door of the Singh vehicle had made contact with the rear passenger side wheel well of the bus (*Id.*, pp. 13, 17).

Charlina Grandison, in bring this action on behalf of herself and her two children, alleges that she and her children were thrown from the rear passenger seats of the bus and as a result of the accident sustained serious personal injuries. Charlina Grandison testified at deposition that her first indication that an accident had occurred was when she heard a boom (*Charlina Tr.*, p. 117). She testified that she too did not feel an impact to the bus (*Id.*, pp. 135-136). Plaintiff claims that as a result of the accident, her body jerked forward and she struck the pole on her right-hand side inside the bus (*Charlina Tr.*, pp. 17-18). The police were called to the accident and they issued a summons to defendant, Ranjit Singh, for having illegally parked in a crosswalk (Vehicle and Traffic Law §1202[a][2][b]; *Singh Tr.*, p. 28). All three plaintiffs were taken by ambulance to Winthrop University Hospital where, plaintiff, Charlina Grandison, had unspecified x-rays taken (*Id.*, p. 27). Plaintiff, Charlina Grandison was discharged the same day without admission. However, two days following her accident, she felt nausea, dizziness, and vomiting as a result of which she presented to Mercy Hospital (*Charlina Tr.*, pp. 35-37).

Plaintiff, Charlina Grandison, 41 years old at the time of her accident, claims that as a result of the subject accident, she sustained, *inter alia*, disc herniation at L-5/S-1; posterior disc herniation extending to flatten the ventral thecal sac and narrow the left foramina; posterior disc bulges at L3/4 and L4/5; head injury; and concussion (*Motion*, Ex. J [Bill of Particulars], ¶2). She contends in opposition to defendants' motion for summary judgment, that the injuries she sustained as a result of this accident fall only within one of the nine categories of the serious injury statute: "significant limitation of use of a body function or system" (*Aff in Opp.*, ¶ 6). Plaintiff does not claim that her injuries fall under any other category of Insurance Law §5102(d). Thus, any other category of serious injury other than those alleged will not be considered by this Court herein (*Melino v. Lauster*, 195 AD2d 653, 656 [3rd Dept. 1993] *affd* 82 NY2d 828 [1993]).

This Court also notes at the outset that plaintiff, Charlina, in opposition to defendants' motions, seeks to withdraw the serious injury claims of the infant plaintiffs, Royal and Joyal Grandison.

In that respect, it is noted that CPLR 3217 governs voluntary discontinuances and gives this Court broad discretion in determining motions to discontinue. Generally, discontinuance is not granted if substantial rights have accrued or the adversary's right would be prejudiced thereby (*Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 AD2d 857 [1st Dept. 1964]). Obviously, neither defendant objects to the proposed withdrawal of the petitions herein. It is the children who arguably would be prejudiced by the withdrawal. However, based upon the papers submitted for this Court's consideration, including the affirmed medical reports of Dr. Wayne Kerness, an Orthopedic Surgeon who conducted independent medical examinations of the infant plaintiffs on June 6, 2006 and the affirmed reports of Dr. Warren Cohen, M.D., a neurologist who examined each infant plaintiff on June 6, 2006 for an independent neurological examination, this Court finds that the infants' injuries, as documented in defendants', Bus Authority and Smith's summary judgment proof, do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). Thus, a review of the papers presented herein confirms that no substantial rights have accrued in this case. Therefore, this Court, in its discretion, will not compel the guardian of the infant plaintiffs to go forward with their serious injury claims (CPLR 3217).

LIABILITY

Defendants, Bus Authority and Smith's motion for summary dismissal of plaintiffs' complaint on the ground that there are no triable issues of fact as to liability is granted. There is no evidence on this record that the defendants, Smith and Bus Authority, were negligent or that they committed any act or

omission of negligence constituting the proximate cause of the plaintiff's injuries.

In support of their motion, defendants, Smith and Bus Authority submit that as evidenced by the summons issued to co-defendant, Ranjit Singh, they are entitled to summary judgment dismissal of plaintiffs' complaint. It is undisputed herein that defendant Singh violated the Vehicle and Traffic Law when he opened his car door into moving traffic when it was clearly unsafe to do so (Vehicle and Traffic Law §1202[a][2][b]; *Singh Tr.*, p. 28). As the party opening the car door, Singh had a duty to see what was there to be seen and to ascertain whether it was "reasonably safe" for him to exit his vehicle. Instead, Singh testified at his deposition that he never saw the 40-foot bus prior to the impact. The deposition testimony of the defendant, bus operator also makes it clear that the impact between the door of Singh's vehicle and the right rear tire of the bus occurred after the front of the bus had passed the defendant's vehicle. Thus, there was no open door that defendant, Smith, could have observed and/or avoided (*cf. Ferguson v. Gassman*, 229 AD2d 464 [2nd Dept. 1996]). There is also no evidence in this case that defendant, Smith, operated his vehicle negligently.

In light of defendants', Smith and Bus Authority's showing of entitlement to judgment as a matter of law, the burden shifts to the parties opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

Defendant, Ranjit Singh's sole submission, in opposing Smith and Bus Authority's summary judgment motion, is his counsel's affirmation wherein the attorney states that Singh testified at deposition that he stopped his car, looked out the side and never saw the bus that impacted his vehicle at any time prior to the impact.

It is black letter law that in a CPLR 3212 motion for summary judgment an affirmation by an attorney who has no personal knowledge of the facts has no evidentiary value (*Zuckerman*, supra; *Stahl v. Stralberg*, 287 AD2d 613 [2nd Dept 2001]). Thus, the conclusory and speculative claims of Singh's attorney in his affirmation in opposition to defendant, Bus Authority and Smith's motion for summary judgment are insufficient to raise triable issues of fact (*Miller v. James*, 262 AD2d 617 [2nd Dept 1999]; *Campo-Joseph v. King*, 277 AD2d 193 [2nd Dept 2000]).

Moreover, in addition, in opposition, defendant, Singh, does not even attempt to refute the fact that he opened his car door directly into the rear tire well of the subject bus, when it was

traveling straight and with the right of way. Thus, Singh, has failed to support with the requisite evidentiary demonstration his contention that a triable issue of fact exists as to whether defendants, Bus Authority and Smith could have and should have taken steps to avoid the impact. Singh's unsupported and conclusory statements that there are questions of fact as to whether the movants, Bus Authority and Smith, used reasonable care in failing to avoid the happening of the accident and whether this was a proximate or contributing cause of the accident are entirely meritless and are not sufficient to raise an issue of fact.

In response to the Bus Authority and Smith's prima facie showing, plaintiffs have also failed to raise a triable issue of fact. In opposing defendants' motion, although counsel for plaintiffs submit the deposition transcripts of the parties herein, he has not submitted any other admissible evidence rebutting the movants' prima facie showing of entitlement to judgment as a matter of law. As stated above, plaintiffs' counsel's affirmation alone has no evidentiary value in opposing defendants' prima facie showing of entitlement to judgment as a matter of law (*Zuckerman*, supra; *Stahl v. Stralberg*, supra). The conclusory and speculative claims of plaintiffs' attorney in his affirmation in opposition are insufficient to raise triable issues of fact on the issue of liability(*Miller v. James*, supra; *Campo-Joseph v. King*, supra).

The record here is undisputed that the front of the bus had already passed defendant, Singh's vehicle when Singh opened his car door and impacted the rear tire well of the bus. It is further undisputed that Singh never saw the subject bus either when he opened his car door or at the time of impact. Thus, whether or not Singh looked out the side of his vehicle prior to opening his door is irrelevant because ultimately, he opened his car door impacting the rear tire well of the bus.

Plaintiffs' counsel's failure to submit any evidence to support their contention that notwithstanding Singh's negligence, defendants, Smith and Bus Authority *also* negligently and carelessly collided with the door of Singh's vehicle, does not establish the existence of triable issues of fact requiring a trial of the action. Based on a review of the record herein, this Court notes that it is undisputed that the impact occurred *after* the front of the bus had passed Singh's vehicle. Plaintiffs have failed to convince this Court, via admissible evidentiary proof, that there exists a material triable issue of fact that defendant, Smith could have done something to avoid the impact. Thus, plaintiffs' counsel's arguments that the bus operator, Smith, failed to see an open car door or the driver exiting the car are entirely meritless.

Similarly, plaintiffs' counsel's arguments that the defendants violated various sections of the VTL are also unavailing as there

is no evidence to support the allegation that defendant, Smith, as the bus operator, performed a forbidden act (VTL §1101), overtook a vehicle on the left proceeding in the same direction (VTL §1122); traveled outside his lane of travel (VTL §1128); drove in a caravan or motorcade (VTL §1129); or was speeding (VTL §1180). Furthermore, it is beyond dispute that the within accident did not involve a pedestrian or a domestic animal (VTL §1146). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Billordo v. EP Realty Associates*, 300 AD2d 523 [2nd Dept. 2002]).

Accordingly, defendants, Bus Authority and Smith's motion for summary judgment dismissal of plaintiffs' complaint on the grounds that there are no triable issues of fact as to liability is granted.

SERIOUS INJURY

Defendant, Ranjit Singh's cross motion for summary judgment dismissal of the complaint on the grounds that plaintiffs have not satisfied the serious injury threshold of Insurance Law is also granted.

As stated above, plaintiff, Charlina Grandison, in her opposition to defendants' motions, claims that her injuries fall into only one of the nine categories of serious injury: namely, "significant limitation of use of a body function or system" (*Aff in Opp.*, ¶6).

In moving for summary judgment, defendants must make a prima facie showing that plaintiff did not sustain a "serious injury" with the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez*, 4 NY3d 566 [2005]; *see also Grossman v. Wright*, 268 AD2d 79, 84 [2nd Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v. Lauster*, supra). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of

the plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems, 98 NY2d 345*, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d at 353 [2002]). However, the sworn MRI and CT scan tests and reports also must also be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems*, supra). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566).

When, as in this case, a claim is raised under the "significant limitation of use of a body function or system" category, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*). A minor, mild or slight limitation is, however, insignificant within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright*, supra at 83).

Here, in support of his motion to establish plaintiff's lack of a serious injury, defendant Singh relies exclusively on defendants, Smith and Bus Authority's proof. Thus, defendant "submits," *inter alia*, the affirmed report of Dr. Wayne Kerness,

M.D., an orthopedic surgeon, who performed an independent orthopedic examination of the plaintiff on June 6, 2006; the affirmed report of Dr. Warren Cohen, M.D., a neurologist, who performed an independent neurological examination of the plaintiff on June 6, 2006; and, the affirmed report of Dr. Robert Tantleff, M.D., who performed an independent radiological review of the MRI of plaintiff's lumbar spine on November 30, 2005.

Insofar as Dr. Tantleff's independent radiological review dated November 30, 2005 of plaintiff's MRI taken on November 17, 2004, almost two months from the date of the accident, are not accompanied by any of his observations during a physical examination of the plaintiff, said report does not constitute competent evidence. Accordingly, the aforesaid MRI report will not be considered by this Court on the instant motion (*Toure v. Avis Rent A Car Systems*, supra).

Dr. Kerness's medical report states, in pertinent part, as follows:

Cervical Tests:
Tenderness Paraspinals: Negative
Tenderness Suprascapular: Negative
Spasm: Negative
There were no surgical scars noted.

Cervical Spine: Range of Motion in Degrees

	Claimant	Normal
Flexion	45°	45°
Extension	45°	45°
Lateral Flexion [R]	45°	30-45°
Lateral Flexion [L]	45°	30-45°
Rotation [R]	60°	60°
Rotation [L]	60°	60°

Lumbar Tests
There is no tenderness noted.
Lasegue: Negative.
Spasm: Negative.
There are no surgical scars noted.
Supine SLR was negative to the left and right.
Reverse seated SLR was negative to the left and right.

Lumbar Spine: Range of Motion in Degrees

	Claimant	Normal
Flexion	80°	90°
Extension	30°	30°
Lateral Flexion [R]	30°	30°
Lateral Flexion [L]	30°	30°
Rotation [R]	30°	30°

Rotation [L]	30°	30°

Restriction is self-imposed.

* * *

DIAGNOSIS:
- Resolved lumbar spine sprain/strain.

The Verified Bill of Particulars did not mention a cervical injury, however the claimant did report this today in her history of alleged injuries. There was no objective evidence of a cervical injury on today's physical exam. Comment regarding an alleged head injury is deferred to the appropriate specialty.

TREATMENT: Based on my examination, it is in my opinion that the claimant is not in need of Physical Therapy or follow-up Orthopedic care.

DISABILITY/ADL's: Based on my examination, the claimant has no disability or restriction of ADL's related to the accident at this time.

WORK STATUS: She reportedly was unemployed, however, based on my examination, the claimant can work at this time in any occupation for which she is qualified.
(*Motion*, Ex. P)

Similarly, Dr. Cohen's independent neurological review, dated June 6, 2006, also concludes, in pertinent part, as follows:

CERVICAL SPINE: Cervical Thoracic Tests:

Foraminal Compression/Spurling Test:	Negative
Jackson's Compression Test:	Negative
Shoulder Depression Test:	Negative
Soto-Hall Test	Negative
Cervical Distraction Test:	Negative

Tenderness:	None
Trigger Points:	None
Spasm:	None

Cervical Spine: Range of Motion in Degrees

	Claimant	Normal
Flexion	40°	45°
Extension	40°	45°
Lateral Flexion [R]	35°	30-45°
Lateral Flexion [L]	35°	30-45°
Rotation [R]	50°	60°
Rotation [L]	50°	60°

Restriction appears self-imposed: Yes

THORACIC SPINE:
Thoracic spine movement with normal excursion and without pain. No spasm or tenderness noted.

LUMBO-SACRAL SPINE: Lumbar Tests:
Forward Flexioin: Negative
Bechterew/Sitting Boot Test: Negative
Straight Leg Raising (Supine)
Right: Negative
Left: Negative
Straight Leg Raising (Sitting)
Right: Negative
Left: Negative
Kernig Test: Right: Negative
Left: Negative
Lumbar tenderness: None
Sacral tenderness: None
Trigger Points: None

Lumbar Spine: Range of Motion in Degrees

	Claimant	Normal
Flexion	60°	90°
Extension	20°	90°
Lateral Flexion [R]	30°	30°
Lateral Flexion [L]	30°	30°
Rotation [R]	30°	30°
Rotation [L]	30°	30°

Restriction appears self-imposed: Yes
* * *
DIAGNOSIS:
Lumbar sprain; resolved.
Headache and dizziness by self-report, with no clinical evidence of vestibular dysfunction.
Neurologic exam reveals no neurologic deficit and there is no evidence of radiculopathy or traumatic neuropathy.

DISABILITY/ADL's: There is disability at this time. There are no restrictions of ADL's at this time. There is no permanency. (*Motion*, Ex. Q)

Based on the foregoing, this Court finds that defendants have submitted ample proof in admissible form that the plaintiff, Charlina Grandison, did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposing defendant's motion, plaintiff submits her own deposition testimony and the sworn "initial consultation" medical

report of Dr. William B. Jones, MD, who examined the plaintiff, Charlina Grandison, on September 10, 2007.

The affirmed medical report of Dr. Jones dated September 10, 2007, indicates that he performed a one-time examination of the plaintiff on September 10, 2007, approximately three years post accident and after the motion for summary judgment was made. Thus, Dr. Jones's medical report, cannot be accorded any weight on these grounds alone (*Medina v. Reis*, 293 AD2d 394 [2nd Dept. 1997]; *Ceruti v. Abernathy*, 285 AD2d 386 [1st Dept. 2001]). Also, in his report, Dr. Jones states that the plaintiff was referred to him by her lawyer. Thus, there is also no evidence that Dr. Jones was the plaintiff's treating physician.

Dr. Jones also does not address nor attempt to rebut the findings that plaintiff suffered from chronic degenerative disc disease (*Pommels v. Perez*, supra at 575-575; *Montgomery v. Pena*, 19 AD3d 288, 290 [1st Dept. 2005]). Accordingly, his opinions as to causation, permanence, and significance are herewith rejected as conclusory, speculative and seemingly tailored to meet the statutory definition (*Arjona v. Calcano*, 7 AD3d 279 [1st Dept. 2004]).

Therefore, plaintiff's failure to come forward with evidence that she sustained a significant limitation of use of a body function or system compels this Court to grant defendant, Ranjit Singh's motion for summary judgment dismissal of plaintiff's complaint for failure to satisfy the serious injury threshold of that category of Insurance Law §5102(d).

Settle Judgment on Notice.

This decision constitutes the order of the court.

Dated: NOV 26 2007

J.S.C.

KENNETH A. DAVIS