

Tejerina v Poncet

2010 NY Slip Op 31623(U)

June 23, 2010

Sup Ct, Nassau County

Docket Number: 14011/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

OSCAR TEJERINA AND SUSAN WONG,

Plaintiff(s),

-against-

LEE PONCET AND ROBERT PONCET,

Defendant(s).

_____ x

Index No. 14011/08

Motion Submitted: 5/19/10

Motion Sequence: 001, 002

The following papers read on this motion:

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

Plaintiffs, Oscar Tejerina and Susan Wong, move, pursuant to CPLR § 3212, for an Order of this Court, granting them summary judgment on the issue of liability. Defendants, Lee Poncet and Robert Poncet, cross move, for an Order of this Court, seeking summary judgment dismissal of plaintiff Susan Wong's claims on the ground that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

The motion and cross motion are determined as herein set forth below.

This personal injury action arises out of a motor vehicle accident that occurred near the intersection of Glen Cove Road and Cedar Swamp Road in Nassau County on March 24, 2008 at approximately 9:25 p.m. As can best be determined from the papers submitted herein, the accident occurred as the vehicle owned by defendant Robert Poncet and being operated by defendant Lee Poncet struck the vehicle being operated by plaintiff Oscar

Tejerina in the rear. Plaintiff Susan Wong was a front seat passenger in the vehicle being operated by Tejerina.

At his sworn oral examination before trial (EBT), plaintiff Tejerina testified that he was stopped at a red light at the intersection for approximately 10 seconds before the light changed to green. Plaintiff stated that he was stopped behind another vehicle and that when the light turned green, all the vehicles on Glen Cove Road traveling north, including the plaintiff, began to advance forward. It was at this time that the defendants struck plaintiffs' vehicle in the rear. Notably, plaintiff testified that the impact occurred while he was still south of the intersection.

This Court finds it very interesting that the plaintiffs fail to provide a complete copy of the sworn testimony of the defendant operator, Lee Poncet. Specifically, pages 17 through 19 of Poncet's testimony, presumably describing how the accident took place and the events and circumstances surrounding the impact, are omitted from the deposition transcript furnished to this Court. The pages preceding the omitted page 17 discuss the events leading up to the impact and beginning on page 20, the defendant testified as to his actions and omissions in avoiding the impact.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923[1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Guiffrida v. Citibank*, 100 N.Y.2d 72, 790 N.E.2d 772, 760 N.Y.S.2d 397 [2003]). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio*, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). Without presenting a complete record, consisting of admissible evidence including a sworn deposition testimony of the defendant, this Court simply cannot find as a matter of law, that there are no issues of material facts surrounding, *inter alia*, defendants' alleged negligence, such that the plaintiffs' burden on the motion for summary judgment on the issue of liability shifts to the defendants (CPLR 3212[b]; *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284, 650 N.Y.S.2d 772 [2d Dept., 1996]).

Accordingly, plaintiffs' motion for summary judgment on the issue of liability is denied.

Defendants' cross motion, for an Order of this Court, seeking summary judgment dismissal of plaintiff Susan Wong's claims on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is however granted.

Both plaintiffs claim that they were seriously injured as a result of this accident; yet, defendants only seek summary judgment relief on the issue of serious injury with respect to plaintiff Susan Wong's injuries. Thus, insofar as is relevant for the purposes of the within cross motion, in her bill of particulars, Susan Wong, claims that, as a result of this accident, she has sustained: C5/6 and C6/7 posterior disc herniations with ventral CSF impression; C3/4 and C4/5 posterior subligamentous disc bulges; L4/5 and L5/S1 posterior disc bulges; and, straightening of the normal lumbar lordosis. At her EBT, Susan Wong testified that prior to this accident, in November 2007, she was involved in another accident in which she injured her neck, back and shoulders. Further, she testified that at the time of the subject accident, she was employed at St. Francis Hospital as a nurse extender and a phlebotomist. She stated that she missed only two weeks of work after the accident. She testified that following her accident, she presented to Glen Cove Hospital and was discharged on the same day. Three days following her accident, however, she, while in the course of her employment at St. Francis Hospital, passed out and was taken to the Emergency Room where she was examined and discharged the same day.

In moving for summary judgment, defendants must make a prima facie case showing that plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommells v. Perez*, 4 N.Y.3d 566, 830 N.E.2d 278, 797 N.Y.S.2d 380 (2005); *see also Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 [2d 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*, 82 N.Y.2d 828, 625 N.E.2d 589, 605 N.Y.S.2d 4 [1993]). 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 A.D.2d 544, 588 N.Y.S.2d 366 (2d Dept., 1992); *Covington v. Cinnirella*, 146 A.D.2d 565, 566, 536 N.Y.S.2d 514 [2d Dept., 1989]). In support of a claim that the plaintiff has not sustained a serious injury, a defendant 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 A.D.2d 268, 587 N.Y.S.2d 692 [2d 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 N.Y.2d 813, 588 N.E.2d 76, 580 N.Y.S.2d 178 [1991]). Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 [1st Dept., 2002]).

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 N.Y.2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002) stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Systems, supra* at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems, supra*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 [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, supra*).

Plaintiff Susan Wong has failed to identify the specific categories of the serious injury statute into which her injuries fall. Nevertheless, whether she can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 [1st Dept., 2002]). Based upon a plain reading of the papers submitted herein, it is obvious that plaintiff's injuries do not fall within the first six categories of "serious injury:" to wit, death; dismemberment; significant disfigurement; a fracture; loss of a fetus; or, permanent loss of use of a body organ, member, function or system.

Furthermore, the record is also devoid of any evidence that the plaintiff's injuries fall within the 90/180 category of Insurance Law §5102(d). In fact, plaintiff's claims that her injuries fall within the "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" category is refuted by her own sworn testimony wherein she states that following the subject accident, she only missed two weeks of work after the accident and that she was back at work within the first three days after the accident because it was at her job at St. Francis Hospital that she fainted and was, for the second time, taken to the Emergency Room there. Further, there is no evidence on this record that shows that Susan Wong was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" as a result of this accident (*Licari v. Elliott*, 57 N.Y.2d 230, 441 N.E.2d 1088,

455 N.Y.S.2d 570 (1982); *see also Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 [3d Dept., 2002]).

Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, “permanent consequential limitation of use of a body organ or member”; and, “significant limitation of use of a body function or system.”

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyley*, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot supra* at 236.; *Scheer v. Koubeck*, 70 N.Y.2d 678, 512 N.E.2d 309, 518 N.Y.S.2d 788 [1987]). A minor, mild or slight limitation shall be deemed “insignificant” within the meaning of the statute (*Licari v. Elliot, supra; see also Grossman v. Wright*, 268 A.D.2d 79, 83, 707 N.Y.S.2d 233 [2d Dept., 2000]).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, 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 (*see 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 the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*id*).

In support of their motion, defendants submit, *inter alia*, the following: the unsworn unaffirmed emergency room records from Glen Cove Hospital dated March 24, 2008; the unsworn unaffirmed emergency room records from St. Francis Hospital dated March 27, 2008; the sworn affirmation, dated May 7, 2009, of Dr. Issac Cohen, M.D. FAAOS, a Board Certified Orthopedic Surgeon, who performed an independent orthopedic evaluation of the plaintiff, Susan Wong, on May 6, 2009; the sworn affirmation, dated August 13, 2009 of Dr. Steven Ender, D.O., Board Certified in Neurology and Electromyography, who performed an independent neurological examination of the plaintiff Susan Wong on April 29, 2009 and again on August 13, 2009; and the sworn affirmed MRI report, dated April 11, 2009, of Dr. David A. Fisher, M.D., a Board Certified Radiologist, who reviewed the radiology films dated February 14, 2008 and April 14, 2008 of the plaintiff Susan Wong’s cervical and lumbar spine.

It is noted at the outset that defendants’ proof submitted in support of their motion for summary judgment, including the affirmed MRI report of Dr. David Fisher, constitutes

competent admissible evidence (*Dioguardi v. Weiner*, 288 A.D.2d 253, 733 N.Y.S.2d 116 (2d Dept., 2001); *Beyel v. Console*, 25 A.D.3d 636, 811 N.Y.S.2d 687 [2d Dept., 2006]). Notably, plaintiff's unsworn unaffirmed emergency room records are also admissible as part of defendants' proof (*Mantila v. Luca*, 298 A.D.2d 505, 748 N.Y.S.2d 511 (2d Dept., 2002); see also *Pagano v. Kingsbury*, *supra* at 271). Insofar as Dr. Fisher avers that he personally reviewed the *actual* MRI films of the plaintiff, said report constitutes admissible medical evidence herein (*Dioguardi v. Weiner*, *supra*; *Beyel v. Console*, *supra*). However, in that regard, said MRI reports fail to document any serious or permanent injury as a result of this accident. Specifically, the MRI of plaintiff's cervical spine dated February 14, 2008, i.e., pre-subject accident, shows: "Mild diffuse degenerative changes, most pronounced at the C5/6 and C6/7 levels." Another MRI of plaintiff's cervical spine dated April 14, 2008, less than a month after the subject accident shows: "Mild diffuse degenerative changes redemonstrated, most pronounced as the C5/6 and C6/7 levels." Similarly, the MRI of plaintiff's lumbar spine dated February 14, 2008, i.e., pre-subject accident, shows: "Mild diffuse degenerative changes, most pronounced at the L4/5 and L5/S1 levels." Another MRI of plaintiff's lumbar spine dated April 14, 2008, less than a month after the subject accident shows: "Mild diffuse degenerative changes redemonstrated, most pronounced as the L4/5 and L5/S1 levels."

Plaintiff's hospital records from the date of her accident and three days after her accident are not indicative of any permanent or serious injuries. Rather, plaintiff's hospital records from St. Francis Hospital indicate that the plaintiff was examined following her fainting spell three days after the accident and that a CAT scan of the brain was performed to rule out small underlying intracranial hemorrhage as a result of the subject accident. The plaintiff's CAT scan showed no intracranial bleed or acute large vessel infarcts. She was diagnosed with a "concussive syndrome" and discharged the same day. In light of the fact that all admissible objective test results are normal, a diagnosis of "concussive syndrome" standing alone does not constitute a serious injury within the meaning of "a permanent consequential limitation of use of a body organ or member", and/or "a significant limitation of use of a body function or system;" there is no objective evidence to support plaintiff's alleged injuries (*Franchini v. Palmieri*, 1 N.Y.3d 536, 537, 807 N.E.2d 282, 775 N.Y.S.2d 232 [2003]).

In his affirmation, Dr. Cohen also states, in pertinent part, as follows:

DIAGNOSIS:

1. Status post motor vehicle accident
2. Temporary exacerbation of preexistent degenerative cervical and lumbar spine complaints, improved.

DISCUSSION:

***In summary, at the time of this evaluation, it is my opinion that the claimant has recuperated satisfactorily well from the soft tissue complaints to the neck and back. She does have a significant history of a prior injury on 11/15/07 involving the cervical and lumbosacral spine area with bulges and herniation, as documented.

No specific medical records are available regarding that accident, but nevertheless, the claimant did have a trigger for recurrent pain into the cervical and lumbosacral spine area. She was treated on a symptomatic basis with satisfactory resolution of the complaints. The additional objective work up performed was essentially unremarkable and, in my opinion, at the time of this evaluation, no evidence of sequelae or permanency is documented. She has normal functional capacity of her neck, back and upper and lower extremities, but has some mild subjective complaints that cannot be clinically corroborated with an otherwise unremarkable physical examination. No evidence of disability or permanency related to this accident is documented.

Dr. Ender in his affirmation also states, in pertinent part, as follows:

Impression: Resolved cervical and lumbosacral paraspinal muscle strain. The claimant has a normal neurological examination. I find no residual neurological disability. She can continue working full time without restrictions. The claimant has subjective complaints of intermittent headaches and dizziness that are vague and do not appear to be related to any residual neurological sequela from her motor vehicle accident of March 24, 2008.

Taken in totality, the mere existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*Cerisier v. Thibiu*, 29 A.D.3d 507, 815 N.Y.S.2d 140 (2d Dept., 2006); *Albano v. Onolfo*, 36 A.D.3d 728, 830 N.Y.S.2d 205 [2d Dept., 2007]).

Having made a prima facie showing that the injured plaintiff did not sustain a “serious injury” within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants’ submissions by demonstrating a triable issue of fact that a “serious injury” was sustained (*see Pommels v. Perez, supra; see also Grossman v. Wright, supra*).

In opposition, the plaintiff submits, her own affidavit; the sworn affirmed narrative report of Dr. Kerin Hausknecht, M.D., Diplomate, American Board of Psychiatry and Neurology dated May 4, 2009, i.e. one year and two months after the date of the accident;

the sworn affirmed reports of Dr. Robert Diamond, M.D., a radiologist who personally reviewed the MRI films of plaintiff's lumbar spine dated April 14, 2008, cervical spine dated April 14, 2008, and right shoulder dated May 8, 2008; the sworn affirmed report of Dr. Dale Alexander, D.O. who examined the plaintiff on March 30, 2010; the sworn affirmed report of Jay Nathan, M.D., an orthopedic and hand surgeon dated May 1, 2008; and the affidavit of plaintiff's treating chiropractor, Dr. Cappell Mayreis, D.C., who first treated the plaintiff on March 26, 2008.

Dr. Diamond's affirmations referencing his personal review of the plaintiffs' MRI films of her lumbar spine, cervical spine and right shoulder fall short of constituting admissible medical evidence because he fails to causally relate his findings of the MRI studies to any trauma sustained as a result of this accident (*Chan v. Casiano*, 36 A.D.3d 580, 828 N.Y.S.2d 173 (2d Dept., 2007); *see also Albano v. Onolfo, supra*). This is particularly important in this case where the plaintiff was also involved in a prior motor vehicle collision only four months before this accident (in November 2007) (*Simon v. Econocraft Worldwide Mfg.*, 38 A.D.3d 303, 830 N.Y.S.2d 661 [1st Dept., 2007]).

Dr. Alexander's affirmation also fails to constitute admissible medical evidence herein. Notably, Dr. Alexander, who examined the plaintiff on March 30, 2010, fails entirely to provide any objective basis whatsoever for his conclusion that "Susan Wong will not be able to perform her usual occupational, recreational and social activities in a complete pain free manner" and "that Susan Wong has sustained permanent injury, as per my physical examination which included clinically significant restrictions of mobility of her spine." In the absence of any objective basis for these conclusions, including the range of motion measurements, this Court simply cannot find that the plaintiff has met the threshold significant limitation of use of a body function or system or permanent consequential limitation categories of Insurance Law §5102(d). Dr. Alexander's conclusions are not supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eycler, supra; Licari v. Elliot, supra; Scheer v. Koubeck, supra*). In the absence of any "quantification" of any loss of range of motion, Dr. Alexander's affirmation is clearly insufficient (*Bravo v. Rehman*, 28 A.D.3d 694, 814 N.Y.S.2d 225 [2d Dept., 2006]).

Dr. Nathan's report also fails to constitute admissible medical evidence herein. Dr. Nathan, an orthopedic and hand surgeon, states in pertinent part, as follows:

PHYSICAL EXAMINATION: On physical examination today regarding her right wrist and right arm, she has tenderness in both areas. She exhibits full range of motion of the wrist with a +/- Finklestein's sign. There is a negative Tinel's sign with a negative Phalen's test. She is grossly motor/sensory intact. She has a mildly positive impingement signs. She

lacks about 10 degrees of full flexion and 10 degrees of internal rotation. She has a mildly positive crossover sign. She has a negative drop-arm test, but a positive impingement sign.

First, it cannot be overlooked by this Court that nowhere in her bill of particulars does plaintiff claim that her wrist was at all injured as a result of this accident. Therefore Dr. Nathan's examination of her wrist is entirely irrelevant for the purposes of this motion.

Second, Dr. Nathan's evaluation that plaintiff "lacks about 10 degrees of full flexion and 10 degrees of internal rotation" is insufficient because not only does Dr. Nathan fail to indicate what part of plaintiff's body has a restricted range of motion but he fails to spell out the recorded range of motion and compare it to the normal range of motion. This is clearly insufficient as objective medical evidence (*Yashayev v. Rodriguez*, 28 A.D.3d 651, 812 N.Y.S.2d 367 (2d Dept., 2006); *Kouvaras v. Hertz Corp.*, 27 A.D.3d 529, 813 N.Y.S.2d 144 [2d Dept., 2006]).

For these reasons, the affidavit of plaintiff's treating chiropractor also falls short of raising a triable issue of fact. Mr. Mayreis states in his affidavit that he examined the plaintiff on March 26, 2008, two days after her accident where, upon "Examination of the cervical spine revealed tenderness and muscle spasm[,] Examination of the thoracic spine revealed tenderness with muscle spasm with trigger points in the thoracic region[, and] Examination of the lumbar spine revealed tenderness diffusely in the lumbar region." Mayeris further states that "Ms. Wong had significant restriction of mobility in the cervical and lumbar spine in all directions" (*Id*). Obviously, in the absence of any quantification or said range of motion and in the absence of any medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler, supra*; *Licari v. Elliot, supra*), Mayeris's affidavit is insufficient.

Plaintiffs' remaining proof also fails to raise an issue of fact as to whether the plaintiff sustained a serious injury within the meaning of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories of Insurance Law §5102(d).

In his narrative report, Dr. Hausknecht, states and opines, in pertinent part, as follows:

MECHANICAL EXAM: Examination of the cervical spine reveals areas of tenderness around C3 to C7 bilaterally. There is mild spasm around C4/5 and some trigger points in the bilateral trapezius muscle. Range of motion testing was evaluated in the cervical spine using a standard goniometer. She has restriction of mobility on right cervical rotation to 60 degrees (normal 80 degrees). There is restriction of mobility on left cervical rotation to 55 degrees (normal 80 degrees). There is restriction of mobility on cervical flexion to 25 degrees (normal 45 degrees). There

is restriction of mobility on cervical extension to 25 degrees (normal 35 degrees). There is restriction of mobility on left side bending to 35 degrees (normal 45 degrees).

Examination of the thoracolumbar spine reveals areas of tenderness and triggerpoints around L3/S1 bilaterally, there is no obvious spasm. She has normal posture. Range of motion testing was evaluated using a standard goniometer.

She has restricted mobility on lumbar flexion to 65 degrees (normal 90 degrees). There is restriction of mobility on lumbar extension to 10 degrees (normal 20 degrees). There is restriction of mobility on the right and left side bending to 20 degrees (normal 25 degrees).

Examination of the right shoulder reveals tenderness around the acromioclavicular region over the supraspinatus fossa.

She has painful limitation of mobility on internal and external rotation and difficulty fully abducting the arm. She has a positive impingement sign.

ASSESSMENT: On the basis of the history provided and physical examination, review of medical records and diagnostic testing results, I believe that as a consequence of the motor vehicle accident on March 24, 2008, Ms. Susan Wong has sustained the following injuries:

1. Traumatic cervical spine derangement.
2. Traumatic lumbar spine derangement.
3. Internal derangement of the right shoulder; rotator cuff tendinitis and impingement.
4. Mild concussion with loss of consciousness.

With a reasonable degree of medical certainty I believe the injuries described above are causally related to the motor vehicle [accident] on March 24, 2008.

As a result of the motor vehicle accident on March 24, 2008, Ms. Wong has sustained aggravated injury to her neck and lower back with clinical deterioration.

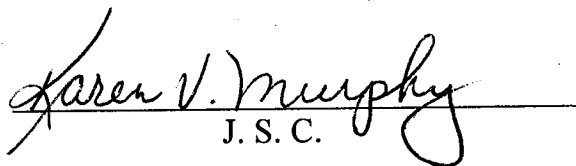
While at first blush, Dr. Hausknecht's report appears to sufficiently raise an issue of fact, it cannot be overlooked by this Court that this is the only admissible proof presented by the plaintiff. Dr. Hausknecht states in his report that he examined the plaintiff on May 4, 2009, i.e., more than one year and two months after the date of the accident. This is the only date for which Dr. Hausknecht offers an opinion as to his evaluation. In the absence of any medical proof in admissible form that is contemporaneous with the accident showing any

initial range of motion restrictions in her cervical or lumbar spine (*Li v. Woo Sung Yun*, 27 A.D.3d 624, 812 N.Y.S.2d 604 (2d Dept., 2006); *Bell v. Rameau*, 29 A.D.3d 839, 814 N.Y.S.2d 534 (2d Dept., 2006) and in the absence of any medical reports that are based upon a recent examination of the plaintiff (*Colon v. Vargas*, 27 A.D.3d 512, 811 N.Y.S.2d 755 (2d Dept., 2006); *Moore v. Edison*, 25 A.D.3d 672, 811 N.Y.S.2d 724 [2d Dept., 2006]), this Court finds that the evidence submitted by the plaintiff is insufficient to raise a triable issue of fact.

Therefore, defendants' cross motion for summary judgment dismissal of plaintiff Susan Wong's claims on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted. Susan Wong's claims against the defendants are therefore dismissed.

This shall constitute the decision and order of this Court.

Dated: June 23, 2010
Mineola, N.Y.


J. S. C.

ENTERED

JUN 30 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE