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SHORT FORM ORDER

INDEX No. 09-10773

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-23-10
ADJ. DATE 7-30-10
Mot. Seq. # 001 - MG
002 - XMG; CASEDISP

JASMINE SCOTT, an infant by her father and natural guardian, EDGAR CAMACHO, Plaintiff, - against - DOUGLAS PESERI and SAVERNA SCOTT, Defendants.	MELUCCI, CELAURO & SKLAR, LLP Attorney for Plaintiff 26 Broadway, 21st Floor New York, New York 10004 MICHAEL G. NASHAK, ESQ. Attorney for Defendant Douglas Peseri 15 Metro Tech Center, 19th Floor Brooklyn, New York 11201-3818 RUSSO, APOZNANSKI & TAMBASCO Attorney for Defendant Saverna Scott 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 26 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers 10 - 17 ; Answering Affidavits and supporting papers 18 - 22 ; Replying Affidavits and supporting papers 23 - 24; 25 - 26 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Saverna Scott for summary judgment dismissing the complaint (#001) is granted; and it is further,

ORDERED that the cross motion by the defendant Douglas Peseri for summary judgment dismissing the complaint (#002) is granted.

The instant action arises from a motor vehicle accident which occurred on March 15, 2008 at the intersection of Commack Road and Crooked Hill Road in Commack, New York. The accident occurred when a vehicle owned and operated by the defendant Saverna Scott collided with a vehicle owned and operated by the defendant Douglas Peseri. The infant plaintiff was a passenger in defendant Scott's vehicle at the time of the accident. The complaint alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, the bill of particulars alleges that she sustained serious and permanent injuries including C4-5 focal

bulge with impingement of neural canal; C5-6 focal bulge with impingement of neural canal; cervical and lumbar strain/sprain syndrome with myofascitis and radiculopathy; cephalgia; vertigo; left shoulder injury; reduced range of motion of the left shoulder; hip injury; left knee injury; rib injury, headaches, and dizziness. It alleges that the infant plaintiff was confined to bed for approximately one week and confined to home for approximately one month. It alleges that she missed approximately one week from school and was partially incapacitated from school for six weeks.

Defendant Scott now moves for summary judgment dismissing the complaint on the grounds that the infant plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant Peseri cross-moves for summary judgment dismissing the complaint on the same grounds.

A "serious injury" is defined as a personal injury which "results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Pagano v Kingsbury***, *supra*; *see also*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of her motion for summary judgment, defendant Scott submits, *inter alia*, the affirmation of Robert Israel, M.D. and the infant plaintiff's deposition testimony. In support of his

cross motion for summary judgment, defendant Peseri relies on the papers submitted by defendant Scott in support of her motion and further submits, *inter alia*, the affirmed report of Armand E. Abulencia, M.D., the affirmed report of Dinesh Shukla, M.D., and a "Student Sport Participation" form, dated August 27, 2008, which was purportedly filled out and signed by the infant plaintiff and her mother, and indicated that the infant plaintiff had no history of back injury, knee injury, and/or spine or limb deformity. The evidence submitted by the defendants was sufficient to meet their *prima facie* burdens of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Casella v New York City Transit Auth.***, 14 AD3d 585, 787 NYS2d 883 [2d Dept 2005]; ***Hodges v Jones***, 238 AD2d 962, 661 NYS2d 159 [1997]; ***Pagano v Kingsbury***, *supra*). In this regard, Dr. Israel performed an independent orthopedic examination on the plaintiff on December 18, 2009. At the time of his examination, the plaintiff alleged that, since the time of the accident, she continued to have pain in her neck, upper back, lower back, and left knee. Dr. Israel examined the infant plaintiff's cervical spine and found a normal lordosis, no tenderness, and no spasm. He performed the Cervical compression testing and Spurling testing and obtained negative results. He measured the range of motion of the plaintiff's cervical spine, compared it to normal values, and found it to be normal in all respects. Dr. Israel examined the infant plaintiff's thoracic spine and found normal kyphosis, no tenderness, and no spasm. Dr. Israel examined the infant plaintiff's lumbar spine and found the lordotic curve was normal, no spasm, and no tenderness. He performed Straight leg raising testing and found it to be bilaterally negative. He measured the range of motion of the plaintiff's lumbar spine, compared it to normal, and found it to be normal in all respects. Lastly, Dr. Israel examined the plaintiff's left knee and found no patella-femoral crepitus. He performed the McMurray test and obtained negative results. He performed the patella-femoral compression test and obtained negative results. He measured the range of motion of the infant plaintiff's left knee, compared it to normal, and found it to be normal. Dr. Israel concluded that the plaintiff sustained sprains of the cervical spine, thoracic spine, lumbar spine, and left knee, and that all such injuries had resolved. Based on his examination, Dr. Israel concluded that the infant plaintiff suffered no disability as a result of the accident, and that no treatment was reasonable or necessary. He asserted that the infant plaintiff was capable of scholastic activities, work activities, and activities of daily living, without restriction.

Dr. Abulencia examined the infant plaintiff on May 28, 2008. At that time, the infant plaintiff complained of pain to her neck, lower back, and left knee. Dr. Abuelencia examined these areas of the infant plaintiff's body and found that she sustained a cervical and lumbar sprain and a left knee contusion, but that there was no need for further therapy, testing or orthopedic treatment, and that the infant plaintiff could continue and/or resume her activities.

Dr. Shukla examined the plaintiff on June 27, 2008 and performed a neurological examination. Dr. Shukla averred that the infant plaintiff's neurological examination was normal. He concluded that the infant plaintiff was not disabled and could safely continue with her current activities. He determined that the plaintiff did not require physical therapy, neurologic treatment, diagnostic testing

or household help.

The infant plaintiff testified that she did not have any pain or discomfort immediately following the accident, but that she had pain in her back and neck the following morning. She testified that she was confined to her bed for approximately a week after the accident and was, thereafter, confined to her home, on and off, on weekends. She missed less than a week of school as a result of her injuries, and her absences were spread out. She also missed about two weeks from gym as a result of the accident. The infant plaintiff testified that she quit the step team, as a result of her injuries, but admitted that no doctor ever told her that she had to quit. The infant plaintiff admitted that she participated in the high school swim team for approximately a month commencing in August of 2008. She stopped participating after a month because her neck was hurting her. The infant plaintiff testified that she received physical therapy for approximately three months following the accident. She did not recall why she stopped receiving physical therapy. She testified that she also went to a chiropractor following the accident. She did not, however, recall why, when, or how long she received chiropractic treatment. The infant plaintiff did not recall the last time she visited a doctor with respect to her injuries, and believed the last doctor she visited was the physical therapist. The infant plaintiff testified that she currently has complaints of pain in her upper back and neck. She sometimes takes Tylenol to help with the pain. When asked about the other areas of her body to which she alleged injuries in her bill of particulars, the infant plaintiff testified that when the accident first occurred she had pain in her knee, shoulder, and hip, but that only her upper back and neck were currently injured The infant plaintiff further elaborated that her hips hurt her on and off for approximately a year following the accident, and occurred primarily following activity, and that her left knee pain went away in about a week.

Contrary to the plaintiff's contention, the evidence submitted was sufficient to demonstrate that the infant plaintiff did not sustain a serious injury to her shoulder, hip, ribs and head (*see generally*, ***Pacheco v Conners***, 69 AD3d 818, 894 NYS2d 782 [2d Dept 2010]; ***Sforza v Big Guy Leasing Corp.***, 51 AD3d 659, 858 NYS2d 233 [2d Dept 2008]).

In opposition to the defendants' prima facie showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra* at 350; ***Charley v Goss***, *supra*). The plaintiff failed to meet this burden.

In opposition to the motion and cross motion, the plaintiff submitted, *inter alia*, the infant plaintiff's emergency room records, an evaluation report and treatment records maintained by Jeffrey Perry, D.O., an evaluation report by Freddie M. Martin, M.D., an MRI report by Mark Shapiro, M.D., and the affirmed report of Jeffrey Perry, D.O., dated July 10, 2010. At the outset, the majority of the evidence submitted, including the infant plaintiff's emergency room records, Dr. Perry's evaluation report and treatment records, Dr. Martin's evaluation report and Dr. Shapiro's MRI report, is of no probative value because this evidence was uncertified and unaffirmed (*see* ***Grasso v Angerami***, 79

NY2d 813, 580 NYS2d 178 [1991]; ***Vasquez v John Doe # 1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]; ***McMullin v Walker***, 68 AD3d 943, 892 NYS2d 128 [2d Dept 2009]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]). The affirmed report of Dr. Perry, dated July 10, 2010, was also without probative value in opposing the motion to the extent that, in arriving at his conclusions, he relied on the unsworn MRI report authored by another physician (*see* ***Vasquez v John Doe # 1***, *supra*; ***Vickers v Francis***, *supra*). In any event, Dr. Perry's affirmed report was insufficient to raise a triable issue of fact. While it set forth findings indicating limitations in the infant plaintiff's range of motion in her spine based on a recent examination of her, neither he nor the plaintiff proffered competent objective medical evidence of the existence of a significant limitation in the plaintiff's spine that was contemporaneous with the subject accident (*see* ***Srebnick v Quinn***, 75 AD3d 637, 904 NYS2d 675 [2d Dept 2010]; ***Delarosa v McLedo***, 74 AD3d 1012, 904 NYS2d 715 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Milosevic v Mouladi***, 72 AD3d 1036, 898 NYS2d 870 [2d Dept 2010]).

Moreover, the evidence submitted, including Dr. Perry's affirmed report, failed to raise a triable issue of fact because it failed to adequately explain the gap in the infant plaintiff's treatment (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Collado v Abouzeid***, 68 AD3d 912, 890 NYS2d 326 [2d Dept 2009]; ***Rivera v Bushwick Ridgewood Props.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2d Dept 2009]).

In addition, the plaintiff failed to submit competent medical evidence that the injuries the infant plaintiff allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Vickers v Francis***, *supra*; ***Sainte-Aime v Suwai Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Based on the foregoing, the motion by defendant Scott for summary judgment dismissing the complaint, and the cross motion by defendant Peseri for the same relief, are granted.

Dated: 10/2/10

THOMAS F. WHELAN, J.S.C.