

Manay v Jones

2011 NY Slip Op 31396(U)

May 12, 2011

Supreme Court, Nassau County

Docket Number: 7014/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GAILLARD H. MANAY and FLORDELIZA M. MANAY,

Plaintiffs,

- against -

ROBERT L. JONES,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 7014/09
Motion Seq. No.: 01
Motion Date: 12/22/10

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting him summary judgment on the ground that plaintiffs did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiffs oppose defendant's motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiffs as a result of an automobile accident with defendant which occurred on September 27, 2008, at or near the intersection of Grand Avenue and Woodside Avenue, Baldwin, County of Nassau, State of New York. At the time of the accident, defendant was the owner and operator of a 2005

Dodge while plaintiff Gaillard H. Manay ("G.M.") was the operator of a 2007 Toyota that was owned by passenger Flordeliza M. Manay ("F.M."). Plaintiffs contend that their vehicle was violently struck in the rear by defendant's vehicle while stopped at the intersection and, a few seconds after the first impact, their vehicle was struck in the rear a second time by defendant's vehicle.

Plaintiff F.M. claims that, as a result of the impact from defendant's vehicle striking her vehicle, she was propelled forward and backward. As a result of the accident, plaintiff F.M. claims that she sustained the following injuries:

Cervical Derangement;

Cervical sprain/strain;

Mild reversal of the normally visualized cervical lordosis with the apex at the level of C4-C5. At this level, there is bulging of the disc material, which impresses upon the ventral surface of the thecal sac and encroaches upon, but does not clearly compress, the spinal cord;

Slightly less prominent bulging of disc material is appreciated at C5-C6;

Centrally located annular tear at L5-S1.

With respect to plaintiff G.M., he claims that he sustained the following injuries as a result of the accident:

Cervical Derangement;

Cervical Radiculitis;

Cervical sprain/strain;

Restriction of motion of the cervical spine;

Lumbar Derangement;

Lumbar sprain/strain;

Lumbar Radiculitis;

Restriction of motion of the lumbar spine;

Left Trochanteric Tendonitis.

Plaintiffs commenced the action with service of a Summons and Verified Complaint on March 31, 2009. Issue was joined on July 9, 2009.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of

the court is not to resolve issues but rather to determine if any such material issues of fact exist.

See Sillman v. Twentieth Century- Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957),

supra. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue.

See Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact

is presented. The burden on the court in deciding this type of motion is not to resolve issues of

fact or determine matters of credibility, but merely to determine whether such issues exist. *See*

Barr v. Albany County, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147

A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a “serious injury” as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a “serious injury.” *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

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 physicians or the unsworn reports of the plaintiff’s examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant’s proof, unsworn reports of the plaintiff’s examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (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 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests.

However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiffs claim that as a consequence of the above described automobile accident with defendant, they both have sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

- 1) a permanent consequential limitation of use of a body organ or member; (Category 7)
- 2) a significant limitation of use of a body function or system; (Category 8)
- 3) 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.(Category 9).

As previously stated, to meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, 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. *See Gaddy v. Eyley*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra*. A claim 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 can be made by an expert’s designation of a numeric percentage of a plaintiff’s loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra*. In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff’s limitation to the normal function, purpose and use of the affected body organ, member, function or system. *See id.*

Finally, to prevail under 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, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102(d)) “which would have caused the alleged limitations on the plaintiff’s daily activities.” *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A

curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." See *Licari v. Elliott, supra* at 236.

With these guidelines in mind, this Court will now turn to the merits of defendant's motion. The Court will address each individual plaintiff separately. In support of his motion with respect to plaintiff F.M., defendant submits the pleadings, plaintiffs' Verified Bill of Particulars, plaintiffs' Amended Verified Bill of Particulars, the transcript of plaintiff F.M.'s examination before trial ("EBT") testimony, plaintiff F.M.'s Somatosensory Evoked Potential ("SSEP") report prepared by Baldwin Medical Services, P.C. on November 5, 2008; the affirmed report of Isaac Cohen, M.D., who performed an independent orthopedic medical examination of plaintiff F.M. on July 7, 2010; the affirmed report of David A. Fisher, M.D., who reviewed plaintiff F.M.'s cervical spine MRI which was performed on November 21, 2008; the affirmed report of David A. Fisher, M.D., who reviewed plaintiff F.M.'s lumbar spine MRI which was performed on November 21, 2008; plaintiff F.M.'s Notice and Proof of Claim for Disability Benefits and plaintiff F.M.'s Employment Records from Mercy Medical Center.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. See *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movants' burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. See *Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d

Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Based upon this evidence, the Court finds that the defendant has established a *prima facie* case that plaintiff F.M. did not sustain serious injury within the meaning of New York State Insurance Law § 5102(d). Dr. Isaac Cohen, a board certified orthopedist, reviewed plaintiff F.M.'s medical records and conducted a physical examination of plaintiff F.M. on July 7, 2010. *See* Defendant's Affirmation in Support Exhibit H. Dr. Cohen examined plaintiff F.M. and performed quantified and comparative range of motion tests on plaintiff F.M.'s cervical spine, upper extremities, lumbosacral spine, lower extremities and left and right shoulders. The results of the tests indicated no deviations from normal. Dr. Cohen's diagnosis of plaintiff F.M. was "Soft tissue strains, cervical and lumbar spine areas, resolved." Dr. Cohen concluded, "[b]ased on the medical records provided, as a consequence of the accident of 9/27/08, the claimant sustained some mild soft tissue injuries for which she did not seek emergency room care, and was treated symptomatically for a number of months by the multi-specialty clinic documented. The objective work up performed was completely unremarkable which included MRI examination of the cervical spine and the lumbosacral spine areas, performed at South Nassau Communities Hospital. Today's objective examination is completely unremarkable with normal range of motion of the neck and back without any neurological deficits present. She did not lose any significant amount of time from work, and she has a completely normal functional capacity of the musculoskeletal system without any evidence of any functional limitation documented. The only positive finding on the current examination is the presence of a 4 ½ month pregnancy with an otherwise, unremarkable and completely normal functional capacity of both upper and lower extremities, cervical and lumbosacral spine areas. It is my opinion that

Ms. Manay sustained mild soft tissue injuries as a consequence of the accident of 9/27/08, that went on to heal uneventfully without evidence of active disability, sequelae or permanency documented. Prognosis is excellent.”

Dr. David A. Fisher, conducted an independent film review of the MRI of plaintiff F.M.’s cervical spine originally performed on November 21, 2008. *See* Defendant’s Affirmation in Support Exhibit I. With respect to his review of the cervical spine MRI, Dr. Fisher’s findings were “[t]he cervical vertebral bodies are normal in height and alignment. Disc spaces are well preserved. There is no evidence of disc herniation or annular disc bulge. The craniocervical junction and cervical cord are normal in appearance and there is no spinal stenosis or fracture. Impression: Normal study. Summary: At your request, I have reviewed an MRI of the cervical spine which was performed eight weeks following the date of the accident. This is a normal study. There are no disc herniations or bulges present. There is no radiographic evidence of recent traumatic or causally-related injury to the cervical spine.” Dr. Fisher, also conducted an independent film review of the MRI of plaintiff F.M.’s lumbar spine originally performed on November 21, 2008. *See* Defendant’s Affirmation in Support Exhibit J. With respect to his review of the lumbar spine MRI, Dr. Fisher’s findings were “[t]he lumbar vertebral bodies are normal in height and alignment. There are mild degenerative changes at the L5/S1 level. This is manifested by disc dehydration and a small posterior annular fissure. No herniations are seen. The remaining discs appear intact. The conus medullaris is normal in appearance. There is no evidence of spinal stenosis or fracture. Impression: Mild degenerative changes at L5/S1. Summary: At your request, I have reviewed an MRI of the lumbar spine which was performed eight weeks following the date of the loss. There is evidence of mild degenerative changes at the L5/S1 level. There are no disc herniations. The small posterior annular fissure noted at the

L5/S1 is compatible with the amount of degenerative change present. There is no clear radiographic evidence of recent traumatic or causally related injury to the lumbar spine.”

With respect to plaintiff F.M.’s 90/180 claim, defendant states that plaintiff F.M.’s employment record and her Notice of Proof of Claim for Disability Benefits Form establish that she did not sustain an injury that prevented her from performing substantially all of the material acts that constituted her customary daily activities for at least ninety (90) days of the one hundred eighty (180) days immediately after the accident. On her Notice and Proof of Claim for Disability Benefits Form, plaintiff F.M. indicated that, after the September 27, 2008 accident, she returned to work for one day on September 30, 2008. She then indicated on said Form that she missed twelve days of work from October 1, 2010 until October 13, 2010, at which time she returned to work. *See* Defendant’s Affirmation in Support Exhibit K. Defendant adds that plaintiff F.M.’s employment record at Mercy Medical Center states that the Center’s physician cleared plaintiff F.M. for work and indicates that she could return to work on October 13, 2010. *See* Defendant’s Affirmation in Support Exhibit L.

Defendant additionally referred to the EBT testimony of plaintiff F.M. in which she indicated that, other than lifting heavy objects, she has no physical limitations in performing daily activities. *See* Defendant’s Affirmation in Support Exhibit F.

Defendant also refers to the EBT testimony of plaintiff F.M. to show that, in said deposition, she admitted that she stopped receiving treatment for her alleged injuries in January 2009 because “the pain subsided at that point” and she “didn’t have any pain at that time after that.” *See id.* Defendant further submits that, during said EBT, plaintiff F.M. testified that at some time before the subject accident she injured her lower back while working as a nurse in England. She testified that, as a result of her prior back injury, she received physical therapy for

four or five months and that, after said prior injury, she did not work for approximately one month. *See id.*

Defendant also submits plaintiff F.M.'s Upper Extremities SSEP Report dated November 5, 2008 as proof that plaintiff F.M. did not sustain a "serious injury." Defendant states that "the negative result of the Somatosensory Evoked Potential ("SSEP") test performed on the nerves of plaintiff's upper extremities constitutes objective medical proof that plaintiff did not sustain a 'serious injury' to her cervical spine in the Accident. Specifically, Dr. David Lifschutz performed somatosensory nerve conduction tests on plaintiff's upper extremities and concluded that it was a '[n]ormal Median nerve SSEP study.'" *See* Defendant's Affirmation in Support Exhibit G.

In support of his motion with respect to plaintiff G.M., defendant submits the pleadings, plaintiffs' Verified Bill of Particulars, plaintiffs' Amended Verified Bill of Particulars, the transcript of plaintiff G.M.'s EBT testimony, plaintiff G.M.'s Somatosensory Evoked Potential ("SSEP") report prepared by Baldwin Medical Services, P.C. on November 5, 2008 and the affirmed report of Isaac Cohen, M.D., who performed an independent orthopedic medical examination of plaintiff G.M. on July 7, 2010.

Based upon this evidence, the Court finds that the defendant has established a *prima facie* case that plaintiff G.M. did not sustain serious injury within the meaning of New York State Insurance Law § 5102(d). Dr. Isaac Cohen reviewed plaintiff G.M.'s medical records and conducted a physical examination of plaintiff G.M. on July 7, 2010. *See* Defendant's Affirmation in Support Exhibit O. Dr. Cohen examined plaintiff G.M. and performed quantified and comparative range of motion tests on plaintiff G.M.'s cervical spine, upper extremities, lumbosacral spine and lower extremities. The results of the tests indicated no deviations from

normal. Dr. Cohen's diagnosis of plaintiff G.M. was "Cervical and lumbosacral strain, resolved. Left hip contusion, resolved" Dr. Cohen concluded, "[a]t the time of this evaluation, Mr. Manay is working on a full-time basis without any restrictions. He has no complaints related to the accident of record, 9/27/08. The physical examination performed today is completely unremarkable without any neurological compromise and he has a satisfactory range of motion as documented. The work up performed is also unremarkable, and in my opinion, his soft tissue complaints resolved uneventfully with the treatment provided without any evidence of sequelae or permanency documented. No evidence of residual disability is present. Mr. Manay has a completely normal functional capacity of the musculoskeletal system and is working and may continue to do so without restrictions. Prognosis is excellent."

Defendant also submits plaintiff G.M.'s Upper Extremities SSEP Report dated November 5, 2008 as proof that plaintiff G.M. did not sustain a "serious injury." Defendant states that "the negative result of the Somatosensory Evoked Potential ("SSEP") test performed on the nerves of plaintiff's upper extremities constitutes objective medical proof that plaintiff did not sustain a 'serious injury' to her cervical spine in the Accident. Specifically, Dr. David Lifschutz performed somatosensory nerve conduction tests on plaintiff's upper extremities on November 5, 2008, only five weeks after the Accident, and reported that it was a '[n]ormal Median nerve SSEP study.'" *See* Defendant's Affirmation in Support Exhibit N.

With respect to plaintiff G.M.'s 90/180 claim, defendant refers to the EBT testimony of plaintiff G.M. in which he indicated that, immediately following the accident, the only thing that he was completely unable to do was golfing. Since the accident, he has resumed playing golf, yet plays less often because he does not have enough time. Furthermore, the only thing plaintiff G.M. does differently since the accident is he is careful how he lifts things. He bought a hand

cart for heavy boxes and water and is careful lifting his daughter, but other than those two things, plaintiff G.M. testified that “everything is the same.” *See* Defendant’s Affirmation in Support Exhibit M. Plaintiff G.M. also testified at his EBT that, at the time of the accident, he worked full time as a telemetry nurse at South Nassau Communities Hospital and that following said accident, he missed “maybe two to three days” from work. *See id.* When he returned from work after the accident his duties and schedule did not change.

The burden now shifts to the plaintiffs to come forward with evidence to overcome defendant’s submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000). In opposition to defendant’s motion, plaintiffs argue that defendant’s motion must be denied since plaintiffs can establish a *prima facie* case that they both satisfied the serious injury threshold to maintain their action.

The Court will once again address each plaintiff separately. To support her burden, plaintiff F.M. submits the Police Accident Report, plaintiffs’ Verified Bill of Particulars, plaintiffs’ Amended Verified Bill of Particulars, plaintiff F.M.’s Affidavit of Merit, the affirmed reports of Dr. Walter Ploski, the medical records and reports from Baldwin Medical Services, P.C., the medical affirmations and reports of physiatrist Dr. Josephine Brawner and neurologist Dr. David N. Lifschutz, the affidavits of chiropractors Dr. Mark Jacobs and Dr. Stephen Matrangolo and the certified report of Dawn Ventura, M.D., who performed plaintiff F.M.’s lumbar spine MRI on November 21, 2008.

Plaintiff F.M. submits that, while she was at the accident scene on September 27, 2008, she was in shock and declined medical assistance. The following morning she began

experiencing severe neck and lower back pain. On September 29, 2008, she began treating with various doctors and therapists at Baldwin Medical Service P.C. in Baldwin, New York, which is now known as Lev Aminov Internal Medicine, P.C. Plaintiff F.M. received physical therapy at this facility for approximately thirty-seven (37) occasions until January 26, 2009 and received chiropractic care on forty-four (44) occasions from September 29, 2008 to March 19, 2009. *See* Plaintiffs' Affirmation in Support Exhibit F.

Marc L. Jacobs, D.C., a duly licensed chiropractor, who maintains his office, MLJ Chiropractic P.C., at Lev Aminov Internal Medicine, P.C., formerly Baldwin Medical Service P.C., examined plaintiff F.M. on September 29, 2008 for chiropractic medical evaluation, rehabilitation and treatment for her alleged injuries from the accident in issue. Plaintiff F.M. presented with complaints of pain and stiffness of severe intensity in her neck, upper extremities, mid back and lower back. Her primary complaints were severe pain to her neck that radiated to her right shoulder, pain in both shoulders, worse in the left, mid back pain extending to the shoulder blades and lower back pain bilaterally. Dr. Jacobs performed an orthopedic/neurological physical examination and testing which included abnormal findings of a positive compression test right, positive cervical distraction test, a positive Soto-Hall Test, positive Kemp's Test bilaterally and a positive Yeoman's Test bilaterally. Dr. Jacobs performed quantified and comparative range of motion tests on plaintiff F.M.'s cervical spine and lumbar spine which indicated quantified limitations and abnormal findings. Plaintiff F.M. reported to Dr. Jacobs about her prior lower back injury in 2006. Dr. Jacobs states "[b]ased upon the history provided by Mrs. Manay, the medical records, my examinations, the objective findings and testing, and the chiropractic treatment and physical therapy administered, it is my opinion with a reasonable degree of chiropractic medical certainty, that the subject motor vehicle accident of

September 27, 2008 is the competent cause of the following injuries: cervical sprain/strain and derangement, C4-C5 and C5-C6 disc bulge per MRI report, L5-S1 centrally located annular tear as per MRI report, and bilateral nerve root irritation at C4-C5 levels with evidence of right peroneal neuropathy as per EMG report. Her inability to properly move and function more than two (2) years following the accident represent permanent consequential limitations and/or significant limitations of use of the affected areas of her cervical and lumbar spine causally related to the subject accident. Ms. Manay has sustained a permanent partial disability to her spine causally related to the accident.” *See* Plaintiffs’ Affirmation in Support Exhibit G.

Dr. Walter Ploski, a board certified orthopedist, who maintains his office at Lev Aminov Internal Medicine, P.C., formerly Baldwin Medical Service P.C., performed an initial orthopedic examination on plaintiff F.M. on October 2, 2008. She presented to Dr. Ploski for medical evaluation and treatment due to complaints of pain to her neck extending out toward the shoulder on the left and low back pain radiating to the right buttock and right proximal posterior thigh. Plaintiff F.M. reported to Dr. Ploski that she had a prior work related accident in 2006 where she injured her lower back and was treated for about two months and then the symptoms subsided. She had no subsequent problems until the present episode. Dr. Ploski states that, on that initial examination of plaintiff F.M., “[c]ervical spine motion was painful. The range of motion was restricted. Tenderness was present at the cervical paravertebral muscles from occiput to the base of the neck. Bilateral trapezius tenderness was present, more severe on the left. Left trapezius muscle spasm was present. Examination of the lower back revealed trunk motion was painful. There was restricted range of motion. There was tenderness at the lumbar paravertebral muscle, more severe on the right. There was tenderness at the lumbosacral area and right buttock. There was marked tenderness at the right upper extremities moved through a

functional range with pain. Leseque test was positive on the right. Right straight leg raise was painful at 45 degrees. Left straight leg raise caused low back pain at 60 degrees. My initial impression were the following causally related injuries of Cervical Derangement, Low back derangement, Rule-out radiculopathy....At the time of her initial orthopedic evaluation, the patient was disabled.” See Plaintiffs’ Affirmation in Support Exhibit H.

Dr. Ploski adds that plaintiff F.M. underwent various modalities of physical therapy, including electric stimulation, hot/cold packs, therapeutic exercises and ultrasound, acupuncture and chiropractic treatment. She presented for physical therapy at Baldwin Medical P.C. approximately thirty-seven (37) occasions from October 2, 2008 through January 26, 2009. “She treated at my office for approximately four months and ended her treatment at my office because she had reached the maximum medical level of improvement, yet her symptoms persisted.” At that time, Dr. Ploski’s diagnosis of plaintiff F.M. was that she “sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic cervical and lumbar spine sprain/strain. Bilateral nerve root irritation at C4-5 levels and right peroneal neuropathy as per EMG. Centrally located annular tear L5-S1 level as per MRI report, and C4-C5 and C5-C6 disc bulges as per MRI report.” See *id.*

Dr. Ploski conducted a follow-up examination of plaintiff F.M. on December 30, 2010. During that examination, plaintiff F.M. told Dr. Ploski that she continues to have pain at the back of her neck, which extends out toward both shoulders and to the shoulder blades. She has pain at the lower back that radiates to both buttocks. She has pain radiating into the left lower extremity. Dr. Ploski performed quantified and comparative range of motion tests on plaintiff’s cervical spine and lumbar spine which indicated quantified limitations and abnormal findings. Dr. Ploski states that, at said examination, plaintiff F.M. “was advised to refrain from activities

such as prolonged walking/sitting as this may further increase his (*sic*) pain. The patient is an operating room nurse and was advised to refrain from actively lifting other patients. Regarding her home activities, Mrs. Manay has three young children (*sic*) was advised to limit home activities that require heavy lifting such as lifting grocery bags and laundry bags, as this may exacerbate her spinal pain." Dr. Ploski concluded, "as a result of the September 27, 2008 motor vehicle accident, Ms. Flordeliza Manay has sustained permanent partial disabilities to her cervical and lumbar spine and have (*sic*) resulted in pain with progressive remission and exacerbation. She will continue follow-up treatments with her primary care physician. She may require further specialized care, such as pain management therapy. She also will require additional physical therapy treatments. Based upon the history provided by Mrs. Manay, my medical records, physical examination, the examinations by all the medical providers, the objective findings and testing, and treatment administered, it is my opinion with a reasonable degree of medical certainty that the motor vehicle accident of September 27, 2008 is the competent producing cause of her current above noted injuries. She has permanent impairments involving the cervical spine and lumbar spine with overall permanent partial disability. Her inability to properly move and function now, more than two (2) years following the accident represent permanent consequential limitations and/or significant limitations of use of the affected areas of her cervical spine and lumbar spine, and are partial permanent restrictions causally related to the subject accident." *See id.*

Dr. Josephine Brawner, a board certified physiatrist, who maintained her office at Lev Aminov Internal Medicine, P.C., formerly Baldwin Medical Service P.C., performed an initial physiatric medical examination on plaintiff F.M. on October 6, 2008. Plaintiff F.M. reported to Dr. Brawner that she had a prior work related lower back injury sustained in 2006 that was

completely resolved prior to the subject motor vehicle accident. Dr. Brawner states that “[u]pon initial physical examination, there was tenderness of the cervical paraspinals, including upper traps and rhomboids. End range pain in all planes. Spurling’s sign was negative. Range of motion was painful and diminished in all planes. Severe tenderness of the thoracic and lumbosacral paraspinal muscles. Straight leg raise was painful at 70 degrees bilaterally. Braggard’s was negative. Truncal range of motion was diminished in all planes. Dr. Brawner’s initial diagnosis of plaintiff F.M. was “Post traumatic cervical, thoracic and lumbar sprain/strain, rule-out left cervical HNP. Rule-out cervical and lumbar radiculopathy.” Plaintiff saw Dr. Brawner for follow-up examinations on November 10, 2008, December 22, 2008 and January 26, 2009. Dr. Brawner’s final diagnosis of plaintiff F.M. was that she “sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic cervical and lumbar spine sprain/strain. Bilateral nerve root irritation at C4-5 levels and right peroneal neuropathy as per EMG. Centrally located annular tear L5-S1 level as per MRI report, and C4-C5 and C5-C6 disc bulges as per MRI report.” Dr. Brawner concluded “as a result of the September 27, 2008 motor vehicle accident, Ms. Flordeliza Manay has sustained permanent partial disabilities to her cervical and lumbar spine and have (*sic*) resulted in pain with progressive remission and exacerbation. Based upon the history provided by Mrs. Manay’s medical records, physical examination, objective findings and testing, and treatment administered, it is my opinion with a reasonable degree of medical certainty that the motor vehicle accident of September 27, 2008 is the competent producing cause of her current above noted injuries.” *See* Plaintiffs’ Affirmation in Support Exhibit I.

Stephen Matrangolo, D.C., a duly licensed chiropractor, states in his affidavit that physical performance testing using a computerized inclinometer was performed on plaintiff

F.M. on October 20, 2008. A series of quantified range of motion studies were performed on plaintiff F.M.'s cervical spine. Based upon the results of said tests, Dr. Matrangolo states that "[m]y opinion to a reasonable degree of chiropractic certainty was that the patient had sustained a whole person impairment rating at that time, which included skeletal and muscular functions combined was 27%." On November 10, 2008, a further examination revealed abnormal muscle involvement supplied by the lumbosacral plexus and lower trunk (C8, T1) nerves. A study found abnormal muscles of the right obturator externus involving the lumbosacral plexus, and the right pectoralis major - lower involving the lower trunk (C8, T1). Dr. Matrangolo concluded "[m]y impression, to a reasonable degree of chiropractic medical certainty was that the plaintiff Flordeliza Manay had sustained causally related cervical injuries and lumbar injuries from the September 27, 2008 motor vehicle accident." *See* Plaintiffs' Affirmation in Support Exhibit J.

Plaintiff F.M. submitted the affirmation of Dr. Dawn Ventura, a radiologist with South Nassau Communities Hospital, under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff F.M.'s cervical spine and lumbosacral spine performed on November 21, 2008. *See* Plaintiffs' Affirmation in Opposition Exhibits K and L. With respect to the MRI of the cervical spine, "[t]here is mild reversal of the normally visualized cervical lordosis with the apex at the level of C4-C5. At this level, there is bulging of disc material, which impresses upon the ventral surface of the thecal sac and encroaches upon, but does not clearly compress the spinal cord. Slightly less prominent bulging of disc material is appreciated at C5-C6....My impression of the MRI of the Cervical Spine is as follows: Reversal of the normally visualized cervical lordosis, with apex at the level of C4-C5, as described above. No frank herniation of the nucleus pulposus. No evidence of ligamentous disruption." *See* Plaintiffs' Affirmation in Support Exhibit K. With respect to the MRI of the lumbar spine,

“[t]he conus medullaris is appreciated at the level of L1. At L5-S1 there is desiccation of disc material and suggestion of small centrally located annular tear....My impression of the MRI of the Lumbar Spine is as follows: Centrally located annular tear at L5-S1. No frank herniation of the nucleus pulposis.” *See* Plaintiffs’ Affirmation in Support Exhibit L.

Dr. David N. Lifschutz, a board certified neurologist, who maintained his office at Lev Aminov Internal Medicine, P.C., formerly Baldwin Medical Service P.C., performed an initial neurological examination on plaintiff F.M. on November 5, 2008. Plaintiff F.M. reported to Dr. Lifschutz that she had a prior work related injury in 2006 where she injured her lower back and had made a full recovery. Dr. Lifschutz’s initial neurological assessment was that “the patient sustained trauma and post traumatic pain syndrome consistent with the following: cervical strain, sprain and myofascitis with radicular signs and symptoms, rule out disc herniation and rule out radioculopathy; lumbosacral strain, sprain and myofascitis with radicular sign and symptoms, rule out disc herniation and rule out radiculopathy. *See* Plaintiffs’ Affirmation in Support Exhibit N.

On December 17, 2008, Dr. Lifschutz performed EMG/NCV of the upper and lower extremities testing of plaintiff F.M. Said EMG/NCV testing indicated findings consistent with bilateral nerve root irritation at C4-C5 levels, as well as other findings indicated thereon. The electrodiagnostic study revealed evidence of a right peroneal neuropathy. Dr. Lifschutz states that “[t]he findings on the EMG/NCV testing are associated with and a result of trauma. That the trauma is causally related to the accident of September 27, 2008.” *See* Plaintiffs’ Affirmation in Support Exhibit M.

Dr. Lifschutz’s final diagnosis of plaintiff F.M. was that she “sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic

cervical and lumbar spine sprain/strain and myofascitis. Bilateral nerve root irritation at C4-5 levels and right peroneal neuropathy as per EMG, Annular tear L5-S1 level as per MRI report, and C4-C5 disc bulge with disc material impressing upon the ventral surface of the thecal sac and encroaching upon the spinal cord and C5-C6 disc bulge as per MRI report.” Dr. Lifschutz concluded “as a result of the September 27, 2008 motor vehicle accident, Ms. Flordeliza Manay has sustained permanent consequential limitations and/or significant limitations in her functional capacity of use of the affected areas of her cervical spine and lumbar spine, and are partial permanent restrictions causally related to the subject accident.... Based upon the history provided by Mrs. Manay’s medical records, physical examinations, objective findings and testing, and treatment administered, it is my opinion with a reasonable degree of medical certainty that the motor vehicle accident of September 27, 2008 is the competent producing cause of her current above noted injuries.” *See* Plaintiffs’ Affirmation in Support Exhibit N.

In support of her 90/180 argument, plaintiff F.M. submits her own affidavit in which she states “[a]t the time of the accident, and currently, I am employed as a registered nurse at Mercy Medical Center. I work as an operating room nurse. My jobs and duties include lifting and positioning patients. This is usually done as part of a team effort. As a result of the accident, I was out of work for approximately nine days. When I returned to work, my work duties were limited and continue to be so. Part of the duties that I share in while working is moving and transporting patients. Since the accident, I only assist in lifting the lightest parts of the patients during transfers which is usually the feet. Further, I no longer lift heavy instruments in the operating room, and I rely on other nurses to perform those functions. Prior to the subject accident, I had no restrictions in my duties as an operating room nurse and I could perform these duties fully and without difficulty.... There have been times when my spinal pain has affected the

performance of my home activities significantly, and at times less. Currently, I still experience pain to my neck and lower back when I perform certain work and household activities....Following the accident, I was unable to properly take care of my kids doing the simplest things such as going shopping with them. In fact, to date, I still rely on my oldest daughter to do certain tasks such as helping us in doing the laundry.... As a result of the accident, my husband and I could not perform most of our household chores for approximately six months after the accident.” *See* Plaintiffs’ Affirmation in Support Exhibit D.

The Court will now address plaintiff G.M.’s arguments/evidence. To support his burden, plaintiff G.M. submits the Police Accident Report, plaintiffs’ Verified Bill of Particulars, plaintiffs’ Amended Verified Bill of Particulars, plaintiff G.M.’s Affidavit of Merit, the affirmed reports of Dr. Walter Ploski, the medical records and reports from Baldwin Medical Services, P.C., the medical affirmations and reports of physiatrist Dr. Josephine Brawner and neurologist Dr. David N. Lifschutz and the affidavits of chiropractors Dr. Mark Jacobs and Dr. Stephen Matrangolo.

Plaintiff G.M. submits that, while he was at the accident scene on September 27, 2008, he was in shock and declined medical assistance. The following morning he began experiencing severe neck and left hip pain. Within a few days of the accident, he began experiencing lower back pain as well. On September 29, 2008, he began treating with various doctors and therapists at Baldwin Medical Service P.C. in Baldwin, New York. Plaintiff G.M. received physical therapy at this facility for approximately thirty-seven (37) occasions until January 26, 2009 and received chiropractic care on forty-four (44) occasions from September 29, 2008 to March 19, 2009. *See* Plaintiffs’ Affirmation in Support Exhibit O.

Dr. Marc L. Jacobs examined plaintiff G.M. on September 29, 2008 for chiropractic

medical evaluation, rehabilitation and treatment for her alleged injuries from the accident in issue. Plaintiff G.M. presented with complaints of pain and stiffness of severe intensity in his cervical spine bilaterally. Upon initial chiropractic evaluation, the cervical pain increased in severity upon movement in all planes of motion with radiation into both traps. Dr. Jacobs states that “[a]lthough, Mr. Gaillard Manay did not initially complain of low back pain, testing brought about a complaint of pain and stiffness of mild intensity in the lumbosacral spine bilaterally. Lumbar pain increased upon movement in all planes of motion.” Dr. Jacobs performed an orthopedic/neurological physical examination, signs and testing which included abnormal findings a positive Soto-Hall Test, and a positive Kemp’s Test Bilaterally. There was a positive Yeoman’s Test Bilaterally. Dr. Jacobs performed quantified and comparative range of motion tests on plaintiff G.M.’s cervical spine and lumbar spine which indicated quantified limitations and abnormal findings. Dr. Jacobs states “[m]y initial impression were the following causally related injuries of cervicgia, thoracic and lumbar pain....he treated at my office for approximately six months and ended his treatment at my office because he had reached the maximum chiropractic level of improvement....Based upon the history provided by Mr. Manay, the medical records, my examinations, the objective findings and testing, and the treatment administered, it is my opinion with a reasonable degree of chiropractic medical certainty, that the subject motor vehicle accident of September 27, 2008 is the competent producing cause of the following injuries: Cervical Derangement, Cervical Radiculitis, Cervical Sprain/Strain, Lumbar Derangement, Lumbar Sprain/Strain, Vertebral Subluxation Complexes of the Cervical, Thoracic & Lumbosacral Spine, Myofascial Pain Syndrome. His inability to properly move following the accident represents significant limitations of use of the affected areas of his cervical and lumbar spine causally related to the subject accident of September 27, 2008. Mr.

Manay has significant symptoms and has had significant limitations in his functional capacity to his spine causally related to the accident.” *See* Plaintiffs’ Affirmation in Support Exhibit P.

Dr. Walter Ploski performed an initial orthopedic examination on plaintiff G.M. on October 2, 2008. He presented to Dr. Ploski for medical evaluation and treatment due to complaints of pain to his neck and lower back. He also had pain radiating down the lateral aspect of the left thigh. Dr. Ploski states that, on that initial examination of plaintiff G.M., “[c]ervical spine motion was painful. The range of motion is restricted. Tenderness was present at the cervical paravertebral muscles from occiput to the base of the neck. Bilateral trapezius tenderness was present, more severe on the left. Cervical compression produces tingling sensations radiating down the upper extremity as far as the hand. There was restricted range of motion. Trunk motion was performed through a functional range and was unremarkable. Tenderness was present at the left greater trochanter. Deep palpation produced radiating pain. Hip motion was performed through a functional range. There was pain at the left greater trochanter on forced adduction. My initial impression were the following causally related injuries of Cervical Derangement, Rule-out radiculopathy left upper extremity and left trochanteric tendonitis....At the time of my initial orthopedic examination of October 2, 2008, He was disabled.” *See* Plaintiffs’ Affirmation in Support Exhibit Q.

Dr. Ploski adds that plaintiff G.M. underwent various modalities of physical therapy, including electric stimulation, hot/cold packs, therapeutic exercises and ultrasound, acupuncture and chiropractic treatment. He presented for physical therapy at Baldwin Medical P.C. approximately thirty-seven (37) occasions from October 2, 2008 through January 26, 2009. “He treated at my office for approximately four months and ended his treatment at my office because he had reached the maximum medical level of improvement, yet his symptoms persisted.” At

that time, Dr. Ploski's diagnosis of plaintiff G.M. was that he "sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic cervical and (*sic*) spine sprain/strain, Post traumatic Nerve Root Irritation at the Left C5-6 levels as documented on EMG, cervical derangement, lumbar derangement." *See id.*

Dr. Ploski conducted a follow-up examination of plaintiff G.M. on December 30, 2010. Upon physical examination, cervical spine motion is performed through a functional range with no complaints of pain. There was no tenderness elicited in the cervical area. There was no tenderness at the lumbar area or trochanteric area. Dr. Ploski states that, Mr. Gaillard (*sic*) sustained injury to the cervical spine and lumbar spine and trochanteric area. He initially had pain and evidence of nerve root irritation, as evidenced by electrodiagnostic findings. He has no complaints at present and has recovered....His inability to properly move and function following the accident and throughout his course of treatment represent significant limitations of use of the affected areas of his body and are partial restrictions causally related to the subject accident."

See id.

Dr. Josephine Brawner performed an initial physiatric medical examination on plaintiff G.M. on October 6, 2008. Dr. Brawner states that "[u]pon physical examination, there was moderate to severe tenderness of the cervical paraspinals, mostly on the left side, with equivocal Spurling's sign on the left. Range of motion was diminished in all planes for which objective inclinometry was later obtained. Upon thoracolumbar spine examination, the lumbar spine did not show tenderness with this examination, but the left greater trochanteric was very tender to palpate. Range of motion was equal, straight leg raise was negative and Braggard's was negative." Dr. Brawner's initial physiatric impression of plaintiff G.M. was "Post traumatic cervical sprain/strain, rule-out left cervical HNP, rule-out left greater trochanteric bursitis."

Plaintiff G.M. saw Dr. Brawner for follow-up examinations on November 10, 2008 and January 26, 2009. Dr. Brawner concluded that “as a result of the September 27, 2008 motor vehicle accident, Mr. Gaillard Manay has sustained injuries to his cervical spine and left hip. Her final diagnosis of plaintiff G.M. was that he “sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic cervical spine sprain/strain, nerve root irritation at the left C5-C6 level as per EMG and left trochanteric tendonitis resolved.” Dr. Brawner added “Mr. Manay’ injuries to his cervical spine represents limitations of use of the affected area causally related to the motor vehicle accident of September 27, 2008. Based upon the history provided by Mr. Manay’s medical records, physical examination, objective findings and testing, and treatment administered, it is my opinion with a reasonable degree of medical certainty that the motor vehicle accident of September 27, 2008 is the competent producing cause of his current above noted injuries.” *See* Plaintiffs’ Affirmation in Support Exhibit R.

Dr. Stephen Matrangolo states in his affidavit that physical performance testing using a computerized inclinometer was performed on plaintiff G.M. on October 20, 2008. A series of quantified range of motion studies were performed on plaintiff G.M.’s cervical spine. Based upon the results of said tests, Dr. Matrangolo states that “I opined that the patient had sustained a whole person impairment rating, which included skeletal and muscular functions combined was 20% at that time. The abnormal muscles involved were the right deltoid-anterior supplied with the C5 nerves.” On November 10, 2008, a follow up examination revealed the abnormal muscles involving the right biceps femoris with the S3 nerves, and the right rectoralis major-lower involving the lower trunk (C8, T1). Dr. Matrangolo concluded “[m]y impression, to a reasonable degree of chiropractic medical certainty, is that the plaintiff Gaillard Manay has

sustained his causally related cervical injuries and lumbar injuries from the September 27, 2008 motor vehicle accident.” *See* Plaintiffs’ Affirmation in Support Exhibit S.

Dr. David N. Lifschutz performed an initial neurological examination on plaintiff G.M. on November 5, 2008. Dr. Lifschutz’s initial neurological assessment was that “the patient sustained trauma to his neck and lower back and was continuing to suffer from cervical strain, sprain and myofascitis with radicular signs and symptoms, rule out disc herniation and rule out radioculopathy. *See* Plaintiffs’ Affirmation in Support Exhibit U.

On December 17, 2008, Dr. Lifschutz performed EMG/NCV of the upper and lower extremities testing of plaintiff G.M. Said EMG/NCV testing indicated findings consistent with nerve root irritation at C5-C6 level as well as other findings indicated thereon. The electrodiagnostic study revealed evidence of a right peroneal neuropathy. Dr. Lifschutz states that “[t]he findings on the EMG/NCV testing are associated with and a result of trauma. That the trauma is causally related to the accident of September 27, 2008.” *See* Plaintiffs’ Affirmation in Support Exhibit T.

Dr. Lifschutz’s final diagnosis of plaintiff G.M. was that “as a result of the September 27, 2008 motor vehicle accident, Mr. Gaillard Manay has sustained significant injuries to his cervical spine, and lumbar spine and left hip....Mr. Manay sustained the following causally related injuries from the September 27, 2008 motor vehicle accident: Post traumatic cervical spine sprain/strain, cervical derangement, nerve root irritation at the left C5-C6 level, lumbar sprain/strain, lumbar derangement and left trochanteric tendonitis. Mr. Manay’s injuries to his cervical and lumbar spine and left hip causally related to the motor vehicle accident of September 27, 2008. Mr. Manay had had significant symptoms and has significant limitations in his functional capacity to his spine and lower extremity causally related to the subject accident.

Based upon the history provided by Mr. Manay's medical records, physical examinations, objective findings and testing, and treatment administered, it is my opinion with a reasonable degree of medical certainty that the motor vehicle accident of September 27, 2008 is the competent producing cause of her current above noted injuries." *See* Plaintiffs' Affirmation in Support Exhibit U.

In support of his 90/180 argument, plaintiff G.M. submits his own affidavit in which he states "I have no doubt that my injuries have been significant, as it is now more than two (2) years after my accident, and I have altered how I perform many of my activities even at the present time. On December 20, 2010, I appeared for a medical re-evaluation with Dr. Walter Ploski....Dr. Ploski examined me and told me that I have achieved full range of motion. Although I currently have full range of motion of my neck, lower back and left hip, I have made major changes to my performance of work and home activities in order not to aggravate or exacerbate my spinal pain and left hip pain. At the time of the accident, and currently, I am employed as a registered nurse at South Nassau Communities Hospital. On the date of accident, I worked in the telemetry department, and was in charge of taking care of seven to nine patients who had cardiac problems or who recently had a stroke. My duties included monitoring the patients and involved lifting and transferring patients. I missed only several days from work, but when I returned, I needed assistance in lifting the patients because of the severe neck and lower back pain that I was experiencing. Following the motor vehicle accident of September 27, 2008, I asked to be transferred to another department. There have been times when my spinal pain has affected the performance of my home activities significantly, and at times less. Currently, I still experience pain to my neck and lower back when I perform certain work and household activities....I could not perform many of my household chores for approximately six months

after the accident. For example, I avoided picking up my four year old daughter and my wife and I were limited in performing household chores such as vacuuming, cooking, cleaning and grocery shopping. My wife and I needed the assistance of my parents who reside with us in performing our everyday household chores for the first six months following the accident.” See Plaintiffs’ Affirmation in Support Exhibit E.

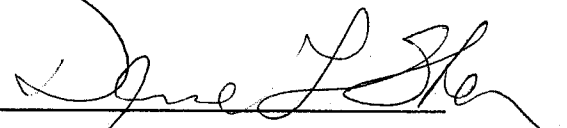
Plaintiffs further argue that plaintiffs’ and defendant’s doctors differ in that “one doctor’s normal is another doctor’s abnormal. Regarding plaintiff Flordeliza M. Manay, the plaintiff and defendant’s medical expert differ on what constitutes minimum normal in range of motion. Defendants’ (*sic*) doctor claims of what is ‘normal’ cervical and lumbar range of motion is completely different than what is considered ‘normal’ by the Plaintiff’s orthopedic doctor, Dr. Walter Ploski.... There is a discrepancy as to Dr. Cohen’s explanation of how his ‘objective’ testing and his assertion of what he considers to be at a minimum ‘normal.’ It is submitted that his determinations are thus simply conclusory.”

The Court concludes that the affirmations and affidavits provided by plaintiffs clearly raise genuine issues of fact as to injuries causally related to the September 27, 2008 accident. Consequently, defendant’s motion for summary judgment is hereby denied.

The parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on May 18, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 12, 2011

ENTERED
MAY 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE