

|                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Castillo v Gonzalez</b>                                                                                                                                                                                                       |
| 2011 NY Slip Op 32690(U)                                                                                                                                                                                                         |
| October 13, 2011                                                                                                                                                                                                                 |
| Sup Ct, Nassau County                                                                                                                                                                                                            |
| Docket Number: 14511/09                                                                                                                                                                                                          |
| Judge: Jeffrey S. Brown                                                                                                                                                                                                          |
| Republished from New York State Unified Court<br>System's E-Courts Service.<br>Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for<br>any additional information on this case. |
| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE

-----X TRIAL/IAS PART 21

KIMBERLY CASTILLO, an infant under the age of  
eighteen (18) years, by her mother and natural guardian  
ISABEL ALFARO, EMELY CASTILLO, an infant under  
the age of eighteen (18) years of age, by her mother and  
natural guardian, ISABEL ALFARO, and ISABEL  
ALFARO, individually,

Plaintiff,

Index No. 14511/09  
Mot. Seq. # 2  
Motion Date 5.5.11  
Submit Date 8.19.11

JOSE ROBERTO GONZALEZ and IPK SERVICE, INC.,

Defendants.

-----X

| The following papers were read on this motion: | Papers Numbered |
|------------------------------------------------|-----------------|
| Notice of Motion, Cross Motion.....            | 1               |
| Answering Affidavits .....                     | 2               |
| Memorandum of Law .....                        | 3               |

Defendants move for an order pursuant to CPLR 3212 granting them summary judgment  
dismissing the complaint against them.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs  
Isabel Alfaro (mother), Emely Castillo (daughter) and Kimberly Castillo (daughter) on April 6,  
2007.

In the bill of particulars, plaintiff Isabel alleges that she sustained the following injuries:

- focal disc bulge at C4-5
- straightening of the cervical lordosis
- broad based disc bulge with extension of disc into the neural foramen
- bilateral cervical radiculopathy
- cervico brachial syndrome
- bilateral trapezius muscle myofascial pain syndrome
- myalgia
- vertebral fixation
- broad based disc bulge at L4-5 with extension of disc into the neural foramen
- lumbar strain
- lumbar myofascitis
- myalgia
- vertebral fixation
- low back syndrome
- abnormal signal of the distal femur and proximal tibia of the knee
- bone bruise/occult fracture of the left knee
- increased signal in the posterior horn of the medial meniscus of the left knee
- left knee derangement
- left knee contusion
- anterior chest contusion
- abdominal pain
- post concussion syndrome with headache
- tension headaches
- dizziness
- nausea
- hypoesthesia in the right hand
- antalgic gait
- gait dysfunction

Plaintiff Kimberly, now 4 years old, alleges that she sustained the following injuries:

- cervical strain; pain, disability and limitation of movement
- was forced to undergo numerous diagnostic procedures/X-rays/MRIs
- was forced to take medication

Plaintiff Emely, now 11 years old, alleges that she sustained the following injuries:

- cervical strain
- cervical contusion
- myalgia
- vertebral fixation
- muscle spasm
- low back contusion
- lumbar spine; myalgia, vertebral fixation, and muscle spasm
- thoracic spine; myalgia, vertebral fixation and muscle spasm

As a proponent of the summary judgment motion, movants had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (see *Browdame v. Candura*, 25 AD3d 747, 748 [2<sup>nd</sup> Dept 2006]).

Defendants established their *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmed medical reports of Dr. Joseph Elfenbein, an orthopedist and Dr. Edward M. Weiland, a radiologist. They found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (see *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Isabel

As to Isabel, Dr. Elfenbein concluded, in pertinent part, as follows:

Impression:

1. Cervical spine sprain/strain - resolved.
2. Lumbar spine sprain/strain - resolved.
3. Right hand sprain/strain - resolved.
4. Left knee sprain/strain - resolved.

Physical Capabilities:

There is no evidence of a permanent orthopedic disability. Ms. Alfaro is able to perform activities of daily living without restrictions.

Upon completion of the examination, the claimant offers no complaints and left the examining area stable and unchanged.

After performing objective tests, Dr. Weiland concluded, in pertinent part, as follows:

Impression:

1. History of closed head trauma - resolved.
2. Cervical sprain/strain - resolved.
3. Lumbosacral sprain/strain - resolved.
4. Normal neurologic examination.

Conclusions:

Ms. Isabel Alfaro relates experiencing multiple injuries while involved in a motor vehicle accident on 4/6/07. However, I find no evidence of any lateralizing neurological deficits at the present time. I do not feel that any further neurological investigational studies or neurologic treatment modalities are warranted given her current physical evaluation today. I see no reason why the claimant should not be able to perform activities of daily living and seek gainful employment activities, without restrictions, from a neurologic perspective, based upon her physical examination findings noted today. I find for no primary neurologic disability at the present time.

There is no finding of any neurologic residual or permanency based upon his physical examination findings noted today.

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. (*Flores v Leslie*, 27 AD3d 220, 221 [1<sup>st</sup> Dept. 2006].)

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102(d). (See *Toure v Avis Rent A Car Sys., Inc.*, *supra*; *Scheer v Kioubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1<sup>st</sup> Dept. 2005].)

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2<sup>nd</sup> Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2<sup>nd</sup> Dept 2008]; *Sharma v Diaz*, 48 AD3d 442 [2<sup>nd</sup> Dept 2007]; *Amato v Fast Repair, Inc.*, 42 AD3d 447 [2<sup>nd</sup> Dept 2007] and upon medical proof contemporaneous with the subject accident. (*Perl v Mehr*, 74 AD3d 930 [2<sup>nd</sup> Dept 2010]; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2<sup>nd</sup> Dept 2008]; *Manning v Tejada*, 38 AD3d 622 [2<sup>nd</sup> Dept 2007]; *Zinger v Zylberberg*, 35 AD3d 851 [2<sup>nd</sup> Dept 2006]).

Even when there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. (*Pommells v Perez*, 4 NY3d 566, 572 [2005].) Whether a limitation of use or

junction is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. (*Dufel v Green*, 84 NY2d 795, 798 [1995].)

It has been repeatedly held that “[t]he mere existence of herniated or bulging discs, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration” (*Catalano v Kopmann*, 73 AD3d 963 [2<sup>nd</sup> Dept 2010]; *Vilomar v Castillo*, 73 AD3d 758 [2<sup>nd</sup> Dept 2010]; *Ortiz v Iania Taxi Services, Inc.*, 73 AD3d 721 [2<sup>nd</sup> Dept 2010]; *Stevens v Sampson*, 72 AD3d 793 [2<sup>nd</sup> Dept 2010]; *Luizzi Schwenk v Singh*, 58 AD3d 811, 812 [2<sup>nd</sup> Dept 2009]).

Moreover, “[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs’ ” (*Johnson v County of Suffolk*, 55 AD3d 875, 877 [2<sup>nd</sup> Dept 2008], quoting from *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 [2<sup>nd</sup> Dept 2005]).

In opposition to the motion, Isabel submits, *inter alia*, her own affidavit and an affirmation of Dr. David Khanan, a doctor of physical medicine and rehabilitation.

On April 13, 2007, Dr. Khanan performed an initial examination wherein he conducted objective tests, including range of motion tests. In his affirmation, Dr. Khanan states as follows:

With regard to her cervical spine, I found range of motion to be as follows:

- with regards to flexion, it was 55 degrees, the normal being 80 degrees;
- extension was 52 degrees, the normal being 60 degrees; -
- right rotation was 78 degrees, with the normal being 80 degrees;
- left rotation was 75 degrees, with the normal being 80 degrees;
- right lateral bend was 36 degrees, with the normal being 45 degrees;
- left lateral bend was 32 degrees, with the normal being 45 degrees.

With regard to Ms. Alfaro's lumbar spine:

- Her flexion was 25 degrees while 60 degrees is normal.
- The lumbar extension was 9 degrees with 40 degrees being normal.
- Her lumbar right lateral bend was 20 degrees with 35 degrees being normal.
- The lumbar left lateral bend was 18 degrees with 35 degrees being normal.
- Her left rotation was limited to 1 degree with 45 degrees being normal.
- Her right rotation was limited to 1 degree with 45 degrees being normal.

With regard to Ms. Alfaro's sacral hip, her flexion was 15 degrees with 45 degrees being normal, and her extension was 1 degree with 5 degrees being normal.

She had additional objective tests performed. With regard to her cervical spine, the cervical compression was positive. With regard to her cervicothoracic spine, the Soto Hall test demonstrated exacerbation of her neck pain. With regard to her lumbar spine, the straight leg raising test revealed lower back pain bilaterally at 45 degrees. With regard to her hip, the Right Fabere's Test showed pain in her right hip. With regard to her knee, the Abduction Stress test was positive on the left and showed pain in the medial and lateral joint line without gapping. She also had limited range of motion of her left knee. Neurological testing of sensory examination using a pinwheel revealed hypoesthesia



bilaterally at the dermatome level of C6 to T1. She had pain and tenderness in all of the areas mentioned herein.

My diagnosis was postconcussion tension headaches, cervico-brachial syndrome, bilateral trapezius muscle myofascial pain syndrome, anterior chest contusion, low back syndrome and left knee derangement – all caused by the motor vehicle collision of April 6, 2007.

Ms. Alfaro treated for approximately nine months, after which she had reached maximum medical improvement. I discharged her from therapy after nine months due to the belief that she had reached maximum medical improvement and any further treatment would have been palliative in nature. I provided instructions on how to do strengthening and stretching exercises at home, designed to provide temporary relief, and this was a continuation of the home exercises which she had been doing during her nine months of treatment.

On May 6, 2011, Dr. Khanan performed a physical examination on Ms. Alfaro for the purposes of this motion. In his affirmation, Dr. Khanan states, in pertinent part as follows: “I performed objective tests on her, which conclusively demonstrate that she still suffers from the injuries which were related to her accident of April 6, 2007. I found a correlation between the said accident and her injuries.”

Dr. Khanan performed range of motion and other tests on her as part of the exam and made the following findings as per the plaintiff's cervical spine:

- The plaintiff's range of motion with regards to flexion was 70 degrees, the normal being 80 degrees;
- extension was 45 degrees, the normal being 60 degrees; -
- left lateral bend was 45 degrees, the normal being 45 degrees;
- right lateral bend was 43 degrees, the normal being 45 degrees;
- right rotation was 50 degrees, with the normal being 80 degrees;

- left rotation was 55 degrees, with the normal being 80 degrees.

In addition, I did the cervical compression test and it was positive. I performed the Soto Hall test on her cervical spine and found it to demonstrate exacerbation of neck pain.

In addition, I performed objective range of motion tests which showed significant restriction of motion of the plaintiff's lumbar spine as follows:

- flexion was limited to 45 degrees while 60 degrees is normal;
- the lumbar extension was limited to 20 degrees with 40 degrees being normal;
- left rotation was limited to 40 degrees with 45 degrees being normal;
- right rotation was limited to 40 degrees with 45 degrees being normal;
- her lumbar right lateral bend was 25 degrees with 35 degrees being normal;
- the lumbar left lateral bend was 30 degrees with 35 degrees being normal;
- lumbar spine showed tenderness and paraspinal muscle spasm. I did the straight leg raising test and it revealed lower back pain bilaterally at 60 degrees. I also did the Gaenslen's test and the Yeoman's test and both were positive bilaterally.

The plaintiff's range of motion on her left knee with regard to flexion was 115 degrees with 135 degrees being normal and her range of motion was 10 degrees with 15 degrees being normal. Additionally, she showed diffuse tenderness over the articular cartilage at the medial condyle of the left knee. I conducted the Abduction Test, and found it to be positive on the left knee showing pain at the medial joint line without gapping.

The plaintiff had never injured the parts of her body that were injured on April 6, 2007 prior to that date, nor had she re-injured them after April 6, 2007.

I can state with a reasonable degree of medical certainty that:

The plaintiff is still suffering from a significant permanent limitation of motion of her cervical and lumbar spines as well as her left knee. In addition, she is still suffering from post-traumatic sprain and strain of her cervical and lumbar spines complicated by the bulging discs in her cervical and lumbar spines. She is suffering from bilateral cervical radiculopathy. She is suffering from left knee internal derangement, as she suffered an occult fracture of her knee.

Any physical activity requiring bending, lifting, carrying, squatting, kneeling, sitting and standing and others are difficult and painful. She cannot clean her house or play with her children. As she is unemployed, she is restricted in looking for employment to ensure that it does not require any physical activity. I can further state with a reasonable degree of medical certainty that the plaintiff, Isabel Alfaro's personal injuries and significant disabilities were caused by the motor vehicle accident on April 6, 2007.

Kimberly

In his affirmed medical report, Dr. Elfenbein concluded, in pertinent part:

Impression:

1. Cervical spine sprain/strain - resolved.

Physical Capabilities:

There is no evidence of a permanent orthopedic disability. Ms. Castillo is able to perform activities of daily living without restrictions.

Upon completion of the examination, the claimant offers no complaints and left the examining area stable and unchanged.

Dr. Weiland opined as follows:

Impression:

1. Cervical sprain/strain - resolved.
2. Normal neurologic examination.

Conclusions:

Ms. Kimberly Castillo relates experiencing multiple injuries while involved in a motor vehicle accident on 4/6/07. [However, I can find no evidence of any lateralizing neurological deficits at the

present time.]

I do not feel that any further neurological investigational studies or neurologic treatment modalities are warranted given her current physical evaluation today. I see no reason why the claimant should not be able to perform activities of daily living and continue her educational responsibilities, without restrictions, from a neurologic perspective, based upon her physical examination findings noted today. I find for no primary neurologic disability at the present time.

In opposition to defendants' proof, plaintiffs submit an affirmation of Dr. Khanan. Dr. Khanan performed an initial examination on Kimberly on April 14, 2007, conducted objective tests, including range of motion tests.

In his affirmation, Dr. Khanan states as follows:

With regard to her cervical spine, I found range of motion to be as follows:

- with regards to flexion, it was 60 degrees, the normal being 80 degrees;
- extension was 50 degrees, the normal being 60 degrees; -
- right rotation was 75 degrees, with the normal being 80 degrees;
- left rotation was 75 degrees, with the normal being 80 degrees;
- right lateral bend with 35 degrees, with the normal being 45 degrees;
- left lateral bend was 40 degrees, with the normal being 45 degrees.

With regard to Kimberly Castillo's lumbar spine:

- flexion was 75 degrees while 60 degrees is normal;
- the lumbar extension was 10 degrees with 40 degrees being normal;
- lumbar right lateral bend was 20 degrees with 35 degrees being normal;
- the lumbar left lateral bend was 15 degrees with 35 degrees being normal;
- left rotation was limited to 25 degrees with 45 degrees

- being normal;  
right rotation was limited to 25 degrees with 45 degrees  
being normal.

She had additional objective tests performed. With regard to her cervical spine, the Cervical Distraction test, Left Jackson's Compression test, Right Jackson's Compression test and Soto Hall test all demonstrated neck pain. With regard to her thoracolumbar spine, the Left and Right Kemp's test both demonstrated exacerbation of pain in her lower back. With regard to her lumbar spine, the straight leg raising test revealed lower back pain bilaterally at 90 degrees. She had pain on flexion and extension and there was tenderness, all in her lumbar spine. She had tenderness in her cervical spine.

My diagnosis was cervical pain, cervical strain, and cervical subluxation and thoracic subluxation, all at multiple sites associated with myalgia, muscle spasm, vertebral fixation and low back pain and neck pain with motion.

I prescribed a course of physical therapy, acupuncture and chiropractic treatment.

Kimberly Castillo treated for approximately six months, after which she had reached maximum medical improvement. I discharged her from therapy after six months due to the belief that she had reached maximum medical improvement and any further treatment would have been palliative in nature. I provided instructions on how to do strengthening and stretching exercises, at home, designed to provide temporary relief, and this was a continuation of the home exercises which she had been doing during her six months of treatment.

On May 6, 2011, Dr. Khanan performed a physical examination on Kimberly Castillo for the purposes of this motion. In his affirmation, Dr. Khanan states as follows: "I performed objective tests on her, which conclusively demonstrate that she still suffers from the injuries which were related to her accident of April 6, 2007. I found a correlation between the said accident and her injuries."

Dr. Khanan performed range of motion and other tests on her as part of the exam and made the following findings, as per the plaintiff's cervical spine:

- range of motion with regards to flexion was 78 degrees, the normal being 80 degrees;
- extension was 60 degrees, the normal being 60 degrees; -
- left lateral bend was 44 degrees, the normal being 45 degrees,
- right lateral bend was 45 degrees, with the normal being 45 degrees;
- right rotation was 73 degrees, with the normal being 80 degrees;
- left rotation was 72 degrees, with the normal being 80 degrees.

In addition, I performed objective range of motion tests which showed significant restriction of motion of the plaintiff's lumbar spine as follows:

- flexion was limited to 55 degrees while 60 degrees is normal;
- lumbar extension was 40 degrees with 40 degrees being normal;
- lumbar right lateral bend was 33 degrees with 35 degrees being normal;
- lumbar left lateral bend was 34 degrees with 35 degrees being normal;
- left rotation was limited to 42 degrees with 45 degrees being normal;
- right rotation was limited to 44 degrees with 45 degrees being normal;
- lumbar spine showed tenderness at low back flexion and extension.

I did the straight leg raising test and it revealed lower back pain bilaterally at 60 degrees.

I can state with a reasonable degree of medical certainty that:

The plaintiff is still suffering from a significant permanent limitation of motion of her cervical and lumbar spine. In addition, she is still suffering from post-traumatic sprain and strain of her

cervical and lumbar spine, including pain in her low back. She is still suffering from cervicalgia.

Any physical activity requiring bending, lifting, carrying, and running are difficult and painful. She has pain if she tries to play with her friends. She missed time from school and additional time from gym class. I can further state with a reasonable degree of medical certainty that the plaintiff Kimberly Castillo's personal injuries and significant disabilities were caused by the motor vehicle accident of April 6, 2007.

Based upon my examination, clinical observations, treatment and objective testing of the plaintiff, Kimberly Castillo, it is my opinion based upon a reasonable degree of medical certainty that the above mentioned personal injuries, disability and significant personal injuries sustained by the plaintiff, Kimberly Castillo, are permanent in nature and that they were all directly caused by the motor vehicle accident of April 6, 2007.

Emely

As to Emely, Dr. Elfenbein concluded as follows:

Impression:

1. Cervical spine sprain/strain - resolved.
2. Thoracic spine sprain/strain - resolved.
3. Lumbar spine sprain/strain - resolved.

Physical Capabilities:

There is no evidence of a permanent disability. The claimant is able to perform activities of daily living without restrictions.

Upon completion of the examination, the claimant offers no complaints and left the examining area stable and unchanged.

Dr. Weiland noted as follows:

Impression:

1. Cervical sprain/strain - resolved.
2. Lumbosacral sprain/strain - resolved.
3. Normal neurologic examination.

Conclusions:

Ms. Emily Castillo relates experiencing multiple injuries while involved in a motor vehicle accident on 4/6/07. However, I can find no evidence of any lateralizing neurological deficits at the present time. I do not feel that any further neurological investigational studies or neurologic treatment modalities are warranted given her current physical evaluation today. I see no reason why the claimant should not be able to perform activities of daily living and continue her educational responsibilities, without restrictions, from a neurologic perspective, based upon her physical examination findings noted today. I find no primary neurologic disability at the present time.

There is no finding of any neurologic residual or permanency based upon her physical examination findings noted today.

In opposition, plaintiffs submit an affirmation of Dr. Khanan. Dr. Khanan performed an initial examination of Emely on April 24, 2007, conducted objective tests, including range of motion tests and states as follows:.

With regard to her cervical spine, I found range of motion to be as follows:

- with regards to flexion it was 50 degrees, the normal being 80 degrees;
- extension was 50 degrees, the normal being 60 degrees; -
- right rotation was 75 degrees with the normal being 80 degrees;
- left rotation was 65 degrees, with the normal being 80 degrees;
- right lateral bend was 35 degrees, with the normal being 45 degrees;
- left lateral bend was 40 degrees, with the normal being 45 degrees.

With regard to Emely Castillo's lumbar spine:

- flexion was 75 degrees while 60 degrees is normal;
- lumbar extension was 15 degrees with 40 degrees being



- normal;
- lumbar right lateral bend was 15 degrees with 35 degrees being normal;
- lumbar left lateral bend was 15 degrees with 35 degrees being normal;
- left rotation was limited to 25 degrees with 45 degrees being normal;
- right rotation was limited to 25 degrees with 45 degrees being normal.

She had additional objective tests performed. With regard to her cervical spine, the Cervical Distraction test, Left Jackson's Compression test, Right Jackson's Compression test and Soto Hall test all demonstrated neck pain. With regard to her thoracolumbar spine, the Left and Right Kemp's test both demonstrated exacerbation of pain in her lower back. With regard to her lumbar spine, the straight leg raising test revealed lower back pain bilaterally at 60 degrees. The Yeoman's test was positive bilaterally. She also had tenderness and limited range of motion of her left ankle, where I noted guarding and protective spasms at the extremes of motion. She had muscle spasms in the paraspinal muscles apparent in the cervical, thoracic and lumbar spines.

My diagnosis was cervical contusion, low back contusion, lumbar subluxation, cervical subluxation and thoracic subluxation, all at multiple sites associated with myalgia, muscle spasm, tension headaches, low back pain, mid back pain, neck pain and vertebral fixation.

I prescribed a course of physical therapy, acupuncture and chiropractic treatment.

Emely Castillo treated for approximately six months, after which she had reached maximum medical improvement. I discharged her from therapy after six months due to the belief that she had reached maximum medical improvement and any further treatment would have been palliative in nature. I provided instructions on how to do strengthening and stretching exercises at home, designed to provide temporary relief, and this was a continuation of the home exercises which she had been doing during the six months of treatment.

On May 6, 2011, Dr. Khanan performed a physical examination on Emely Castillo for the

purposes of this motion. In his affirmation, Dr. Khanan states as follows: "I performed objective tests on her, which conclusively demonstrate that she still suffers from the injuries which were related to her accident of April 6, 2007. I found a correlation between the said accident and her injuries."

Dr. Khanan performed range of motion and other tests on her as part of the exam and made the following findings, as per the plaintiff's cervical spine:

- range of motion with regards to flexion was 80 degrees, the normal being 80 degrees;
- extension was 58 degrees, the normal being 60 degrees; -
- left lateral bend was 43 degrees, the normal being 45 degrees;
- right lateral bend was 42 degrees, with the normal being 45 degrees;
- right rotation was 72 degrees, with the normal being 80 degrees;
- left rotation was 75 degrees, with the normal being 80 degrees. In addition, I found tenderness on backward extension.

In addition, I performed objective range of motion tests which showed a significant restriction of motion of the plaintiff's lumbar spine as follows:

- flexion was limited to 54 degrees while 60 degrees is normal
- lumbar extension was limited to 38 degrees with 40 degrees being normal
- lumbar left lateral bend was 33 degrees with 35 degrees being normal;
- lumbar left lateral bend was 33 degrees with 35 degrees being normal;
- left rotation was limited to 44 degrees with 45 degrees being normal;
- right rotation was limited to 42 degrees with 45 degrees being normal;
- lumbar spine showed tenderness and paraspinal muscle spasm. I did the straight leg raising test and it revealed

lower back pain bilaterally at 60 degrees.

The plaintiff had never injured the parts of her body that were injured on April 6, 2007 prior to that date, nor had she re-injured them after April 6, 2007.

I can state with a reasonable degree of medical certainty that:

The plaintiff is still suffering from a significant permanent limitation of motion of her cervical and lumbar spine. In addition, she is still suffering from post-traumatic sprain and strain of her cervical and lumbar spine, including pain in her low back. She is still suffering from cervicgia.

Any physical activity requiring bending, lifting, carrying, and running are difficult and painful. She has pain if she tries to play with her friends. She missed time from school and additional time from gym class. I can further state with a reasonable degree of medical certainty that the plaintiff, Emely Castillo's personal injuries and significant disabilities were caused by the motor vehicle accident of April 6, 2007.

Based upon my examination, clinical observations, treatment and objective testing of the plaintiff, Emely Castillo, it is my opinion based upon a reasonable degree of medical certainty that the above mentioned personal injuries, disability and significant personal injuries sustained by the plaintiff, Emely Castillo, are permanent in nature and that they were all directly caused by the motor vehicle accident of April 6, 2007.

Based on the record submitted, plaintiffs have raised triable issues of fact by submitting, among other things, affirmed reports describing medical examinations conducted contemporaneously with the collision, as well as affirmed reports describing medical examinations conducted in 2011. These reports demonstrate that there are triable issues of fact as to whether the collision caused injuries to the plaintiffs that were serious injuries under the "permanent consequential limitation" or "significant limitation" of use categories of Insurance

Law §5102(d) (*see Evans v Pitt*, 77 AD3d 611 [2<sup>nd</sup> Dept 2010], *lv to app dismiss*. 16 NY3d 736 [2011]; *Sanevich v Lyubomir*, 66 AD3d 665 [2<sup>nd</sup> Dept. 2009]; *Noel v Choudhury*, 65 AD3d 1316 [2<sup>nd</sup> Dept. 2009]; *cf. Husbands v Levine*, 79 AD3d 109 [2<sup>nd</sup> Dept. 2010]).

Since plaintiffs established that at least some of their injuries satisfy the “no-fault” threshold, “it is unnecessary to address whether [their] proof with respect to other injuries [they] allegedly sustained would have been sufficient to withstand defendant’s motion for summary judgment.” (*Linton v Nawaz*, 14 NY3d 821, 822 [2010]; *McLelland v Estevez*, 77 AD3d 403 [2<sup>nd</sup> Dept. 2010]).

Finally, plaintiffs have not sustained their burden under 90/180 day category which requires a plaintiff to submit objective evidence of a “medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural 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.” (Insurance Law §5102[d]).

“When construing the statutory definition of a 90/180 day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment.” (*Thompson v Abbasi*, 15 AD3d 95 [1<sup>st</sup> Dept 2005]; *Gaddy v Eyler*, *supra*).

Specifically, plaintiffs have no admissible medical reports stating that they were disabled, unable to work or unable to perform daily activities for the first ninety (90) days out of one hundred eight (180) days. (*Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1<sup>st</sup> Dept 2010]; *Sutton v Yener*, 65 AD3d 6275 [2<sup>nd</sup> Dept. 2009].)

In view of the foregoing, the motion is **granted in part and denied in part.**

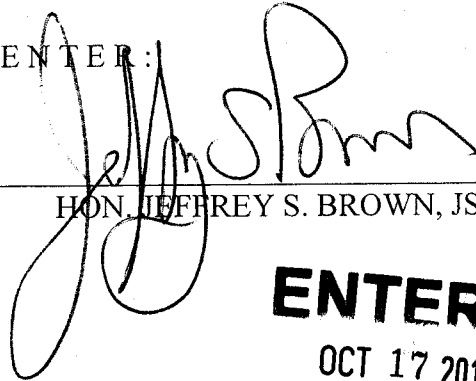
The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
October 13, 2011

Attorney for Plaintiffs  
Sanford L. Pirotin, P.C.  
323 Madison Street  
Westbury, NY 11590

Attorney for Defendants  
Robert J. Adams, Jr., Esq., LLC  
300 Garden City Plaza, Ste. 130A  
Garden City, NY 11530

ENTER:

  
HON. JEFFREY S. BROWN, JSC

**ENTERED**  
OCT 17 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE