SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

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**MICHELE WINDISCH,**

Plaintiff,

- against -

**ANNA G. FASANO,**

Defendant.

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**DECISION AND ORDER**
Index No: 298/10

Motion Sequence Nos: 001 & 002
Original Return Date: 01-19-11

**P R E S E N T :**
**HON. JOEL K. ASARCH,**
**Justice of the Supreme Court.**

The following named papers numbered 1 to 9 were submitted on this Notice of Motion on August 18, 2011:

| | Papers numbered |
|---|---|
| Notice of Motion, Affirmation and Affidavit (Seq. 001) | 1-3 |
| Affirmation in Opposition | 4 |
| Reply Affirmation | 5 |
| Notice of Motion, Affirmation in Support (Seq. 002) | 6-7 |
| Amended Affirmation in Opposition | 8 |
| Reply Affirmation | 9 |

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The motion by the plaintiff, Michele Windisch, pursuant to CPLR 3212, for an Order granting her summary judgment on the issue of liability [motion sequence 1]; and the motion by the defendant, Anna G. Fasano, for an Order awarding her summary judgment dismissing the plaintiff's complaint on the ground that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) [motion sequence 2], are decided as follows:

This action arises out of a motor vehicle accident that occurred on September 25, 2009 at

approximately 11:00 a.m. at the intersection of Jerusalem Avenue and Alken Avenue in the Village of Seaford, Nassau County, New York. At the time of the accident, plaintiff and defendant were traveling in opposite directions on Jerusalem Avenue. The accident occurred as defendant was attempting to make a left turn onto Alken Avenue. The intersection of Jerusalem Avenue and Alken Avenue is controlled by a traffic light.

In bringing this action, plaintiff claims that she sustained serious injuries as a result of the accident. Specifically, plaintiff claims that she sustained, *inter alia*, rotator cuff tendinosis with inferior surface partial thickness tear of the supraspinatus tendon, left shoulder; left shoulder bursitis and sprain; left shoulder pain with increase in neck pain radiating into the right upper extremity; numbness and tingling in the right upper extremity extending into the back of the arm, forearm and hand; cervical strain; neck pain, and tingling sensation into her arm (Verified Bill of Particulars, ¶5).

At the time of the accident, the 43-year old plaintiff was employed as a secretary at St. Pius X Roman Catholic Church. At her examination before trial, plaintiff testified that she works only three days a week from 9:00 a.m. to 4:00 p.m. and that she did not miss any time from work as a result of this accident (Windisch Tr., p. 6). She testified that as a result of this accident, she is unable to transport the laundry up and down in her house, wash her dog or play recreational volleyball with her family (*Id.* at pp. 57-59). She also testified that she can no longer lift her son (*Id.* at p. 60) or blow dry her hair (*Id.* at p. 64).

In moving for summary judgment dismissal of the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of the Insurance Law, defendant is not required to disprove any category of serious injury which has not been pled by the plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved

by the defendant by means other than the submission of medical evidence, including the plaintiff's own testimony and their submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2nd Dept. 1989]).

Here, the plaintiff claims that her injuries fall within the following five categories of the serious injury statute: to wit, significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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 (Verified Bill of Particulars, ¶5).

Inasmuch as the plaintiff has failed to allege and claim that she has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Plaintiff's claim that her injuries fall within the "significant disfigurement" category are also dismissed. The standard by which significant disfigurement is to be determined within the meaning of the statute is whether a reasonable person would view the condition as unattractive, objectionable, or as the subject of pity or scorn (see, *Tugman v. PJC Sanitation Service, Inc.*, 23 AD3d 457 [2nd Dept.2005]; *Sirmans v. Mannah*, 300 AD2d 465 [2nd Dept.2002]). A disfigurement may be considered "significant" and thus constitute a "serious injury" if a reasonable person viewing the injured party's body in its altered state would regard the condition as unattractive, objectionable, or

a subject of pity or scorn (*Spevak v. Spevak*, 213 AD2d 622 [2nd Dept 1995]). In the absence of any claim in her bill of particulars or her deposition referencing any "unattractive, objectionable" condition, it is clear that the plaintiff has also abandoned her claim that her alleged injuries left her body in an altered state that is a "subject of pity or scorn."

Similarly, plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law §5102(d) are also unsupported and contradicted by her own testimony wherein she states that she did not miss any time from work and returned to her regular duties upon returning to work. Further, to the extent that plaintiff has failed to claim or otherwise provide any evidence that she was "medically" impaired from doing any activities as a result of this accident for 90 days within the first 180 days following this accident, this Court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc. 3d 743 [Sup. Ct. Nassau 2007]).

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

In support of a claim that the plaintiff has not sustained a serious injury, defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendant's motion, to produce prima facie evidence in admissible form to support the claim for serious injury (*Licari v. Elliot*, 57 NY2d 230 [1982]). In order to be sufficient to establish a prima facie case of serious

physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012, *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept.1998]).

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,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*Toure v. Avis Rent A Car Systems,* supra).

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

causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566 [2005]). The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" (*Id.; Neugebauer v. Gill*, 19 AD3d 567 [2nd Dept. 2005]).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, supra; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]). When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff's limitations "to the normal function, purpose and use of the affected body organ, member, function or system" (*Id* at 98 NY2d 350).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion.

In support of its motion, the defendant submits, *inter alia*, plaintiff's emergency room report

from New Island Hospital; the affirmation of Dr. John C. Killian, M.D., a Board Certified Orthopedic Surgeon, who performed an independent orthopedic examination of the plaintiff on January 18, 2011; and the affirmed report dated January 12, 2011 of Dr. Jessica F. Berkowitz, M.D., a diagnostic and consultative radiologist who "reviewed the radiological examination performed on the [plaintiff]...on 10/27/09 at Zwanger-Pesiri Radiology" (Defendant's Motion, Ex. H).

Initially, it is noted that Dr. Berkowitz's report does not constitute competent medical evidence. Specifically, based on her sworn report, it is plain that Dr. Berkowitz has merely "reviewed" Michele Windisch's "radiological examination." It is unclear to this Court as to whether the "radiological examination" to which Dr. Berkowitz refers is meant to indicate actual MRI films or MRI reports of another physician. In either case, Dr. Berkowitz's report is incompetent and inadmissible. In order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read said MRI films (*Fiorillo v. Arriaza,* 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007]; *Sayas v. Merrick Transportation*, 23 AD3d 367 [2nd Dept. 2005]). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to the causality of the findings (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]).

MRI reports are also admissible if another radiologist, i.e., not the radiologist who performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician (*Dioguardi v. Weiner*, 288 AD2d 253 [2nd Dept. 2001]; *Beyel v. Console*, 25 AD3d 636 [2nd Dept.

2006]; *Porto v. Blum*, 39 AD3d 614 [2nd Dept. 2007]).[1] If, however, another physician avers that he or she personally reviewed the prescribing radiologist's sworn reports (not the MRI films), then in order to constitute competent medical evidence, that physician must also pair up his or her findings with a recent physical examination (*Silkowski v. Alvarez*, 19 AD3d 476 [2nd Dept. 2005]).

In this case, Dr. Berkowitz's report fails on all possible grounds. First, it is unclear as to whether she is the prescribing radiologist. Second, she does not aver that she reviewed the actual MRI films. Lastly, there is no indication that Dr. Berkowitz performed her own physical examination of the plaintiff so as to pair her findings with her reading of the "radiological examination."

For these reasons, Dr. Berkowitz's report does not constitute competent medical evidence in support of defendant's motion. Accordingly said report will not be considered by this Court on the instant motion (*Mezentseff v. Lau,* 284 AD2d 379 [2nd Dept. 2001]; *Meric v. Cancela*, 275 AD2d 309 [2nd Dept. 2000]).

Nevertheless, defendant has established her prima facie entitlement to judgment as a matter of law. Dr. John Killian's affirmation sufficiently establishes that the plaintiff, Michele Windisch, did not sustain a "serious injury" within the meaning of the statute. Specifically, the affirmed report of Dr. Killian confirms that he examined the plaintiff, performed quantified range of motion testing on her cervical spine and left shoulder with a goniometer, compared his findings to normal range of motion values, and concluded that the range of motion measured were normal, except for in the left shoulder elevation which Dr. Killian concluded to be volitional resistance. Further, Dr. Killian

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[1]Of note, however, is that if the results of the unsworn MRI report are referred to in the affirmed medical reports of the defendant's examining doctor, the plaintiff is then permitted to submit and rely upon the same unsworn MRI report in opposing the motion (*Zarate v. McDonald*, 31 AD3d 632 [2nd Dept. 2006]).

performed motor and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that plaintiff had resolved left shoulder pain, with no permanent residual or disability in either plaintiff's left shoulder or cervical spine (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]).

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

In opposition, plaintiff submits, *inter alia*, the affirmed reports of Dr. Philip M. Rafiy, M.D., an orthopedic surgeon; the affirmed report of Dr. Jeffrey M. Cohen, M.D., Diplomate American Board of Physical Medicine and Rehabilitation; and the affirmed reports of Dr. William A. Weiner, D.O.

Of note is the fact that none of plaintiff's submissions sufficiently demonstrates that plaintiff had any initial limitations of plaintiff's cervical spine or left shoulder (*Nemchyonok v. Ying*, 2 AD3d 421 [2nd Dept. 2003]); *Pajda v. Pedone*, 303 AD2d 729 [2nd Dept. 2003]). Specifically, plaintiff annexed five report of Dr. Rafiy, dated September 30, 2009, October 21, 2009, November 13, 2009, December 23, 2009 and January 27, 2010. In all of these reports, Dr. Rafiy only set forth the range of motion for the left shoulder abduction and flexion. Further, it was not until plaintiff's fifth evaluation that Dr. Rafiy performed range of motion testing on her cervical spine. However, none of these range of motions are compared to normal values (*Abraham v. Bello*, 29 AD3d 497 [2nd Dept. 2006]; *Forlong v. Faulton*, 29 AD3d 856 [2nd Dept. 2006]) and he does not identify any objective tests to ascertain the range of motion limitations (*Toure v. Avis Rent A Car Systems*, supra; *Powell*

*v. Alade*, 31 AD3d 523 [2nd Dept. 2006]). Thus, all of Dr. Rafiy's opinions, as to any purported loss are unfounded, and the Court will not consider such.

Similarly while Dr. Cohen's evaluation report dated January 10, 2011 (and Dr. Rafiy's March 3, 2011 report) contain acceptable range of motion testing, both reports are prepared nearly one and one-half years after the accident and thus not contemporaneous with the accident (*Nemchyonok v. Ying*, supra; *Pajda v. Pedone*, supra).

Dr. Weiner's report also falls short of raising a triable issue of fact. Dr. Weiner writes in his report dated May 31, 2011 that an "MRI of the cervical spine dated December 30, 2010 by Dr. Philip Rafiy was submitted for my independent radiological review." Dr. Weiner then goes on to make the following "Impression," to wit: "Central Disc Herniation at the C5-C6 level with component annular tear consistent with acute post traumatic findings" (Aff. In Opp., Ex. E). In his second report also dated May 31, 2011, Dr. Weiner again writes that he performed an independent radiology review and that an MRI of plaintiff's left shoulder dated October 27, 2009 was submitted for his review from an outside facility (*Id.*, Ex. F).

As stated above, in the absence of any indication that Dr. Weiner personally reviewed the actual MRI films (not the MRI report), Dr. Weiner's report cannot be considered herein (*Dioguardi v. Weiner*, supra; *Beyel v. Console*, supra). Further, even if this Court were to assume that Dr. Weiner, in fact, reviewed the plaintiff's actual MRI films, in the absence of any opinion as to the causality of his findings in either report (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]), neither report is sufficient to raise an issue of fact as to plaintiff's serious injury.

Therefore, in light of plaintiff's failure to raise any triable issue of fact, defendant's motion

for summary judgment dismissal of plaintiff's complaint on the grounds that the plaintiff, Michele Windisch, did not sustain a serious injury within the meaning of the Insurance Law, is **granted**. Plaintiff's complaint is dismissed in its entirety.

Under these circumstances, plaintiff's motion, pursuant to CPLR 3212, for an Order granting her summary judgment on the issue of liability is **denied as moot**.

This shall constitute the decision and order of this Court.

Settle judgment on notice.

Dated: Mineola, New York
November 25, 2011

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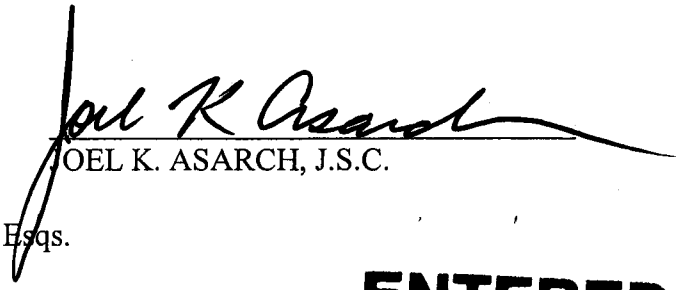

JOEL K. ASARCH, J.S.C.

Copies mailed to:
Law Offices of Michael Cervini, Esqs.
Attorneys for Plaintiff

Richard T. Lau & Associates
Attorneys for Defendant