SHORT FORM ORDER

INDEX No. 10-36973
CAL No. 13-01668MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 2-15-13
ADJ. DATE 11-19-13
Mot. Seq. # 001- MD
002 - MD

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THOMAS BRITTINGHAM, an infant by his mother and natural guardian, CAROLYN BRITINGHAM, KRISTINA BRITINGHAM, an infant by her mother and natural guardian, CAROLYN BRITTINGHAM, and CAROLYN BRITINGHAM, Individually,

Plaintiffs,

- against -

COLIN SMITH, MICHAEL SMITH and CARRIE ANN COHAN,

Defendants.

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Upon the following papers numbered 1 to 40 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001)1 -16; (002) 17-22; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 23-38; Replying Affidavits and supporting papers 39-40; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendant, Carrie Ann Cohan, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiffs Kristina Brittingham and Thomas Brittingham did not sustain serious injuies as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (002) by defendants, Colin Smith and Michael Smith, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiffs, Kristina Brittingham and Thomas Brittingham, did not sustain serious injuries as defined by Insurance Law § 5102 (d) is denied.

This negligence actions arises out of a motor vehicle accident which occurred on October 8, 2008, at Head of the Neck Road and Deer Lane, in Manorville, New York. The plaintiffs allege that they sustained serious injuries when the vehicle owned by Michael Smith and operated by Colin Smith, and the vehicle operated by Carrie Ann Cohan, came into contact. It is alleged that Thomas Brittingham and Kristina

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Brittingham were passengers in the vehicle operated by Carrie Ann Cohan. Carolyn Brittingham is the mother of the infant plaintiffs Thomas and Kristina Brittingham. Causes of action sounding in negligence have been asserted on behalf of each infant plaintiff. Carolyn Brittingham has asserted a derivative cause of action relating to each infant plaintiff.

The defendants seek summary judgment dismissing the complaint on the basis that neither infant plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d), and, thus, the derivative claims asserted by Carolyn Brittingham must be dismissed as well.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (001), defendant Carrie Ann Cohan has submitted, inter alia, an attorney's affirmation, copies of the summons and complaint, her answer with cross claim asserted against co-defendants Michael Smith and Colin Smith for judgment over and apportionment of damages, answer served by the Smith defendants with a cross claim asserted against co-defendant Carrie Ann Cohan, plaintiffs' verified bill of particulars; uncertified copies of the Brookhaven Memorial Hospital emergency department record, pediatrician's record of Thomas Brittingham, MRI reports of the cervical and lumbar spine of Kristina Brittingham dated October 10, 2019; reports of Isaac Cohen dated October 6, 2011 concerning his independent orthopedic examinations of Kristina Brittingham and Thomas Brittingham; transcript of the examination before trial of Kristina Brittingham; transcript of the examination before trial of Thomas Brittingham signed by his mother, Carolyn Brittingham; and uncertified/unauthenticated copies of school attendance record for Kristina Brittingham.

In support of motion (002), the Smith defendants have submitted, inter alia, an attorney's affirmation; and copies of the summons and complaint, answers with cross claims, and plaintiffs' verified bill of particulars. Counsel incorporates by reference into motion (002) the arguments and evidentiary submissions contained in motion (001).

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which

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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of her verified bill of particulars, Kristina Brittingham alleges that as a result of this accident, she sustained injuries consisting of: cervical sprain/strain; cervical radiculitis; lumbar sprain/strain; lumbar radiculitis; thoracic sprain/strain; lumbago; and myalgia/myofascitis; pain, stiffness and restrictions of motion of the affected areas.

By way of his verified bill of particulars, Thomas Brittingham alleges that as a result of the accident, he sustained injuries consisting of: thoracic strain/sprain; cervical sprain/strain; lumbar sprain/strain; lumbar radiculitis; pain, stiffness, and restriction of motion of the affected areas.

Based upon careful review and consideration of the evidentiary submissions, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that plaintiffs did not sustain a serious injury as defined by Insurance Law § 5102 (d).

While the infant plaintiff Thomas Brittingham and his sister, Kristina Brittingham, were both treated by neurologists, as noted in Dr. Cohen's report concerning his independent examinations of the plaintiffs, no report from a neurologist has been submitted. This leaves the court to speculate as to expert opinions concerning whether either plaintiff sustained any neurological injuries. Of significance, it is noted that Kristina Brittingham

lost consciousness at the time of the accident, and pleaded cervical and lumbar radiculitis.

Dr. Cohen identified various medical records and reports which he reviewed as part of his independent orthopedic examination of Kristina, including chiropractic records of Dr. Whitaker; neurologic examination by Dr. Matthew dated January 9, 2010, progress note for General Pediatrics at Stony Brook Hospital dated June 9, 2009, and physical therapy records beginning January 2010 through October 2010. Dr. Cohen also identified various medical records and reports which he reviewed as part of his independent orthopedic examination of the infant plaintiff, eleven year old Thomas, including the chiropractic records of Dr. Whitaker, neurological followup evaluations by Dr. Mathew, and other itemized records. None of these medical records reviewed by him have been provided in support of his opinions concerning either plaintiff, as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case, precluding summary judgment.

Dr. Cohen made reference to the supplemental bill of particulars, however, no supplemental bill of particulars has been provided by the moving defendants. The failure to provide a supplemental bill of particulars prevents this court from determining whether any additional injuries were claimed as to either plaintiff. In particular, it is noted that Kristina had lumbar and cervical MRIs performed on October 10, 2010. The cervical MRI report provided by defendants indicates that at C5-6 there is mild right foraminal stenosis secondary to uncovertebral osteophyte formation, and a possible small right lateral disc herniation. Dr. Cohen does not rule out that any of the findings demonstrated on the cervical or lumbar MRI studies are causally related to the subject accident, precluding summary judgment.

Dr. Cohen makes no reference to the plaintiffs' claims of cervical and/or lumbar radiculopathy, and has not ruled out such conditions and whether the radiculitis claimed by each plaintiff is not causally related to the subject accident, precluding summary judgment.

While a curriculum vitae was submitted with Dr. Cohen's report of Michael Brittingham, who was thirteen years of age at the time of the independent orthopedic examination, he does not indicate his qualifications or experience in treating pediatric patients to qualify to render opinions with regard to pediatric patients, raising further factual issues.

Additionally, the defendants' examining physician did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering defendants' physician's affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was unable to substantially perform all of the material acts which constituted his or her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physician does not comment on this period, precluding summary judgment on this category of injury as well.

Kristina Brittingham testified to the extent that she was born in 1993 and was in either ninth or tenth grade when the accident happened. She was a passenger in the vehicle being driven by her aunt, Carrie Ann Cohan. She blacked out when the accident occurred, but regained consciousness at the scene of the accident.

Since the accident, she continued to lose consciousness a couple times a month between October 2008 and August 2011. She sustained a black eye to her left eye, which took about two weeks to resolve. In addition to the pain associated with the black eye, the left side of her face hurt, her head and neck hurt, and she felt really dizzy. She testified to the care and treatment she received relative to the injuries she alleges were sustained in this accident, including treatment with patches and injections by Dr. Mathew, a neurologist, for the migraines and headaches she has suffered since the accident. Kristina testified that she has been a dance student since two years of age, and was both a student and a student teacher of dance. She attended the dance studio six or seven days a week for years prior to the accident. Due to the accident, she had to quit dance school and has not been able to return. She felt her grades in school dropped after the accident due to headaches, dizziness, and difficulty concentrating.

Thomas Brittingham testified to the extent that he was in fifth grade and was a passenger in his aunt's car when the accident occurred. The day after the accident, he awoke in the morning with pain in his middle and lower back. He received treatment from Dr. Mathew for his back and has continued to see him every month since. He stated that he has scoliosis. He was treated by Dr. Whitaker, a chiropractor. He also received acupuncture. He attended physical therapy three times a week following the accident and continues to do so. Since the accident, he is unable to run long distances and can only run around the track once as his back starts cramping up. In seventh grade he had to stop playing football because his back started hurting really badly. He has to take pain medication every day for his back pain.

Based upon the foregoing, it is determined that the defendants have failed to demonstrate entitlement to summary judgment as to either plaintiff as to either category of injury defined in Insurance Law §5102 (d).

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motions (001) and (002) by defendants for dismissal of the complaint and any cross claims on the basis that the plaintiff has failed to meet the serious injury threshold defined in Insurance Law §5102 (d) is denied.

The foregoing constitutes the Order of this Court.

Dated: January 23, 2014
Riverhead, NY

Hector D. LaSalle
HON. HECTOR D. LASALLE, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**