

Hernandez v Stepney
2015 NY Slip Op 30802(U)
April 1, 2015
Sup Ct, Bronx County
Docket Number: 310431/2011
Judge: Betty Owen Stinson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
CLAUDINE HERNANDEZ, MONICA ALTRECHE,
JOSNIEL HERNANDEZ, an infant under the age of
eighteen (18), by his mother and natural guardian,
JENNIE HERNANDEZ, and JENNIE HERNANDEZ,
individually,

Plaintiffs,

INDEX № 310431/2011

-against-

DECISION/ORDER

CALVIN B. STEPNEY II,

Defendant.

-----X
HON. BETTY OWEN STINSON:

This motion by defendant for summary judgment dismissing plaintiffs' complaint is granted.

On Saturday, December 4, 2010, plaintiff Claudine Hernandez' car was struck from behind by a vehicle owned and operated by the defendant. Claudine Hernandez ("Claudine") was driving; her sister Jennie Hernandez ("Jennie") and Jennie's son Josniel Hernandez ("Josniel") were backseat passengers in the car.

Jennie and Josniel were taken to a hospital by ambulance, examined and released. Claudine drove her car from the scene. Claudine did not seek medical attention until four days later on December 8, 2010, when she and Jennie visited Webster DST Medical ("Webster") and they began a regimen of physical therapy. Josniel came to Webster one week later on December 15, 2010. They all remained in physical therapy until around April 2011 when their no-fault benefits expired.

Plaintiffs commenced this action alleging injuries as a result of the accident. After discovery was complete, defendant made the instant motion for summary judgment for plaintiffs' failure to demonstrate they had suffered serious injuries.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a "permanent loss of use of a body organ, member, function or system", a "permanent consequential limitation of use of a body organ or member", a "significant limitation of use of a body function or system" or a "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v*

Palmieri, 1 NY3d 536 [2003]; *Licari v Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either “permanent” or involve a “significant” limitation of use (*Kordana v Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of “significant limitation” requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, *lv denied*, 91 NY2d 805 [1998]; *Gaddy v Eycler*, 167 AD2d 67, *aff’d*, 79 NY2d 955 [1992]). Strictly subjective complaints of a plaintiff or self-serving history unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678 [1987]; *Marrache v Akron Taxi Company*, 50 AD3d 973 [1st Dept 2008]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that “substantially all” of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The “substantially all” standard “requires a showing that plaintiff’s activities have been restricted to a great extent rather than some slight curtailment” (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708).

Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]). “Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert’s ‘conclusion that plaintiff’s condition is causally related to the subject accident is mere speculation’, insufficient to support a finding that such a causal link exists” (*Diaz v Anasco*, 38 AD3d 295 [1st Dept 2007], citing *Montgomery v Pena*, 19 AD3d 288 [2005]).

An unexplained gap in treatment is fatal to a plaintiff's claim of serious injury (*Colon v Kempner*, 20 AD3d 372 [1st Dept 2005]). Explanations for gaps in treatment must be proffered by doctors within medical reports or affidavits (*Pommels v Perez*, 4 NY3d 566 [2005]; *Farozes v Kamran*, 22 AD3d 458 [2nd Dept 2005]).

“Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury” (*Pommels v Perez*, 4 NY3d 566 [2005]; *DeJesus v Paulino*, 61 AD3d 605 [1st Dept 2009]). Nor is evidence of radiculopathy (*Casimir v Bailey*, 70 AD3d 994 [2nd Dept 2010]). A plaintiff's subjective complaints of pain are insufficient, without more, to establish that herniated discs constitute a serious injury (*Pierre v Nanton*, 279 AD2d 621 [2nd Dept 2001]).

The defendant may rely on medical records and reports prepared by plaintiff's treating physicians to establish that plaintiff did not suffer a serious injury causally related to the accident (*Franchini*, 1 NY3d 536). Once the burden has shifted however, an affidavit or affirmation by the person conducting a physical examination of the plaintiff is necessary to establish a serious injury, unless plaintiff is offering unsworn reports already relied upon by the defendant (*Grossman v Wright*, 268 AD2d 79 [3rd Dept 2000]; *see also Zoldas v Louise Cab Co.*, 108 AD2d 378 [1st Dept 1985]). The affirmation must set forth the objective medical tests and quantitative results used to support the opinion of the expert (*Grossman*, 268 AD2d 79). “An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (cite omitted)” (*Toure v Avis Rent A Car Systems*, 98 NY2d 345 [2002]). A conclusory affidavit of the doctor does not constitute medical evidence (*Zoldas*,

108 AD2d 3778; *see also Lopez v Senatore*, 65 NY2d 1017 [1985] [conclusory assertions tailored to meet statutory requirements insufficient to demonstrate serious injury]).

CLAUDINE

In support of his motion, defendant offered copies of the pleadings, the bill of particulars, the deposition testimony of the plaintiffs, and an affirmation and report by Dr. Alvin Bregman. The bill of particulars as to Claudine alleges injuries including a herniated spinal disc at C4-5 impinging on the neural canal and a bulging disc at L4-5 impinging on the thecal sac, radiculopathy, sprains and strains. Claudine alleged further that she was confined to her bed and home for three weeks following the accident.

Claudine testified that she was born in 1980 and was therefore 30 years old at the time of the subject accident (deposition, September 25, 2013 at 8). She was 5'2" tall and weighed 150 pounds (*id.* at 13). Her head hit the headrest as a result of the accident impact (*id.* at 19, 20-21). She immediately felt pain in her neck and right hand (*id.* at 27). By the time she sought treatment at Webster, she had complaints about her back hurting as well (*id.* at 33, 35-36).

Claudine missed three weeks of her employment as a police officer because of the accident, and then returned to work on desk duty for another two weeks before returning to full duty thereafter (*id.* at 10, 40-41). At the time of her deposition she had been employed as a police officer for eleven years (*id.* at 10).

Claudine did not continue treatment after April 2011 (*id.* at 38-39). She has no immediate plans to return to treatment (*id.* at 39). She has always had health insurance through her employment with the New York City Police Department (*id.* at 45-46).

Dr. Alvin Bregman, defendant's expert orthopedist, examined Claudine on December 12,

2013. He reviewed her bill of particulars, her physical therapy treatment records, the MRI reports of her cervical and lumbar spine, the EMG/NCV testing of her upper extremities, the range of motion and muscle strength testing reports and x-ray reports of her right hand, thoracic spine and lumbar spine.

Dr. Bregman found full range of motion in her neck and back expressed numerically and compared to normal measurements. Range of motion in her right hand was within normal limits and there was no swelling, erythema, ecchymosis or tenderness. Muscle strength in her upper and lower extremities was 5 out of 5. Straight leg raising was negative both in seated and supine positions. There was no spasm or tenderness in the lumbar spine. Dr. Bregman concluded that Claudine had suffered cervical, thoracic and lumbar sprains as a result of the accident, which had all resolved. He found no objective evidence of disability.

In opposition to the motion, plaintiffs offered the police report of the accident; affidavits of the plaintiffs; an initial examination report by Dr. Sanni-Thomas of Webster DST Medical with the actual examination notes by a different, unidentified person; the affidavits of Dr. Raymond Bartoli and unaffirmed MRI reports by radiologists Dr. Mark Shapiro and Dr. Sasan Azar with respect to Claudine and Jennie. No physical therapy attendance or evaluation notes were offered.

Claudine stated in her affidavit that she could not continue treatments after her no-fault benefits expired because she could not afford the insurance co-payments. She continues to experience severe, intermittent pain in her neck, upper and lower back on an almost daily basis. She has difficulty sitting or walking "too long". She has "great difficulty" showering, lifting and putting on clothes. She is unable to work out.

Dr. Sanni-Thomas, Doctor of Osteopathy, certified records of an examination of Claudine

performed on December 8, 2010, four days after the accident. His unaffirmed statement is signed by him but does not say he examined Claudine, until the last sentence where he bases his opinion on "his" examination. The notes of that examination which follow, however, end with an illegible chiropractor's signature that is, nevertheless, nothing at all like Dr. Sanni-Thomas' signature and contains no stamp or other identifying mark. According to Dr. Sanni-Thomas' statement, Claudine complained of headache, nausea, neck pain radiating to her right shoulder, arm and hand and mid and low back pain. Shoulders, elbows, hips, knees and ankles all demonstrated full range of motion. Her right hand was painful, tender and stiff, with ecchymosis and signs of trauma. Range of motion of the hand, however, was full, motor strength was 5 out of 5 and there was no atrophy. Tinel's, Finkelstein, Phalen's and Froment's tests were all negative.

Claudine's cervical spine showed mild spasm and tenderness, but no trigger points and full range of motion. Axial loading, Spurlin's, Cervical Distraction and Lhermitte signs were all negative.

The thoracic and lumbar spines showed severe spasm and tenderness with range of motion limited by pain. Numerical measurements were provided, but with no reference to normal numbers. Lumbar spine tests including the Valsalva Maneuver, Prone Knee Bending and Sacroiliac Joint Tenderness were all negative.

Claudine's gait was stable, she could walk in tandem and walk heel-to-toe. Her degree of disability was "temporary, partial". Dr. Sanni-Thomas reported the preliminary diagnosis as cervical and lumbar spine strain secondary to acceleration/deceleration, post-concussion headache, right hand sprain/strain and PTSD. Dr. Sanni-Thomas reported Claudine's condition at the time as directly related to the subject accident and her prognosis "at the present time" to be

“good”. That statement was immediately followed by what appears to be a boilerplate section entitled “Opinion Prognosis” contradicting that prognosis finding. No final diagnosis or examination report was offered at the end of physical therapy.

An unaffirmed MRI report of Claudine’s cervical spine, dated January 24, 2011, by Dr. Mark Shapiro reported a herniated disc at C4-5 and a bulging disc at C5-6, both impinging on the neural canal. An unaffirmed MRI report of Claudine’s lumbar spine, dated January 8, 2011, by Dr. Sasan Azar reported a bulge at L4-5, impinging on her thecal sac.

Dr. Bartoli, plaintiff’s expert chiropractor, examined Claudine on July 28, 2014, more than three years after she finished with the physical therapy paid for by no-fault insurance. According to his affidavit dated August 22, 2014, Dr. Bartoli reviewed Claudine’s records from Webster, including the report by Dr. Sanni-Thomas and MRI reports by one Pervaiz Qureshi, M.D. MRI records either generated or reviewed by a Dr. Qureshi were not included with this report. Dr. Bartoli’s opinion is based on the records he listed, his conversation with Claudine and the physical exam he conducted. Claudine reported feeling immediate pain to her neck and right hand at the time of the accident and acute pain to her neck and back later that night. Pain was rated a 7 out of 10. There was no mention of headache or PTSD. She reported going to Webster a day or so later.

At the time of Dr. Bartoli’s examination, Claudine complained of neck and back pain, with radicular pain to her extremities. Dr. Bartoli found decreased range of motion in Claudine’s neck and back, measured numerically and compared to normal numbers. Dr. Bartoli found spasm in the cervical and lumbar spine and Maximum Foraminal Compression, Valsalva’s sign, Pheasant’s and Kemp’s tests all showing pain.

Dr. Bartoli’s final diagnosis was cervical and lumbar disc syndrome and radiculopathy,

segmental dysfunction, herniated disc at C4-5 and a bulging disc at C5-6, causing impingements on the neural canal, and a bulging disc at L4-5. He concluded that Claudine was substantially impaired from kneeling, running, jumping, prolonged walking, sitting, lifting, squatting and bending and had been so since the day of her accident. He concluded that she suffered a significant limitation of use of a bodily system or function and her injuries were permanent and consequential as a result of the subject accident.

Defendant has established his entitlement to summary judgment which plaintiff Claudine has not refuted with admissible medical evidence. Defendant met his burden of showing by admissible medical evidence that Claudine suffered from sprain injuries which have completely resolved. She admitted returning to work after only three weeks and then being restored to full duty within another two weeks, precluding a claim that she suffered from a medically determined, non-permanent injury that prevented her from performing substantially all her daily activities for 90 out of the first 180 days following the accident.

Dr. Sanni-Thomas' statement, supported by the examination notes of the unidentified chiropractor who actually examined her, says that Claudine was found to have full range of motion in her cervical spine four days after the accident, despite a finding of spasm and tenderness secondary to the acceleration/deceleration (whiplash) injury she suffered as a result of the accident. Her right hand had full range of motion and full strength, despite being stiff and bruised from the accident. Neither whiplash nor bruises, however, rise to the level of a serious injury. The unaffirmed evidence of bulging or herniated discs, even if admissible, without some further evidence of a significant limitation of movement, are insufficient to show a serious injury. The contemporaneous evidence of limitation was unaffirmed and the person who actually examined

Claudine is unidentified.

Webster's records reported spasm and tenderness in Claudine's thoracic and lumbar spine. Her range of motion in those areas was limited by her expressions of pain, an insufficient measure of limitation of movement for the purpose of demonstrating a serious injury. All other tests performed in both the cervical and lumbar spine were found to be negative, including a Cervical Distraction test and the Valsalva maneuver, despite what Dr. Bartoli reported as being contained in Webster's records. Dr. Sanni-Thomas reported the preliminary diagnosis to be cervical and lumbar strain due to acceleration/deceleration injuries, thoracic strain, right hand sprain, post concussion headache syndrome and PTSD, none of which, without further proof of limitations as a result, constitute serious injury as a matter of law. There was, furthermore, no discussion at any time, treatment for, or further evidence to support a diagnosis of concussion or PTSD.

In his statement, Dr. Sanni-Thomas concluded that Claudine suffered only a "partial" and "temporary" disability with a "good" prognosis. No final assessment of her condition at the end of her physical therapy was offered.

Three years later, defendant's expert, Dr. Bregman, found Claudine had full range of motion in her cervical, thoracic and lumbar spine, and had originally suffered sprains in those areas, all of which had resolved. He found no evidence of disability or need for treatment. Claudine's injuries were neither significant initially, nor permanent. Defendant thus made his *prima facie* case for summary judgment as to Claudine.

Claudine's offerings in opposition did not raise an issue of fact for trial. The gap in treatment of three and one-half years between the end of her reported physical therapy and her examination by Dr. Bartoli is enough to show she suffered no permanent injury by itself, and her

bald, completely unsupported claim that she could not afford the co-payments required by her health insurance provider to continue treatment is not enough to overcome that evidentiary bar. She offered no numbers showing her salary, her financial obligations or the amount of co-payments required. Her own subjective claims, that she has intermittent pain and difficulty showering, lifting and dressing herself and is unable to work out, are vague and insufficient by themselves to raise an issue of fact for trial (see *Pierre*, 279 AD2d 621 [subjective complaints of pain and limitation insufficient to establish serious injury]).

Dr. Bartoli's affidavit is not enough to raise an issue of fact as to whether Claudine suffered serious injury as a result of the accident. His affidavit is conclusory, merely repeating statutory language (see *Lopez*, 65 NY2d 1017 [1985][conclusory assertions tailored to meet statutory requirements insufficient to establish serious injury]). Even if all Dr. Bartoli's physical findings were correct, given the gap in treatment, his conclusion as to causation is purely speculative. Although he based his conclusion as to causation on a lack of any evidence that Claudine had suffered prior injuries, he was silent as to the possibility of later injuries, especially since her records show she had no limitation of movement in her cervical spine four days following the accident. Nevertheless, upon finding limitation in Claudine's cervical spine years later, he concluded it had been limited in that way since the time of the accident. Furthermore, Dr. Bartoli misrepresented some of the other findings reported by Dr. Sanni-Thomas, including that a positive Cervical Distraction test and Valsalva Maneuver were found, when the opposite was true according to those records. The MRI records are unaffirmed, but even if those findings were in proper form, Claudine's inadequately explained gap in treatment is fatal to her case.

JENNIE

In support of his motion as to Jennie, defendant offered all the same exhibits as those offered for Claudine. Jennie's Bill of Particulars alleged injuries including bulging spinal discs at C7-T1 through T6-7; L1-2; L4-5 and L5-S1, neck pain, headache, sprains and strains. She lost four days of work after the accident.

Jennie testified that she was born in 1979 and so was 31 years old at the time of the accident (deposition, September 18, 2013). She is 5'6" tall and weighed about 150 pounds at the time (*id.* at 47-48). Presently she weighs about 180 (*id.* at 47). Everyone in the car was wearing seatbelts (*id.* at 10). Upon impact, her head went forward hitting the front passenger seat and then she was thrown back into her seat (*id.* at 15). She was taken to the hospital, complained of pain in her neck, mid back and low back, given a prescription for pain and released (*id.* at 21-24). She missed a "couple" days from her full-time employment after the accident, but returned to full job duties after that (*id.* at 44-45).

A "couple days" after the accident, Jennie sought medical treatment at Webster and underwent physical therapy there for 5 months (*id.* at 25-27). When that was concluded because the facility closed, she sought treatment in another facility and treated for her neck and low back, but stopped after two months because it was too "inconvenient" (*id.* at 30-33). She had health insurance at the time (*id.* at 44-45). She has had perhaps four visits since for back massages in different places, one being the Grey Wolf Lodge in Pennsylvania (*id.* at 35, 37).

Jennie still has neck pain about once a week (*id.* at 43). She has mid and low back pain when on stairs (*id.*). She can no longer go to the gym, has "difficulty" with sex, cleaning, sitting or standing for long periods and cannot lift heavy objects (*id.* at 46, 49, 66-69, 75).

Jennie was examined by Dr. Bregman, defendant's expert, on May 1, 2014. She complained of pain in her neck, mid and low back. She weighed 189 pounds and was 36 weeks pregnant. Range of motion in her cervical spine was normal and there was no spasm in her thoracic or lumbar spine. She had normal gait and a negative straight leg raising test. Dr. Bregman found that Jennie had suffered cervical, thoracic and lumbar spine sprains, all of which had resolved.

In opposition to the motion as to Jennie, plaintiffs offered Jennie's affidavit, the medical records certified by Dr. Sanni-Thomas of Webster together with examination notes, unaffirmed MRI reports by Drs. Shapiro and Azar, and the affidavit of Dr. Raymond Bartoli. As with Claudine, no physical therapy attendance or evaluation notes were included.

Jennie sought treatment at Webster four days after the accident and was examined by Dr. Sanni-Thomas. She complained of severe, intermittent headaches and nausea, pain in her neck and mid back, and low back pain aggravated by lifting, changing position and bending. Her neck was reported to be supple. In his unaffirmed report, Dr. Sanni-Thomas stated Jenny had severe spasm and tenderness in her cervical, thoracic and lumbar spine. She had range of motion limited by pain in her neck and back, with measurements, but no reference to the normal. All other reported tests were negative.

In his examination notes, Dr. Thomas provided the reference numbers showing that Jennie had normal range of motion in flexion and extension in her cervical spine and was limited by pain only in side flexion and rotation, 25 degrees out of a normal 45, and 50 degrees out of 80, respectively. Range of motion was also limited secondary to pain in the thoracic and lumbar spine with measurements related to the normal numbers.

Dr. Sanni-Thomas' diagnosis was cervical, thoracic and lumbar strain, post concussion headache syndrome and right and left leg contusions. There was no final mention of her condition at the end of her physical therapy in Dr. Sanni-Thomas' report.

The accompanying examination notes also contained an unaffirmed consultative report by Dr. Barry A. Dublin, M.D. His measurements of the limitations in Jennie's cervical and lumbar spine differed both in measurements and reference numbers from Dr. Sanni-Thomas so they could not be compared. The date of his examination is illegible. He found no tenderness in the thoracic spine, but positive Soto Hall, Kemp's and straight leg raising tests. His assessment was cervical and low back sprain and post traumatic headaches.

The unaffirmed MRI report of Jennie's thoracic spine by Dr. Sasan Azar shows bulging discs at C7-T1 through T6-7 and at the L1-2 level. The unaffirmed MRI report of Jennie's lumbar spine by Dr. Mark Shapiro shows bulging discs at L4-5 and L5-S1, impinging on the neural canal.

Jennie stated in her affidavit, dated August 20, 2014, that she continues to have radiating, severe, intermittent pain in her neck and mid and low back. She cannot sit or walk for "too long". She has "difficulty" showering, lifting and putting on clothes. She cannot work out. She reported having an additional two months of physical therapy at GFG Medical, P.C., but it was "impossible" to schedule time for it with her work and family obligations. Also, she could not afford the co-payments required by her health insurance. No records of that therapy were provided.

Dr. Bartoli examined Jennie on July 28, 2014. He reviewed the Webster records and stated that he based his opinion on MRI reports by Dr. Pervaiz Qureshi, his conversation with Jennie and his physical examination of Jennie. Jennie complained of pain in her neck and back

and radicular pain to her extremities. Dr. Bartoli found spasm and limitation in movement, with pain, in her neck and back, measured numerically and compared to normal numbers. He found positive Foraminal Compression, Valsalva's, Pheasant's and Kemp's tests.

His diagnosis was cervical and lumbar disc syndrome and radiculopathy, segmental dysfunction, and all the bulging discs referenced above. He concluded Jennie was substantially incapacitated from performing her customary daily activities, and prevented or impaired from kneeling, running, jumping, prolonged walking or sitting, lifting, squatting and bending, all caused by the subject motor vehicle accident. He concluded further that her injuries constituted a significant limitation of use of a body system or function and were both permanent and consequential.

Defendant has demonstrated his *prima facie* entitlement to summary judgment as to plaintiff Jennie, which plaintiffs have not refuted with admissible evidence. Since Jennie's bill of particulars claimed that she lost only four days from work, she is precluded from claiming she suffered a medically determined injury preventing her from performing substantially all her daily activities for 90 out of the first 180 days following the accident. Dr. Bregman found that she had suffered only cervical, thoracic and lumbar sprains as a result of the accident, all of which had resolved.

Jennie's offerings in opposition do not raise an issue of fact for trial. Although Dr. Sanni-Thomas found measurably limited movement in Jennie's neck and back, it was limited by Jennie's subjective complaints of pain. All other tests were negative. His diagnosis was strains to the affected areas, post concussion headaches and contusions, none of which constitute serious injury as a matter of law. Jennie's own subjective complaints of pain and limitation are

insufficient to establish a serious injury with nothing more. The MRI reports are unaffirmed, thus inadmissible, and the MRI reports purportedly relied upon by Dr. Bartoli were apparently based on tests performed by a radiologist whose reports were not offered in evidence. Even if the MRI reports by Drs. Shapiro and Azar were admissible, and all of Dr. Bartoli's physical findings were accurate, his conclusion as to causation after more than three years from cessation of treatment is only speculative. Furthermore, Jennie herself did not sufficiently explain the gap in treatment for her injuries. Mere claims of inconvenience and inability to pay the co-payments required by her health insurance are insufficient without further evidentiary support.

JOSNIEL

In support of the defendant's motion for summary judgment as to Josniel, defendant offered copies of the pleadings, the bill of particulars as to Josniel, his deposition testimony, and Dr. Bregman's affidavit and report. The bill of particulars alleged that Josniel suffered bulging discs at L3-4 and L4-5 and left shoulder sprain as a result of the accident. He was out of school for four days.

Josniel testified that he was born in 1997 and was therefore 13 years old at the time of the accident (deposition, September 18, 2013). He hit his back against the seat of the car and felt pain in his mid and low back and left shoulder (*id.* at 12, 14). He was taken to a hospital, examined and released (*id.* at 14-16). He was an 8th grade student at the time and missed two days of school (*id.* at 7, 22). He was not taking gym at the time (*id.* at 9). Because of the accident he has "trouble" playing basketball, kickball and running (*id.* at 22-23). By "trouble" he means he has to stop before the others do (*id.* at 22). He is covered by his father's health insurance plan (*id.* at 19).

Dr. Bregman examined Josniel on May 1, 2014. Josniel complained of pain in his mid and

low back. He did not mention his left shoulder. Dr. Bregman found no spasm, full range of motion in the cervical and lumbar spine and normal muscle strength. Drop Arm and Apprehension tests were negative. There was no impingement sign. Straight leg raising in the seated and supine postures was negative. Dr. Bregman concluded Josniel had suffered sprains in his thoracic and lumbar spine and left shoulder, all of which had resolved.

In opposition to the motion, plaintiffs offered Josniel's affidavit, medical records from Webster, an affirmation by Dr. Bartoli and an unaffirmed MRI report by Dr. Mark Shapiro. Josniel stated in his affidavit, dated August 20, 2014, that he went to Webster for treatment about one day after the accident complaining of pain in his low back and left shoulder. He was in physical therapy for five months until April 2011. He could not afford co-payments for more treatment, although he still suffers severe pain in his low back and left shoulder intermittently and almost daily. Presently he has "difficulty" sitting or walking "too long", showering, lifting, and putting on clothes. He is unable to play sports or work out.

Webster's records reflect that Josniel first came to that facility on December 15, 2010, eleven days after the accident. He complained of headache, neck, mid back and low back pain. He was found to be 5'3" and weighed 168 pounds. Range of motion in Josniel's neck and left shoulder were found to be full and all tests were negative. Dr. Sanni-Thomas found moderate spasm in Josniel's thoracic and lumbar spine and limited range of motion secondary to pain. Right and left knee joints revealed pain, but there was no tenderness or swelling and muscle strength was normal. All other tests were negative. His disability was rated temporary and partial and his prognosis was good. Dr. Sanni-Thomas' diagnosis was cervical and lumbar strain secondary to acceleration/deceleration injury, thoracic muscle strain and sprains and strains to

both knees. Examination notes by Dr. Sanni-Thomas reported numerical limitations in range of motion in the thoracic and lumbar spine compared to normal numbers.

An unaffirmed MRI report signed by Dr. Mark Shapiro and dated on January 7, 2011 showed Josniel to have bulging discs at L3-4 and L4-5, creating impingement on the neural canal.

Dr. Bartoli examined Josniel on July 28, 2014 and reviewed Josniel's records from Webster and MRI reports by Dr. Pervaiz Qureshi. Those latter MRI reports were not included with plaintiffs' opposition. Once again, Dr. Bartoli reported the Cervical Distraction test to have been positive when performed by Dr. Sanni-Thomas, although Webster's records reported the opposite. None of the other tests mentioned by Dr. Bartoli, apart from range of motion, as having been found to be positive by Dr. Sanni-Thomas are mentioned in Dr. Sanni-Thomas' report, unless perhaps they are all alternative names for the same thing.

According to Dr. Bartoli, a second examination of Josniel at Webster on February 21, 2011 showed restriction in Josniel's cervical and lumbar spine, measured numerically and compared to normal measurements. Dr. Bartoli's own examination resulted in findings showing limited range of motion due to pain in Josniel's cervical and lumbar spine. His diagnosis was cervical and lumbar disc syndrome, segmental dysfunction of the cervical and lumbar spine, radiculopathy and bulging discs at L3-4 and L4-5, with impingement on the neural canal.

Dr. Bartoli concluded Josniel's limitations and complaints of pain were directly related to the subject accident, he sustained a significant loss of use of his cervical and lumbar spine, his injuries are permanent and consequential, and constitute significant loss of use of his cervical and lumbar spine. Dr. Bartoli opined that Josniel is substantially impaired or prevented from kneeling, running, jumping, prolonged walking or sitting, lifting, squatting and bending. He is

also incapacitated from performing his customary daily activities to a substantial degree.

Defendant has demonstrated his *prima facie* entitlement to summary judgment as to plaintiff Josniel, which plaintiffs have not refuted with admissible evidence. Since the accident happened on a Saturday in early December, and since Josniel missed no more than two days of school, he is precluded from claiming he suffered a medically determined injury preventing him from performing substantially all his daily activities for 90 out of the first 180 days following the accident. Dr. Bregman found that he had suffered only sprains as a result of the accident, all of which had resolved.

Josniel's offerings in opposition do not raise an issue of fact for trial. Josniel did not appear at Webster for physical therapy until eleven days after the accident. At that time he was found by Dr. Sanni-Thomas to have no limitation of movement in his cervical spine and left shoulder. Josniel alleges in his bill of particulars no more than bulging discs in his low back in any event. The limitations there were "secondary to pain". Dr. Sanni-Thomas found Josniel's disability to be temporary and partial with a good prognosis. His diagnosis was no more than strains to the affected areas, including Josniel's knees.

More than three years after physical therapy ended, Dr. Bartoli found limitations in range of motion of Josniel's cervical and lumbar spine and attributed them to the subject motor vehicle accident, apparently missing at least one of Dr. Sanni-Thomas' findings, that there was no limitation in range of motion in Josniel's cervical spine eleven days after the accident. Dr. Bartoli's conclusion of disc syndrome, segmental dysfunction and bulging discs and the resulting limitations is vague, and his opinion as to the significance or permanence of those conditions is conclusory and merely repeats statutory language.

also incapacitated from performing his customary daily activities to a substantial degree.

Defendant has demonstrated his *prima facie* entitlement to summary judgment as to plaintiff Josniel, which plaintiffs have not refuted with admissible evidence. Since the accident happened on a Saturday in early December, and since Josniel missed no more than two days of school, he is precluded from claiming he suffered a medically determined injury preventing him from performing substantially all his daily activities for 90 out of the first 180 days following the accident. Dr. Bregman found that he had suffered only sprains as a result of the accident, all of which had resolved.

Josniel's offerings in opposition do not raise an issue of fact for trial. Josniel did not appear at Webster for physical therapy until eleven days after the accident. At that time he was found by Dr. Sanni-Thomas to have no limitation of movement in his cervical spine and left shoulder. Josniel alleges in his bill of particulars no more than bulging discs in his low back in any event. The limitations there were "secondary to pain". Dr. Sanni-Thomas found Josniel's disability to be temporary and partial with a good prognosis. His diagnosis was no more than strains to the affected areas, including Josniel's knees.

More than three years after physical therapy ended, Dr. Bartoli found limitations in range of motion of Josniel's cervical and lumbar spine and attributed them to the subject motor vehicle accident, apparently missing at least one of Dr. Sanni-Thomas' findings, that there was no limitation in range of motion in Josniel's cervical spine eleven days after the accident. Dr. Bartoli's conclusion of disc syndrome, segmental dysfunction and bulging discs and the resulting limitations is vague, and his opinion as to the significance or permanence of those conditions is conclusory and merely repeats statutory language.

No sworn report of bulging discs by Dr. Qureshi was offered by Dr. Bartoli and the unaffirmed MRI by Dr. Shapiro is inadmissible. Even if it were admissible and relied upon by Dr. Bartoli, Josniel's explanation for the gap in treatment of at least three years is fatal to his case. He was covered by his father's insurance and, as a minor, was not responsible for co-payments, but rather his parents were. Josniel did not say that his father was unable to afford co-payments or that he was even asked to provide them. Josniel's complaints of limitation, that he must stop playing basketball, kickball or running before some un-named others do, is patently insufficient to describe significant injury.

The complaint is dismissed as to the plaintiffs Claudine Hernandez, Jennie Hernandez and Josniel Hernandez. Movant is directed to serve a copy of this order with notice of entry on the Clerk of Court who shall delete those names from the caption, leaving only the name of Monica Altreche as a party plaintiff.

This constitutes the decision and order of the court.

Dated: April / , 2015
Bronx, New York



BETTY OWEN STINSON, J. S.C..