SHORT FORM ORDER

INDEX No. 09-44777
CAL. No. 11-00408MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-13-11 (#002 & #003)
MOTION DATE 8-2-11 (#004)
ADJ. DATE 9-13-11
Mot. Seq. # 002 - MD
003 - MotD
004 - XMD

DEBRA L. MCGARRITY and WLADISLAW NABIAL, Plaintiffs, - against - NARCIZA PICO, RODRIGO L. BORJA, ELLEN CITARELLA and ANTHONY CITARELLA, Defendants.	EDWARD R. YOUNG & ASSOCIATES Attorney for Plaintiffs 112 Route 109 West Babylon, New York 11704 ROBERT P. TUSA, ESQ. Attorney for Defendants Pico & Borja 898 Veterans Memorial Highway, Suite 320 Hauppauge, New York 11788 PEKNIC, PEKNIC & SHAEFER, LLC Attorney for Defendants Citarella 1005 West Beech Street Long Beach, New York 11561

Upon the following papers numbered 1 to 52 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-14; (003) 15-34 ; Notice of Cross Motion and supporting papers (004) 35-46 ; Answering Affidavits and supporting papers _; Replying Affidavits and supporting papers 47-48; 49-50; 51-52 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendants, Narciza Pico and Rodrigo L. Borja, pursuant to CPLR 3212 for an order dismissing the complaint on the basis that the plaintiffs, Debra McGarrity and Wladislaw Nabial, did not sustain a serious injury as defined in Insurance Law § 5102(d) is denied; and it is further

ORDERED that motion (003) by the defendants, Ellen Citarella and Anthony Citarella, pursuant to CPLR 3212 for summary judgment on the issue of liability dismissing the complaint as asserted against them, and further dismissing the cross claim by Narciza Pico and Rodrigo L. Borja, is granted and the complaint and the cross claims asserted against the Citarella defendants are dismissed with prejudice and severed from the action, and the cross claim asserted by the Citarella defendants against Pico and Borja is dismissed and severed from the action; and that part of the application which seeks an order dismissing the complaint on the basis that the plaintiffs did not sustain a serious injury as defined in Insurance Law § 5102 (d), has been rendered academic by dismissal of the complaint and cross claims asserted against the Citarella defendants, and is denied as moot; and it is further

ORDERED that in searching the record, summary judgment is granted as a matter of law in favor of Wladislaw Nabial on the issue of liability and the counterclaim for judgment over asserted by defendants Narciza Pico and Rodrigo L. Borja against Nabial is dismissed with prejudice and severed from the action; and it is further

ORDERED that motion (004) by the plaintiffs, Debra McGarrity and Wladislaw Nabial, pursuant to CPLR 3212 for summary judgment on the issue that they each sustained a serious injury as defined by Insurance Law § 5102(d), is denied.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiffs, Debra McGarrity and Wladislaw Nabial, on March 30, 2007 when they were involved in a three-car automobile accident on East Main Street at or near its intersection with Evergreen Avenue, in Brookhaven, New York. Wladislaw Nabial was the operator of a motor vehicle in which Debra L. McGarrity was a passenger. The vehicle operated by Ellen Citarella was stopped behind the Nabial vehicle which was also stopped. The vehicle owned by Rodrigo L. Borja and operated by Narciza Pico struck the Citarella vehicle in the rear, causing the Citarella vehicle to strike the plaintiffs' vehicle in the rear. In their answer, Narciza Pico and Rodrigo L. Borja asserted a cross claim against the co-defendants Ellen Citarella and Anthony Citarella for judgment over against them; and have further asserted a counterclaim against the plaintiff, Wladislaw Nabial for judgment over against him. The Citarella defendants have asserted a cross claim against Narciza Pico and Rodrigo L. Borja.

In motion (002), Narciza Pico and Rodrigo L. Borja, seek an order dismissing the complaint on the basis that the plaintiffs did not sustain serious injury as defined in Insurance Law § 5102(d). In motion (003), the Citarella defendants seek summary judgment on the issue of liability, dismissing the complaint as asserted against them and the cross claim asserted against them by Narciza Pico and Rodrigo L. Borja. They also seek an order determining that the plaintiffs did not sustain serious injuries as defined by Insurance Law §5102 (d). In motion (004), the plaintiffs seek summary judgment on the issue that they each sustained a serious injury as defined in Insurance Law §5102 (d).

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]).

Turning to motion (003) wherein Ellen Citarella and Anthony Citarella seek summary judgment dismissing the complaint and the cross claims asserted against them on the basis that they are not liable for the occurrence of the accident, and that the plaintiffs did not sustain a serious injury as defined by Insurance Law §5102 (d). They have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the defendants' respective answers with cross claims and counterclaim, plaintiff's verified bill of particulars; an uncertified copy of the police MV 104 accident report with attached witness statement of Ellen Citarella; copies of the unsigned transcripts of the examinations before trial, all dated September 17, 2010, of Wladislaw Nabial, Debra McGarrity, Ellen Citarella, and Narciza Pico; uncertified medical records from Brookhaven Memorial Hospital; copies of the reports of Richard Lechtenberg, M.D. dated November 7, 2010 concerning his independent neurological examination of Debra McGarrity, Sanford R. Wert, M.D. dated December 8, 2010 concerning his independent orthopedic examination of Debra McGarrity, Arthur Fruhauff, M.D. dated November 29, 2010 concerning his independent radiological review of the MRI studies performed on Debra McGarrity on May 5, 2007; uncertified copy of medical records for Wladislaw Nabial; the reports of Richard Lechtenberg, M.D. dated November 7, 2010 concerning his independent neurological examination of Wladislaw, Dr. Sanford R. Wert, M.D dated December 8, 2010 concerning his independent orthopedic examination of Wladislaw Nabial, Arthur Fruhauff, M.D. dated November 29, 2010 concerning his independent review of the MRI dated May 19, 2007of the lumbar spine of Wladislaw Nabial.

Initially, the Court notes that the unsworn MV-104 police accident report submitted by the Citarella defendants constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]). The unsigned, but certified deposition transcripts are admissible pursuant to ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2nd Dept 2011]. While the deposition transcript of Ellen Citarella, dated September 17, 2010, is unsigned, it is considered by this court as adopted as accurate by the moving defendant (*see*, ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

LIABILITY

Ellen Citarella testified at her examination before trial that she was involved in a motor vehicle accident on March 30, 2007 on East Main Street (a/k/a Montauk Highway) while traveling in a westerly direction. When she reached the intersection with Route 112, the traffic light turned red. She slowly brought her vehicle to a stop about a quarter of a car length behind a stopped yellow Dodge Hemi truck, when her vehicle was struck in the rear by a green car in back of her. The impact caused her vehicle to move forward and strike that vehicle in front of her, which vehicle was also still at a full stop. She testified that the vehicle which struck her vehicle was driven by a woman, later identified as Narciza Pico. The plaintiffs were in the stopped vehicle in front of her, and her vehicle struck them as a result of the impact by the Pico vehicle.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795

NYS2d 645 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2d Dept 2005]; ***Power v Hupan***, *supra*).

"It is negligence as a matter of law to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the driver's length of vision ahead of him. This rule is known generally as the 'assured clear distance ahead' rule. In application, the rule constantly changes as the motorist proceeds, and is measured at any moment by the distance between the motorist's vehicle and any intermediate discernible static or forward-moving object in the street or highway ahead constituting an obstruction in his path. Such rule requires a motorist in the exercise of due care at all times to see, or to know from having seen, that the road is clear or apparently clear and safe for travel, a sufficient distance ahead to make it apparently safe to advance at the speed employed" (***O'Farrell v Inzeo et al,*** 74 AD2d 806, 426 NYS2d 1 [1st Dept 1980]).

Based upon the foregoing, it is determined that the vehicle operated by Ellen Citarella was at a complete stop when it was struck in the rear by the vehicle operated by Narciza Pico and owned by Rodrigo L. Borja, and that Narciza Pico was negligent as a matter of law in violation of NY Veh. & Traf. Law §1129(a). Narciza Pico has not come forward with a non-negligent explanation for the happening of the accident. Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence; moreover, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead (*see*, ***N.Y. Veh. & Traf. Law §1129(a); Shamah v Richmond County Ambulance Service, Inc. et al,*** 279 AD2d 564, 719 NYS2d 287 [2d Dept 2001]). Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]). Here, the defendants, Pico and Borja, have failed to raise a factual issue or to come forward with a non-negligent explanation to preclude summary judgment from being granted to the Citarella defendants.

Accordingly, that part of motion (003) wherein the Citarella defendants seek dismissal of the complaint and cross claim asserted against them on the basis they bear no liability for the happening of the accident is granted, and the complaint and cross claim as asserted against them are dismissed with prejudice. The cross claim asserted by the Citarella defendants against co-defendants Pico and Borja is dismissed as well. That part of motion (003) by the Citarella defendants for dismissal of the complaint on the basis that the plaintiffs have not sustained a serious injury within the meaning of Insurance Law § 5102 (d) has been rendered academic by dismissal of the complaint against them, and is denied as moot.

In searching the record, it is determined that the adduced testimonies establish that the Nabial vehicle was also at a complete stop when the Citarella vehicle was struck by the vehicle being operated by defendant Pico, pushing the Citarella vehicle into the Nabial vehicle. Counsel for Debra McGarrity and Wladislaw Nabial, in opposing the defendants' motions, and in support of motion (004), adopts each and every contention raised in the Citarella's motion for summary judgment on the issue of liability and incorporates the same by reference into motion (004). The testimony that the Nabial and Citarella vehicles were stopped in traffic when the Citarella vehicle was struck from behind by the Pico vehicle is undisputed. Pico's negligence proximately caused the accident. Thus, Nabial bears no liability for the occurrence of the accident as a matter of law.

Accordingly, the counterclaim asserted by Pico and Borja against plaintiff Nabial is dismissed with prejudice.

SERIOUS INJURY

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 medical 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*).

In support of motion (002), Narciza Pico and Rodrigo L. Borja have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint and defendant's answer with a counterclaim and cross claim, a copy of plaintiffs' bill of particulars, and various discovery demands; partial, unsigned and uncertified copies of the transcripts of the examinations before trial, dated September 17, 2010, of Wladislaw Nabial and Debra McGarrity; uncertified medical records of Debra McGarrity and Wladislaw Nabial; copies of the reports of Michael J. Katz, M.D. dated November 23, 2010 concerning his independent orthopedic examination of Debra McGarrity, Peter Ross, M.D. dated November 9, 2007

concerning his independent radiological review of the MRI studies performed on Debra McGarrity on May 5, 2007; uncertified copy of medical records for Wladislaw Nabial; the reports of Michael J. Katz, M.D. dated November 23, 2010 concerning his independent orthopedic examination of Wladislaw, Dr. Sanford R. Wert, M.D. dated December 8, 2010 concerning his independent orthopedic examination of Wladislaw Nabial, Peter Ross, M.D. dated November 9, 2007 concerning his independent review of the MRI dated May 19, 2007of the lumbar spine of Wladislaw Nabial.

It is determined that the partial, and unsigned and uncertified deposition transcripts of Debra McGarrity and Wladislaw Nabial are not in admissible form pursuant to CPLR 3212, (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.,*** 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion.

DEBRA L. MCGARRITY

By way of the verified bill of particulars, Debra L. McGarrity alleges that she sustained injuries consisting of left herniation at L3-4 with impingement on the foramen; right herniation at L4-5 with impingement on the foramen; herniation at C3-4, 5-6. 7-8; radiculopathy into the upper and lower extremities; straightening of the cervical lordosis; headaches; and nausea.

Michael J. Katz, M.D. set forth in his sworn report, the records he reviewed in rendering his opinions, however, those records, and the MRI and x-ray reports, have not been provided to this court by the defendant as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., supra. Expert testimony is limited to facts in evidence (*see, **Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2nd Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). Here, Dr. Katz may offer opinions based upon his own examination of the plaintiff.

As determined by use of a goniometer, Dr. Katz set forth the range of motion values found upon evaluation of Ms. McGarrity's cervical spine, lumbar spine, and upper and lower extremities, and compared those findings to the normal range of motion values and found no deficits. Although Dr. Katz reached the opinion that Ms. McGarrity sustained a cervical strain with radiculitis, resolved, and lumbosacral strain with radiculitis, resolved, and although the plaintiff has claimed both cervical and lumbar radiculopathy in the bill of particulars, the defendants have not submitted a report from a neurologist who examined the plaintiff ruling out the claimed neurological injury (*see, **Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

Dr. Katz offers a conclusory opinion that the MRI reports of the cervical spine and lumbar spine indicate changes which are degenerative in nature as based upon Dr. Ross' radiological review. He sets forth some of Dr. Ross' findings, but does not indicate what findings were set forth on the MRI reports by the treating radiologist relating to the plaintiff's lumbar and cervical spine. Dr. Katz does not render an opinion based upon his own review of the MRI reports which have not been submitted to this court in support of his opinion, leaving it to this court to speculate as to the findings set forth by the treating radiologist.

Peter Ross, M.D. set forth that he performed an independent radiology reviews of the MRI examinations of the plaintiff's cervical and lumbar spine and stated his findings. However, the MRI reports of the treating radiologists who initially interpreted the films upon which Dr. Ross bases his opinion upon have not been provided as evidentiary submissions, leaving it to this court to speculate as to whether the plaintiff's radiologist and Dr. Ross reached the same findings upon review of the films.

Dr. Ross' impression upon review of the cervical spine MRI films is that of veterbral spondylosis changes involving the C4 through C7 vertebrae of the cervical spine, with mild desiccation of the C3-4 and C4-5 discs, and more desiccation of the C5-6 and C6-7 discs, with narrowing of the C5-6 interspace. There is central disc herniation at C4-5 deforming the subarachnoid space; hard soft disc complex comprised of posterior vertebral osteophyte bar formation combined with a diffuse smooth broad based annular bulge deforming the subarachnoid space with focal herniation component present, but with central canal stenosis and bilateral foraminal stenoses at C5-6; and focal central right parasagittal disc herniation component at C6-7 deforming the subarachnoid space, with mild bilateral foraminal stenoses with the right greater than the left.

Dr. Ross states he reviewed the MRI of the plaintiff's lumbar spine and set forth his findings of vertebral spondylosis changes involving L3-S1 vertebrae with desiccation of the L1-2, L2-3, L3-4, and the L5-S1 discs, with more desiccation of the L4-5 disc with narrowing of the interspace. He further states the L3-4 level shows a diffuse broad based annular bulge extending right and left laterally into the bases of the neural foramina with a small focal right lateralized disc herniation component encroaching upon the right neural foraminal base, without direct compression of the adjacent right peripheral exiting L4 root within the neural foramen, nor that of the left peripheral exiting L4 root, and overgrowth of the facet joints and ligamentum flavum with mild encroachment upon the lateral recesses bilaterally.

Although Dr. Ross opines that these conditions pre-existed the accident of March 30, 2007, his opinion is conclusory and unsupported by the record. He does not indicate the age of these findings which he states are degenerative changes which pre-existed the accident. He does not address the nature of causation of the findings, and whether he reviewed and/or compared any prior studies in rendering his opinion.

Accordingly, the moving defendants have not established entitlement to summary judgment on the issue that Debra McGarrity did not sustain a serious injury within the definition of Insurance Law § 5102(d).

WLADISLAW NABIAL

By way of the verified bill of particulars, Wladislaw Nabial alleges he sustained injuries consisting of a disc bulge at the L3-4 level and central herniation at the L5-S-1 level.

Michael J. Katz, M.D. set forth in his sworn report that he examined Mr. Nabial. It appears from Dr. Katz' report that he and the plaintiff were verbally sparring during the examination. Dr. Katz states that a Dr. DeMoura questions the plaintiff's idiopathic low back pain, or low back pain of unknown origin. Noteworthy is that Dr. Katz has not submitted this record by Dr. DeMoura to this court in support of his statement, and does not indicate whether Dr. DeMoura was a treating physician or an independent

examining physician. Dr. Katz continues that Mr. Nabial had an unphysiological response to straight leg testing. When he conducted a seated straight leg raising test, Mr. Nabial complained of pain in his back, but when he conducted the straight leg raising test in the supine position, Mr. Nabial had no pain. Notably, Dr. Katz does not indicate which leg there was pain in the sitting position, and if it was the same leg that did not have pain in the supine position. Thus, Dr. Katz raises credibility issues as to Mr. Nabial's "unphysiological"response to examination (*see*, ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]; ***Lalla v Connolly***, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]), which credibility issues are to be determined by a jury and preclude summary judgment.

It is additionally noted, that although Dr. Katz states the Mr. Nabial currently shows no signs or symptoms of permanence relative to his neck or back, and that he is not currently disabled, he does not rule out that the conditions alleged in Mr. Nabial's bill of particulars were not caused by the accident of March 30, 2007. Dr. Katz continues that there were old fractures noted in the x-rays of Mr. Nabial's lumbar spine, but he does not indicate the location of these fractures, causation, or when they occurred. Dr. Katz does not state the findings set forth on the MRI and x-ray reports, which he reviewed and upon which he bases his opinions, and has not included those reports as evidentiary submissions in support of his conclusions.

Peter Ross M.D. set forth in his sworn report that he performed an independent radiology review of the MRI of the plaintiff's lumbar spine taken on May 19, 2007. He states there is mild loss of height of the superior endplates of the L1 and L2 vertebrae, consistent with old compression fracture deformities for which he recommends clinical correlation combined with plain radiographs of the lumbar spine. However, clinical correlation and the results of plain radiographs have not been submitted in support of his inconclusive review.

Dr. Ross further indicates that there are vertebral spondylosis changes which involve the L1 through the S1 vertebrae with desiccation of the L1-2, L2-3, L3-4, and L5-S1 discs, with no evidence of focal disc herniations or diffuse annular bulges. But, Dr. Ross continues, the L3-4 level shows a small diffuse broad-based annular bulge extending right and left laterally into the bases of the neural foramina without focal herniation component present, and that the L5-S1 level shows vertebral spondylosis changes combined with a small focal central disc herniation component extending to the epidural fat, with direct compression on the thecal sac or the corresponding nerve roots. Dr. Ross opines that these degenerative conditions pre-existed the accident of March 30, 2007. However, his opinion is conclusory and unsupported with a basis for his opinion. Additionally, the MRI report generated by the plaintiff's treating radiologist has not been submitted as an evidentiary submission, leaving it to this court to speculate as to whether the treating radiologist and Dr. Ross have similarly interpreted the films.

Additionally, defendants' examining physician did not examine Ms. McGarrity or Mr. Nabial during the statutory period of 180 days following the accident, thus rendering the physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted their 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 expert does not offer an opinion relative to that period of time.

Based upon the foregoing, the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Debra McGarrity or Wladislaw Nabial did not sustain a serious injury within the meaning of Insurance Law §5102 (d), under either category. The factual issues raised in defendants' moving papers preclude summary judgment. Inasmuch as the moving parties failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "seriousinjury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the plaintiffs' 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]) as the burden has not shifted.

In cross motion (004), Debra McGarrity and Wladislaw Nabial seek summary judgment on the issue that they each sustained a serious injury within the definition of Insurance Law §5102 (d). In support of their application, they have submitted, inter alia, an attorney's affirmation; the affirmed reports of Jeffrey Perry, D.O., and Mark Shapiro, M.D.; the affidavits of Debra McGarrity and Wladislaw Nabial; reports of Jeffrey Perry, D.O. dated May 4, 2011, April 9, 2007 and April 6, 2007 with records; EMG studies; and MRI studies of Debra McGarrity's lumbar and cervical spines dated May 5,2007, and Wladislaw Nabial's lumbar spine dated May 19, 2007, all read by Mark Shapiro, M.D.

DEBRA MCGARRITY

The MRI of Debra McGarrity's lumbar spine report dated May 5, 2007, affirmed by Mark Shapiro, M.D., sets forth the impression of levoscoliosis, left foraminal herniation at L3-4 creating impingement, and right foraminal herniation at L4-5 creating impingement. The MRI report of Debra McGarrity's cervical spine dated May 5, 2007, affirmed by Mark Shapiro, M.D. sets forth the impression of central disc herniations at C4-5, C5-6, and C6-7, without central spinal stenosis or foraminal impingement.

In his affirmed report/record of May 4, 2011, Jeffrey Perry, D.O. states he examined Ms. McGarrity, and obtained, as determined by goniometer, measurements of her cervical spine and set forth his findings, comparing the findings to the normal range of motion values. He set forth that cervical flexion was 52/60 degrees, extension 64/75 degrees, right rotation 64/80 degrees, left rotation 60/80 degrees, right lateral flexion 38/45, left lateral flexion 35/45; and dorsolumbar spine flexion 74/90 degrees, extension 30/30 degrees, right rotation 36/45 degrees, left rotation 35/45 degrees, right lateral flexion 30/30 degrees, and left lateral flexion 28/30 degrees. He tested manual muscle strength of the left and right upper and lower extremities and found giveaway weakness of the hip flexors, hip extensors, knee flexors, knee extensors, ankle dorsiflexors, ankle plantar flexors and strength of the extensor hallucis longus. Sensation was diminished in the right and left L4-5 dermatones.

Dr. Perry states that Ms. McGarrity was involved in a motor vehicle accident on March 30, 2007 and although she acknowledges having had prior difficulties with her neck and low back, she was not symptomatic at the time of the accident. After a course of physical therapy and ongoing symptoms, it is Dr. Perry's opinion that she has permanent injuries, including restricted range of motion, and what appears to be painful radiculopathy emanating from the cervical spine and lumbar spine. Dr. Perry further opines with a reasonable amount of medical certainty that the competent producing cause of her current condition is a direct result of the accident in question, acknowledging the pre-existing issues from which she had been asymptomatic for a year prior. He also states that the electrodiagnostic studies reveal a right L4

asymptomatic for a year prior. He also states that the electrodiagnostic studies reveal a right L4 radiculopathy and a left C5-6 and C6-7 radiculopathy.

In his report of April 6, 2007, Dr. Perry states that Ms. McGarrity had a previous injury in 1998 when involved in a motor vehicle accident, and thereafter injured her neck and back upon twisting. He indicates that he was given a note from Ms. McGarrity from South Shore Neurology Group revealing a history of lumbar radiculopathy with a herniated disc at L4-5 and cervical radiculopathy.

There are factual issues raised in the supporting medical records submitted by McGarrity concerning, but not limited to, how her previous neck injury was diagnosed, if MRI's were taken, how the prior cervical radiculopathy was diagnosed, and the cervical level involved. Proximate cause of the injuries claimed in this accident has not been established as the prior injuries to her neck and back have not been articulated with any medical specificity to rule out factual issues, relative to causation and/or proximate cause. Based upon the foregoing, Debra McGarrity has not established prima facie entitlement to summary judgment.

WLADISLAW NABIAL

The MRI report of Wladislaw Nabial's lumbar spine dated May 19, 2007, affirmed by Mark Shapiro, M.D., gives the impression of a broad based disc bulge at L3-4 and central disc herniation at L5-S1, without spinal stenosis or foraminal impingement.

Mike Pappas, D.O. has set forth in his report dated April 6, 2007, that Mr. Nabial was involved in a motor vehicle accident on March 30, 2007 and now has pain in his neck traveling to his left shoulder, with numbness in his left third and fourth fingertips, pain with turning his head to the left, and low back pain. He found decreased sensation in the left fourth and fifth digits, but does not indicate how he tested for this. Dr. Pappas obtained goniometric range of motion measurements and compared his findings to the normal range of motion values for the cervical and lumbar spine. Cervical flexion was 60/60 degrees, extension 50/50 degrees, right cervical rotation 64/80 degrees, and left cervical rotation 47/80 degrees, however, right and left lateral cervical flexion were not set forth. Lumbar flexion was 76/90 degrees, and extension 22/30 degrees. However, right and left lateral flexion and rotation have not been set forth. The failure to set forth the right and left cervical flexion, and right and left lumbar lateral rotation raise factual issues which preclude summary judgment.

In his affirmed report Dr. Jeffrey Perry, D.O., sets forth that Mr. Nabial had an x-ray study of the lumbar spine in 2007, which, by impression, documents "Deformity of the spine with degenerative arthritic changes, scoliosis and probable ulnar fracture with slight loss of alignment and probable old fracture with a slight loss of alignment at the level of T12-L1, L2-3, for which appropriate follow studies...., depending on clinical correlation may be utilized." Dr. Perry continues that Mr. Nabial denies having any other accidents or injuries prior to the accident in question or subsequent to the accident. Upon goniometric range of motion testing, the range of motion studies were performed but were not compared to the normal range of motion values, thus precluding summary judgment as no deficits have been set forth. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2d Dept 2002]). A disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (***Hussein, et al. v Harry Littman, et al.,*** 287 AD2d 543, 731 NYS 2d 477 [2d Dept 2001]).

Dr. Perry states that it can be stated with a reasonable amount of medical certainty that the competent producing cause of his current condition is a direct consequence of the accident in question since the patient denies having had prior or subsequent injuries. Although Dr. Perry states that the accident in question is the competent producing cause of the accident, he indicates that Mr. Nabial has been under the care of a spine surgeon, but does not indicate whether that care pre-dated or post-dated the accident, and those records of the spine surgeon have not been submitted by the plaintiff. Dr. Perry states that straight leg raise is negative on the left, but is positive on the right, with decreased sensation in the right L5-S1 dermatone. He further indicates that electrodiagnostic studies reveal a right L5 radiculopathy which represents a significant and permanent injury for which interventional treatment is a consideration. Although Dr. Perry, on the most recent visit by Mr. Nabial, set forth range of motion determinations, they have not been compared to the normal range of motion values. Thus, these factual issues preclude summary judgment.

Based upon the foregoing Wladislaw Nabial has not demonstrated prima facie entitlement to summary judgment on the issue that he sustained a serious injury as defined by Insurance Law §5102(d).

Accordingly, motion (004) by the plaintiffs, Debra McGarrity and Wladislaw Nabial, for summary judgment on the issue that they each sustained a serious injury as defined by Insurance Law § 5102(d), is denied.

Dated: Dec. 30, 2011

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION