SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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LEROY K. LITTLE and RENEE LITTLE,

Plaintiffs,

-against-

LUIS BARAJAS-CISNEROS and MARTIN SUACEDO,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 12471/2010
Motion Date: May 4, 2012

The following papers numbered 1 to 6 were read on the motion for summary judgment by defendants alleging that the plaintiff Leroy K. Little did not meet the serious injury threshold as defined in Insurance Law § 5102(d):

Notice of Motion-Affirmation-Exhibits A-D.. 1-3

Affirmation in Opposition-Affidavit. 4-5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action stemming from a motor vehicle accident on June 20, 2009 wherein it is alleged that plaintiff was struck by defendant's vehicle while crossing the street. Plaintiff alleges a disc herniation and disc bulges for which he received multiple steroid injections and the placement of a spinal stimulator into his back.

In support of their motion, defendants submit the pleadings plaintiff's deposition transcript, and the affirmed medical report of Ira Neustadt, M.D, a neurologist. According to Dr.

Neustadt's report, plaintiff suffers from degenerative disc changes. Specifically, Dr. Neustadt claims "Apparently, an MRI scan showed evidence of degenerative disc changes in the low back area." However, defendants failed to submit a copy of the MRI report or demonstrate that it actually showed degenerative disc changes.

"Summary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of a triable issue' (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted)." *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept., 1965).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.'" *Wanger v Zeh*, 45 Misc2d 93, 94, (Sup. Ct., Albany County, 1965), *aff'd* 26 AD2d 729 (3rd Dept.1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bakerian v H.F. Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3

NY2d 395, 404 (1957).

The movant has the burden of submitting evidence, in admissible form, to support his motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Unsworn documents are inadmissible evidence and thus a party's reliance thereon in support of a motion for summary judgment is improper. *See, Huntington Crescent Country Club v M & M Auto & Marine Upholstery, Inc.*, 256 AD2d 551, 551 (2nd Dept. 1998). It is well established that "[t]he 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." *Winegrad v New York University Medical Center,* 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 480 (1974). *Finkelstein v. Cornell University Medical College*, 269 AD2d 114, 117 (1st Dept. 2000). The moving party must affirmatively demonstrate the merits of its claim or defense, and cannot obtain summary judgment merely by "pointing to gaps in its opponent's proof." *Kajfasz v Wal-Mart Stores, Inc.,* 288 AD2d 902, 902 (4th Dept. 2001); *Dodge v City of Hornell Industrial Development Agency,* 286 AD2d 902, 903 (4th Dept. 2001)*; Frank v Price Chopper Operating Co., Inc.,* 275 AD2d 940 (4th Dept. 2000).

The defendant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers". *Winegrad v New York University Medical Center, supra,* 64 NY2d at 853; *See, also, Miccoli v Kotz,* 278 AD2d 460, 461 (2nd Dept. 2000); *Karras v County of Westchester,* 272 AD2d 377, 378 (2nd Dept. 2000); *Fox v Kamal Corporation,* 271 AD2d 485 (2nd Dept. 2000); *Gstalder v State of New York,* 240 AD2d 541, 542 (2nd Dept. 1997); *Lamberta v Long Island Railroad,* 51 AD2d 730, 730-731 (2nd Dept. 1976);

Greenberg v Manlon Realty, Inc., 43 AD2d 968, 969 (2nd Dept. 1974).

In the instant case, defendants failed to make a prima facie showing that Mr. Little did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident (*see Toure v Avis Rent A Car Sys.,* 98 NY2d 345 (2002); *Gaddy v Eyler,* 79 NY2d 955 (1992); *Walker v Village of Ossining,* 18 AD3d 867 (2nd Dept. 2005).

A serious injury is defined in the Insurance Law §5102(d) as:

> 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.

Defendants assert that plaintiff's degenerative disc disease is a "pre-existing condition" under *Pommells v Perez,* 4 NY3d 566 (2005) thereby shifting the burden to the plaintiff on this basis alone to address this evidence of degeneration and explain how the subject accident caused plaintiff's injuries. While Dr. Neustadt refers to prior treatment with Dr. Kim for lower back pain prior to the accident, no evidence of this treatment was submitted with the motion to ascertain how close in time to the accident was the treatment.

Defense counsel essentially argues that Dr. Neustadt's opinion that plaintiff's bulging discs are degenerative in nature and therefore not causally related to the accident is a sufficient basis under *Pommells* upon which to shift the burden to the plaintiff on this motion. As discussed below, that is not how this Court reads *Pommells* and this Court also is of the opinion that this is not a proper or practical conclusion.

Pommells is a trilogy of cases, two of which are relevant here: *Carrasco v Mendez* and *Brown v Dunlap*. In *Carrasco v Mendez*, the Court of Appeals affirmed dismissal of the plaintiff's complaint on the threshold issue and held "... with *persuasive evidence* that plaintiff's alleged pain and injuries were related to a pre-existing condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation." (4 NY3d at 579) (emphasis added). The "persuasive evidence" submitted by the defendant in *Carrasco* included an affirmed report from one of the plaintiff's treating physicians which acknowledged the existence of a pre-existing degenerative condition and that a return to pre-accident status had been achieved (4 NY3d at 578).

In *Brown*, while the Court found that the defendant had met its initial burden on the motion (at least with respect to the alleged "gap in treatment"), it also held as to the alleged pre-existing condition that a chiropractor's "conclusory notation" is "itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident" (4 NY3d at 577). The Court of Appeals clearly drew a contrast between the evidence presented in *Brown* and the evidence presented *Carrasco*. Thus, it appears that a "conclusory notation" by a defense doctor as to a pre-existing condition is insufficient whereas " persuasive evidence" comprised at least in part of an admission by plaintiff's treating physician as to a degenerative condition is sufficient for a defendant to carry its burden on a summary judgment motion.

Here, all that is present is Dr. Neustadt's conclusory notation that the plaintiff's bulging discs are merely degenerative in nature. Dr. Neustadt does not address the herniation found in the MRI report. Dr. Neustadt also does not explain how it is plaintiff experienced no need for steroid injections or a spinal implant before the accident, but consistently experienced pain after the

accident which required this treatment. Thus, based on this Court's review of *Pommells,* Dr. Neustadt's opinion, in and of itself, is insufficient to shift the burden to the plaintiff.

Furthermore, any conclusion that a finding of a degenerative condition is in itself sufficient for a defendant to carry its burden on a motion for summary judgment is neither a proper nor practical result. The Court takes judicial notice of the notorious and indisputable fact, as is commonly proved before the Court at trial, that many adults over the age of 30, and most adults over the age of 50, have degenerative changes in their spine and that many such changes are asymptomatic (*Hunter v New York, Ontario & Western R.R. Co.,* 116 NY 615 [1889]; *Erie County Bd. of Social Welfare v Holiday,* 14 AD2d 832 [4th Dept. 1961]). If the establishment of degenerative changes in the spine is sufficient in itself for a defendant to meet its burden on a summary judgment threshold motion, that burden will be met in virtually every case. If merely establishing degenerative changes in the spine is enough, plaintiffs-at least those over the age of 30–will almost always be required to provide the explanation of causation required by *Pommells.* A finding of degeneration in the spine must be accompanied by something more such as pre-accident radiological tests establishing the pre-accident degenerative changes or more "persuasive evidence" than provided in this case. When this alone is the basis for the defendant's motion, the defendant has failed to meet its burden (*Gentile v Snook,* 20 AD3d 389 [2d Dept. 2005]). Again, without more, the instant motion must fail. This is parallel to the rule that, in response to a defense motion for summary judgment, it is insufficient for a plaintiff to merely establish the existence of a disc herniation (*Pommells,* 4 N.Y.3d at 574).

Defendants' motion must also fail since Dr. Neustadt relies substantially on unsworn medical reports from medical providers which are not in the record here. This requires denial of

the motion (*Jackson v Colvert,* 24 AD3d 420 [2d Dept. 2005]; *Bycinthe v Kombos,* 29 AD3d 845 [2d Dept. 2006]).

Since defendants failed to meet their burden in the first instance, it is unnecessary to decide whether plaintiff's opposition raised a triable issue of fact. *See, Chiara v Dernago*, 70 AD3d 746, 747 (2nd Dept. 2010); *Giammalva v Winters*, 59 AD3d 595, 596 (2nd Dept. 2009). Therefore, defendants' motion for summary judgment is denied as defendants failed to prove their prima facie case.

The foregoing constitutes the decision and order of this Court.

Dated: May 8, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.