

ENTERED IN COMPUTER mod,md  
**SCAN**

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. UTE WOLFF LALLY,**

*Justice*

STEPHANIE PERCIBALLI, an infant, TRIAL/IAS, PART 11  
NASSAU COUNTY

Plaintiff(s),

MOTION DATE: 8/24/05  
INDEX No. 2082/04  
ACTION NO. 1  
CAL. NO. 2005H1805

-against-

ROBERT M. STERN, RAFAEL ADAMES and  
SANTOS A. ESTEVEZ,  
Defendant(s).

RAFAEL E. ADAMES,  
Plaintiff(s),

ACTION NO. 2  
INDEX NO. 3066/04  
MOTION DATE: 8/24/05  
CAL. NO. 2005H1803

-against-

ROBERT M. STERN, MAURO PERCIBALLI and  
DIANE PANICCIA,  
Defendant(s).

The following papers read on the motions for summary judgment

|  |       |
|--|-------|
| Notice of Motion/ Order to Show Cause..... | 1-7   |
| Notice of Motion.....                      | 8-10  |
| Answering Affidavits.....                  | 11-20 |
| Replying Affidavits .....                  | 21-24 |
| Briefs: .....                              |       |

Upon the foregoing papers, it is ordered that this motion by defendant Robert M. Stern for an order pursuant to CPLR 3212 granting summary judgment in action #1 dismissing the complaint as to Diane Perciballi, a/k/a Diane Paniccia, and the complaint in action #2 as to plaintiff Rafael E. Adames on the grounds that neither plaintiff has sustained serious injury within the meaning of Insurance Law § 5102(d) is granted as to plaintiff Diane Perciballi and denied as to plaintiff Rafael E. Adames.

Motion by defendants Mauro Perciballi and Diane Paniccia in action #2 for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the grounds that plaintiff Rafael E. Adames failed to sustain serious injury as defined by Insurance Law § 5102(d) is denied.

Plaintiffs in actions #1 and #2 seek to recover money damages for personal injuries they allegedly sustained as a result of a rear-end collision on May 21, 2003 on Pine Hollow Road at or near Pine Drive, Nassau County, New York. According to her bill of particulars, Diane Perciballi's injuries include, inter alia, restricted range of motion of her cervical and lumbar spines. Rafael Adames' bill of particulars lists injuries including, inter alia, bulging disc at C5-C6 with ventral impingement on thecal sac; cervical/lumbar sprain/strain and cervical/lumbar radiculopathy.

Defendant Robert M. Stern seeks summary judgment dismissing the complaints in action #1 and action #2 predicated on the grounds that the injuries allegedly sustained by Diane Perciballi and Rafael E. Adames do not satisfy the threshold serious injury requirement of § 5102(d) of the Insurance Law. In support of his motion for summary judgment, movant has submitted the affirmations of P. Leo Varriale, M.D., an orthopedist, and Edward M. Weiland, M.D., a neurologist who examined plaintiff Diane Perciballi on November 15, 2004 and February 17, 2005 respectively. Dr. Varriale opines that plaintiff Diane Perciballi "can do her full work at home" and "there is no disability." He does not, however, set forth the objective tests he performed to support his clinical finding of "resolved cervical strain." *Black v Robinson*, 305 AD2d 438 [2nd Dept. 2003]. Dr. Weiland, on the other hand, sets forth the objective tests he performed to substantiate his conclusion of no disability arising from the motor vehicle accident herein and his diagnosis of resolved cervical and lumbosacral sprain/strain and subjective headache disorder. He found full range of motion of the neck, shoulders, extremities as well as the lower torso. Further, he found no evidence of any lateralizing neurological deficits.

With respect to Rafael E. Adames (plaintiff in action #2), who was examined on March 31, 2005, Dr. Weiland found, inter alia, no disability vis a vis any injury from the accident herein, "no evidence of any lateralizing neurologic deficits \* \* \* to correlate with claimant's subjective complaints," "full range of motion of the neck and both shoulders" as well as normal range of motion of the cervical and lumbar spines. Dr. Varriale, who examined Mr. Adames on April 26, 2005, notes in his affirmation that Mr. Adames had been in a previous car accident in 1998 in which he fractured his left arm and injured his back. He opines that "the lumbar spine and tendinitis of the left humerus are partly related to the accident of 1998 and partly related to the accident of May 21, 2003" and that "the impingement of the left shoulder is causally related to the accident of May 21, 2003.

Where, as here, defendant has established a prima facie basis

for summary judgment, the burden shifts to plaintiff to tender proof, in admissible form, sufficient to create a material issue of fact that serious injury exists necessitating a trial (**Franchini v Palmieri**, 1 NY3d 536, 537). Plaintiff must come forward with objective evidence to establish that he/she sustained serious injury as a result of the accident and that his/her loss, limitation or disability is causally related to the injury (**Gaddy v Eyler**, 79 NY2d 955, 957). The proof must be viewed in the light most favorable to the non-moving party (**Cammarere v Villanova**, 166 AD2d 760, 761). For the categories of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system, the proof must relate to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of that body part (**Toure v Avis Rent A Car Systems, Inc.**, 98 NY2d 345, 353).

In opposition to the summary judgment motion plaintiff Diane Perciballi has submitted the affidavit of her treating chiropractor, Carl B. Hardy, D.C., who apparently last examined her on September 10, 2003, and the affirmation of Jill A. Bressler, M.D., a neurologist, who examined her on March 3, 2005. Dr. Hardy's references to findings from his examination of plaintiff Diane Perciballi approximately twenty-one months before the summary judgment motion, and his projection of "permanent weakening" of the supporting structures of the cervical spine, have no probative value in the absence of a recent examination (**Sauer v Marks**, 278 AD2d 301). While Dr. Bressler notes a decreased range of motion of the cervical spine laterally to the right and left to 10 degrees and a palpable tenderness at C5-6 and C6-7, she fails to compare this limitation to the normal function, purpose and use of the affected body organ, member, function or system (**Suarez v Abe**, 4 AD3d 288, 289), and fails to attribute those conditions to the accident. Moreover, she provides no foundation or objective medical basis to support her findings to correlate this limited range of motion to any restriction in plaintiff's activities. **Stevens v Homiak Transport, Inc.**, 21 AD3d 300 [1st Dept. 2005]. Plaintiff Diane Perciballi's submissions are, therefore, insufficient to raise a triable question of fact on the serious injury threshold issue.

Plaintiff Rafael E. Adames has submitted the sworn narrative report of Aric Hausknecht, M.D. who performed a neurological examination of Mr. Adames on July 12, 2005 and found a 20% limitation in range of motion of his cervical spine and a 25% limitation in the range of motion of his lumbar spine. An expert's designation of a numeric percentage of a plaintiff's loss of motion

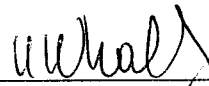
Perciballi v Stern  
Adames v Stern

4

Index No. 2082/04  
Index No. 3066/04

can properly be used to substantiate a claim of serious injury. Toure v Avis Rent A Car Systems, Inc., supra. Dr. Hausknecht refers to Mr. Adames' "contributory prior medical history of neck and back problems" and opines that said condition was "exacerbated by the motor vehicle accident of 5/21/03." He further states that "[w]ith a reasonable degree of medical certainty, the subsequent motor vehicle accident is a substantial factor in the causation of his current neck and back condition." Viewing the evidence in the light most favorable to plaintiff Rafael E. Adames, the court finds that his opposition papers raise a triable issue of fact as to whether he suffered serious injuries as a result of the accident of May 21, 2003 and whether the accident herein aggravated any injuries he sustained in the prior accident (1998).

Dated: OCT 13 2005

  
\_\_\_\_\_  
J/S.C.

**ENTERED**

**OCT 19 2005**

**NASSAU COUNTY  
OUNTY CLERK'S OFFICE**