

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY  
Justice**

MOD

**JODY PIERRE RAPHAEL and FRANTZ  
LALANNE,**

**Motion Sequence #4  
Submitted May 17, 2011**

**Plaintiffs,**

**-against-**

**INDEX NO: 4982/09**

**CHRISTOPHER ADAMO and DINAWATTIE  
ADAMO,**

**Defendants.**

**The following papers were read on this motion for summary judgment:**

<b>Notice of Motion and Affs.....</b>	<b>1-5</b>
<b>Affs in Support.....</b>	<b>6&amp;7</b>
<b>Affs in Opposition.....</b>	<b>8-10</b>
<b>Affs in Reply.....</b>	<b>11&amp;12</b>

Upon the foregoing papers, it is ordered that this motion by defendants, Christopher Adamo and Dinawattie Adamo, for an Order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiffs' complaint on the grounds that neither Jody Pierre Raphael nor Frantz Lalanne can prove that their injuries satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) as defined in Insurance Law § 5104(a) is granted as to Jody Pierre Raphael and denied as to Frantz Lalanne.

This is an action to recover money damages for serious personal injuries allegedly sustained by plaintiffs as the result of defendants' negligence arising out of a motor vehicle accident that occurred on July 12, 2008 at approximately 7:20 p.m. near the intersection of Hempstead Turnpike and Claridge Avenue in Nassau County, New York. Plaintiff, Frantz Lalanne ("Lalanne"), a passenger in a vehicle driven by plaintiff Jody Pierre Raphael ("Raphael"), came into contact with a vehicle being operated by the defendant Dinawattie Adamo and owned by defendant Christopher Adamo.

Both plaintiffs were twenty six years old and were unemployed at the time of the accident. They both allege in their bill of particulars that they were confined to their respective beds and homes for approximately four months and intermittently thereafter. Plaintiff, Raphael at his examination before trial admitted that his confinement to his home was not prescribed by any doctor.

Raphael also testified that as a result of this accident, there is nothing that he can no longer do that he used to be able to do before the accident. He further admitted that he had no hobbies and did not play any sports prior to this accident.

Plaintiff Lalanne testified that as a result of this accident he can no longer play basketball or run track. He testified that he can jump but only in a limited way. He stated that he can no longer cook, clean or do his laundry as a result of the injuries sustained in this accident. He stated that he can not stand up for more than ten minutes at a time.

In their bill of particulars, plaintiffs allege, that, as a result of this accident, they sustained, *inter alia*, the following:

Raphael: disc bulges at C5-C6 and C6-C7; cervical sprain and strain with radiculopathy; traumatic spasm of the cervical-paravertebral musculature; loss of normal cervical lordosis; traumatic spasm of the thoracic paravertebral musculature; loss of normal thoracic lordosis; cervical sprain and strain with radiculopathy; lack of mobility of the right shoulder; sprain of the right shoulder; lack of mobility of the right knee; sprain of the right knee; traumatic spasm of the cervical-paravertebral musculature; lumbosacral sprain and strain with radiculopathy; traumatic spasm of the lumbar paravertebral musculature; loss of normal lumbar lordosis; and, traumatic spasm of the trapezii, deltoid and sternocleidomastoid musculatures.

Lalanne: disc bulges at C4-C5 and C5-C6; cervical sprain and strain with radiculopathy; traumatic spasm of the cervical-paravertebral musculature; loss of normal cervical lordosis; traumatic spasm of the thoracic paravertebral musculature; loss of normal thoracic lordosis; posteromedial meniscal tear of the left knee; joint fluid compatible with synovitis; sprain and lack of mobility of the left knee; traumatic spasm of the cervical-paravertebral musculature; disc bulges at L3-L4 and L4-L5; lumbosacral sprain and strain with radiculopathy; traumatic spasm of the lumbar paravertebral musculature; loss of normal lumbar lordosis; and, traumatic spasm of the trapezii, deltoid and sternocleidomastoid musculatures.  
(*Bill of Particulars*, ¶5).

Both plaintiffs claim that their respective injuries fall within the following three categories of the serious injury statute: to wit, permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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.

When moving for summary judgment in an action arising out of a motor vehicle accident the defendants are required to make a *prima facie* case showing that the

plaintiff did not sustain a “serious injury” within the meaning of the statute. Once this is established, the burden then shifts to the plaintiff to come forward with evidence to overcome the defendants’ submissions by demonstrating a triable issue of fact that a “serious injury” was sustained (*Pommels v Perez*, 4 NY3d 566; *Grossman v Wright*, 268 AD2d 79, 84).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v Lauster*, 82 NY2d 828). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff’s own testimony and her submitted exhibits (*Michaelides v Martone*, 186 AD2d 544; *Covington v Cinnirella*, 146 AD2d 565, 566).

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the their examining physician or the unsworn reports of the plaintiff’s examining physician (*Pagano v Kingsbury*, 182 AD2d 268). However, unlike the movant’s proof, unsworn reports of plaintiff’s examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813). Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff’s injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 353, stated that plaintiff’s proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (Id.). However, the MRI and CT scan tests and reports must be paired with the doctor’s observations during his physical examination of the plaintiff (Id.). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (see *Gonzalez v Vasquez*, 301 AD2d 438).

Even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v Perez, supra*).

Whether plaintiff can demonstrate the existence of a serious injury upon which a recovery may be had depends upon the quality, quantity and credibility of admissible evidence (*Manrique v Warshaw Woolen Associates, Inc.*, 297 AD2d 519).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand, addressing each plaintiff's injuries, separately and in turn.

Initially, it is noted that plaintiff Raphael does not oppose defendants' motion for summary judgment. Nonetheless, this Court is not relieved of its obligation to ensure that the movants have demonstrated their entitlement to the relief requested (*Zecca v Ricciardelli*, 293 AD2d 31).

With respect to plaintiff Raphael's claims of serious injury under the 90/180 category of Insurance Law § 5102(d), this Court finds that Raphael's claims are contradicted by his own sworn statements and testimony wherein he states that while he was confined to his bed or home for four months following the date of the accident and intermittently thereafter, he was unemployed and his decision to stay home was not medically determined. Further, there is no testimony nor any admissible evidence, or even allegations for that matter, that he was curtailed in his usual activities "to a great extent rather than some slight curtailment" as a result of this accident (*Licari v Elliott*, 57

NY2d 230, 236; *see also Sands v Stark*, 299 AD2d 642). According to his own sworn testimony, there is nothing that he can no longer do as a result of this accident. In light of these facts, and in light of the fact that no where does the plaintiff or his counsel state that the activities that were curtailed as a result of this accident were "medically determined," this Court determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Therefore, this Court will restrict its analysis to the remaining two categories as it pertains to this plaintiff; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyley*, 79 NY2d 955; *Scheer v Koubeck*, 70 NY2d 678; *Licari v Elliot*, *supra*). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Id.*; *see also Grossman v Wright*, *supra* at 83).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc.*, *supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative,

provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*).

In support of their motion, the defendants submit, the unsworn electrodiagnostic studies of the plaintiff's upper extremities on August 13, 2008 performed by Dr. Zarina Mandelblat, M.D., PM&R, and the affirmed medical report of Dr. Michael J. Katz, MD, Fellow American Academy of Orthopedic Surgeons, who performed an independent orthopedic examination of the plaintiff on September 14, 2010.

On August 13, 2008, just one month following the date of plaintiff's accident, Dr. Mandelblat, on behalf of the plaintiff (*Pagano v Kingsbury*, 182 AD2d 268), supervised nerve conduction studies on plaintiff's upper extremities and an EMG on plaintiff's cervical paraspinal muscles and the muscles of plaintiff's upper extremities and concluded: "Normal Study. No significant electrodiagnostic abnormalities in the muscles and nerves sampled."

Moreover, in his sworn report dated September 14, 2010, Dr. Katz, notes, in pertinent part, as follows:

Examination of the Cervical Spine:

There is no tenderness about the cervical spine and there is no paravertebral muscle spasm. Flexion is present to 50 degrees (normal 50 degrees) and extension is present to 60 degrees (normal 60 degrees). Lateral flexion is present with right sided lateral flexion to 45 degrees (normal 45 degrees) and left sided lateral flexion to 45 degrees (normal 45 degrees). Right sided rotation is present to 80 degrees (normal 80 degrees) and left sided rotation is present to 80 degrees (normal 80 degrees). Motor strength is present in the C5-T1 innervated segments. Sensation is intact in the C5-T1 innervated dermatomes. Reflex testing reveals the biceps, triceps, and brachioradialis reflexes to be 2+ and symmetric. Adson's test is negative.

Examination of the Thoracolumbar Spine: The gait was normal without antalgic or Trendelenburg component. No paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees), extension to 30 degrees (normal 30 degrees) and lateral and side bending to 30 degrees (normal 30 degrees). Straight leg raising test was negative. Sensory examination revealed full sensation to light touch in the L3-S1 dermatomes. Reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilateral. Babinski was negative and there was no demonstrable clonus. Patrick was negative.

Examination of the Right Shoulder: There is no swelling, erythema, or induration. Active abduction is present from 0-170 degrees (normal 170 degrees). Flexion is present from 0-170 degrees (normal 170 degrees), internal rotation is present from 0-45 degrees (normal 45 degrees) and external rotation is present from 0-90 degrees (normal 90 degrees). The apprehension test is negative. There is no impingement at 90 degrees (normal 90 degrees). There is no crepitation at the AC joint. There is no deformity about the clavicle or AC joint. There is no joint line tenderness. The deltoid is well developed. Sensation is intact in the Axillary nerve autonomous zone. There is no dislocation, clicking, or grating with movement. O'Brien's test was negative. Hawkins-Kennedy test was negative.

Examination of the Left Shoulder: There is no swelling, erythema, or induration. Active abduction is present from 0-170 degrees (normal 170 degrees). Flexion is present from 0-170 degrees (normal 170 degrees), internal rotation is present from 0-45 degrees (normal 45 degrees) and external rotation is present from 0-90 degrees (normal 90 degrees). The apprehension test is negative. There is no impingement at 90 degrees (normal 90 degrees). There is no crepitation at the AC joint. There is no deformity about the clavicle or AC joint. There is no joint line tenderness. The deltoid is well developed. Sensation is intact in the Axillary nerve autonomous zone. There is no dislocation, clicking, or grating with movement.

Examination of the Right Knee: There is a normal valgus attitude about the knee in the standing position. There is no swelling about the knee. There is no effusion within the knee. The range of motion is 0-135 degrees (normal 135 degrees) in the flexion/extension arc. The patellar reflex is 2+. There is no medial or lateral joint line tenderness. Lachman's test is negative for anterior/posterior instability. The patellar apprehension test is negative. The motor strength of the Quadriceps is 5/5. The knee is stable to varus and valgus stress. There is a negative pivotal shift test. The posterior drawer sign is negative. The posterior sag sign is negative. There is no demonstrable crepitus. The prepatellar bursa is supple and lacks swelling, erythema, or induration.

Range of motion was determined using a goniometer.



Diagnosis: Cervical strain with radiculitis by history – resolved.  
Thoracolumbosacral strain with radiculitis by history – resolved.  
Bilateral shoulder contusion, resolved.  
Right knee contusion, resolved.

Comment: The claimant is a 28-year-old male who alleges an injury of 07/12/08 as a seatbelted driver. The injuries diagnostic are cervical strain with radiculitis, thoracolumbosacral strain with radiculitis, bilateral shoulder contusion and right knee contusion. The treatment was consistent with the injuries diagnosed. The MRI report of the cervical spine indicates changes, which are preexisting in nature. Currently, he shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 07/12/08. He is currently not disabled. He is capable of gainful employment, but is not working by choice. He is capable of his activities of daily living. He is capable of his pre-loss activity levels.

Based on this evidence, this Court finds that defendants have satisfied their *prima facie* burden of judgment as a matter of law that the plaintiff Jody Pierre Raphael did not sustain a serious injury within the meaning of the statute as a result of this accident (*Franchini v Palmieri*, 1 NY3d 536; *Luciano v Luchsinger*, 46 AD3d 634).

Plaintiff, Raphael, fails to oppose the defendants' motion for summary judgment. As such, so much of defendants' motion for an order granting summary judgment dismissing the cause of action as to plaintiff Raphael is granted.

That portion of defendants' motion for an order granting summary judgment in their favor dismissing the cause of action brought by plaintiff Frantz Lalanne is denied.

Initially, it is noted that plaintiff Lalanne testified at his examination before trial that he had a pre-existing injury to his neck and back as a result of a prior motor vehicle accident in July, 1999. At that time, plaintiff treated with Dr. Birendra K. Trivedi who diagnosed the plaintiff with cervical spine radiculopathy and lumbosacral spine radiculopathy. Plaintiff testified that he brought a lawsuit for the injuries he sustained in the prior accident and recovered.

Further, plaintiff was also involved in a second prior accident in 2002 wherein he injured his neck and back again. On September 6, 2002, Dr. Freilich supervised the MRI performed on plaintiff's cervical spine and reported:

"[h]erniation disc C3-C4 towards the right and centrally indenting the thecal sac. Bulging discs C4-C5 and C5-C6. Herniation disc C7-T1 toward the right and centrally. Narrowed neural foramina all levels C2-T1"

Additionally, Dr. Kleyman supervised nerve conduction studies and an EMG on plaintiff's lower extremities and related paraspinal muscles and concluded:

"[t]he study is consistent with L5 radiculopathy on the right side."

Furthermore, plaintiff testified at his examination before trial, and his medical records establish that he had a pre-existing injury to his left knee as a result of a third prior accident. Specifically, plaintiff testified that in November 2003 he was involved in a motor vehicle accident wherein he sustained an injury to his left knee and was in a coma. Specifically, plaintiff testified that he was in a coma for two weeks and that he fractured his left patella which was casted. Dr. Fastich supervised a CT scan of plaintiff's left knee and found:

"Minimally displaced fracture mid patella" and "moderate sized suprapatella fusion"

Plaintiff testified that he brought a lawsuit for the injuries he sustained in this prior accident.

In addition to the plaintiff's unsworn medical records establishing the facts surrounding his three prior motor vehicle accidents, the defendants also submit the following: the affirmed medical report of Dr. Michael J. Katz, MD, Fellow of the American Academy of Orthopedic Surgeons, who performed an independent medical examination

of the plaintiff on July 9, 2010; and, the affirmed report of Thomas J. McLaughlin, a chiropractor/acupuncturist who performed an independent chiropractic and acupuncture examination of the plaintiff on September 17, 2008.

Initially it is noted that the "affirmed" report of Thomas J. McLaughlin does not constitute competent medical evidence in support of defendants' motion for summary judgment. CPLR 2106 is very clear:

The statement of an attorney admitted to practice in the courts of the state, or of a *physician*, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit. (Emphasis Added).

The intent of the statute is also clear: the persons currently eligible to submit affirmations in lieu of affidavits all have professional obligations of honesty and as such they need not be required to attest the accuracy of their statements before a notary public.

Neither chiropractors nor acupuncturists come within scope of statute allowing affirmations by certain persons to be given the same force and effect as an affidavit; to make a competent, admissible affirmation, a chiropractor and an acupuncturist, like most other persons, must first appear before a notary or other such official and formally declare the truth of the contents of the document (*Casas v Montero*, 48 AD3d 728; *Doumanis v Conzo*, 265 AD2d 296).

Accordingly, Mr. McLaughlin's report will not be considered by this Court in support of defendants' motion.

In his sworn report dated July 9, 2010, Dr. Katz, notes, in pertinent part, as follows:

Examination of the Cervical Spine:

There is no tenderness about the cervical spine and there is no paravertebral muscle spasm. Flexion is present to 50 degrees (normal 50 degrees) and extension is present to 60 degrees (normal 60 degrees). Lateral flexion is present with right sided lateral flexion to 45 degrees (normal 45 degrees) and left sided lateral flexion to 45 degrees (normal 45 degrees). Right sided rotation is present to 80 degrees (normal 80 degrees) and left sided rotation is present to 80 degrees (normal 80 degrees). Motor strength is present in the C5-T1 innervated segments. Sensation is intact in the C5-T1 innervated dermatomes. Reflex testing reveals the biceps, triceps, and brachioradialis reflexes to be 2+ and symmetric. Adson's test is negative.

Examination of the Thoracolumbar Spine: The gait was normal without antalgic or Trendelenburg component. No paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees), extension to 30 degrees (normal 30 degrees) and lateral and side bending to 30 degrees (normal 30 degrees). Straight leg raising test was negative. Sensory examination revealed full sensation to light touch in the L3-S1 dermatomes. Reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilateral. Babinski was negative and there was no demonstrable clonus. Patrick was negative.

Examination of the Right Shoulder: There is no swelling, erythema, or induration. Active abduction is present from 0-170 degrees (normal 170 degrees). Flexion is present from 0-170 degrees (normal 170 degrees), internal rotation is present from 0-45 degrees (normal 45 degrees) and external rotation is present from 0-90 degrees (normal 90 degrees). The apprehension test is negative. There is no impingement at 90 degrees (normal 90 degrees). There is no crepitation at the AC joint. There is no deformity about the clavicle or AC joint. There is no joint line tenderness. The deltoid is well developed. Sensation is intact in the Axillary nerve autonomous zone. There is no dislocation, clicking, or grating with movement.

Examination of the Left Knee: There is a normal valgus attitude about the knee in the standing position. There is no swelling about the knee. There is no effusion within the knee. The range of motion is 0-135 degrees (normal 135 degrees) in the flexion/extension arc. The patellar reflex is 2+. There is no medial or lateral joint line tenderness. Lachman's test is negative for anterior/posterior instability. The patellar apprehension test is negative. The motor strength of the Quadriceps is 5/5. The knee is stable to varus and valgus stress. There is a negative pivotal shift test. The posterior drawer sign is negative. The posterior sag sign is negative. There is no demonstrable crepitus. The prepatellar bursa is supple and lacks swelling, erythema, or induration.

Range of motion was determined using a goniometer.

Diagnosis: Cervical strain with radiculitis – resolved.  
Thoracolumbosacral strain with radiculitis – resolved.  
Left knee derangement – resolved.  
Right shoulder contusion – resolved.

Comment: The claimant is a 28 year old male who alleges an injury of 07/12/08 as a seatbelted front seat passenger. There [sic] injuries diagnosed in the records are: cervical strain with radiculitis, lumbosacral strain with radiculitis, and left knee derangement, right knee contusion. The treatment provided was consistent with the injuries diagnosed in the records. The injuries can occur with rapid acceleration or deceleration. It is significant that the MRI reports of the cervical and lumbosacral spine not findings are degenerative in nature. Currently, he shows no signs or symptoms of permanence relative the neck, back, or right shoulder. He is currently not disabled. He is capable of gainful employment but is not working by choice. He is capable of his activities of daily living. He is capable of pre-loss activities. It is significant that he did not see [sic] immediate care following the accident.

Based upon this evidence, this Court finds the defendants have submitted medical evidence sufficient to establish that the plaintiff, Frantz Lalanne did not, as a result of the subject accident, sustain a “serious injury” within the meaning of the “permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system” categories of the statute.

Specifically, this Court cannot overlook the fact that the plaintiff has readily admitted to multiple prior motor vehicle accidents including an accident which injured his left knee. Where there is admissible medical evidence of a preexisting condition that would interrupt the chain of causation between the subject accident and the claimed injury, dismissal of the plaintiff’s complaint may be warranted (*Pommels v Perez, supra*).

The defendants have also established their *prima facie* entitlement to judgment as a matter of law with respect to plaintiff’s claims that his injuries satisfy the 90/180 category of Insurance Law §5102(d).

To prevail under the “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” category, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non permanent nature” (Insurance Law §5102[d]) “which would have caused the alleged limitations on the plaintiff’s daily activities (*Monk v Dupuis*, 287 AD2d 187, 191), and, furthermore, a curtailment of the plaintiff’s usual activities “to a great extent rather than some slight curtailment” (*Licari v Elliott*, *supra* at 236; *see also Sands v Stark*, *supra*).

While there is testimony by the 26 year old plaintiff that he was prevented from playing basketball or running track and that he is now limited in his abilities to cook, clean, do his laundry, by submitting evidence of plaintiff’s prior motor vehicle accidents, the defendants have established that his impairments were not medically determined and if they were medically determined, they were not caused as a result of this accident. Moreover, in light of the plaintiff’s testimony that he can jump but only in a limited way, this Court is not convinced that plaintiff’s activities including his ability to play basketball was curtailed “to a great extent rather than some slight curtailment.”

In opposition, plaintiff Lalanne solely relies upon the affirmed medical report of Svetlana Khandros, M.D., a doctor of Internal Medicine, who first evaluated the plaintiff on July 15, 2008 (three days after his motor vehicle accident). That plaintiff does not proffer his own affidavit in opposing defendants’ motion can be overlooked by this Court in this context where the sworn affirmation of Dr. Khandros, who supplies the

evidentiary showing necessary to successfully resist the motion (CPLR 3212 [b]; *Rotuba Extruders v Ceppos*, 46 NY2d 223, 229).

Dr. Khandros explains in her affirmation that she consistently and extensively treated the plaintiff for his injuries sustained as a result of the subject accident. She concludes, in pertinent part, as follows:

17. Due to the mechanism of the above traumatically induced injuries there is weakening of the supportive soft tissue structures. The vertebrae are now more easily misaligned with aberrant mechanics for the affected unit causing pain and discomfort due to the nerve endings. It is my opinion within a reasonable degree of medical certainty that considering Mr. Lalanne's symptomatology that the weakness may well predispose these areas to further problems with exacerbation of symptoms and development of arthritic changes. I have advised Mr. Lalanne to avoid excessive bending, lifting, sitting or standing in a stationary position for prolonged periods of time.

18. The patient's reported symptoms and clinical findings, as stated above, are causally related to the injuries sustained in his motor vehicle accident on July 12, 2008, and as a result, he has a substantial and consequential permanent partial disability. The patient continues to suffer from chronic pain and discomfort as is evident from his recent evaluation and examination on March 22, 2011. Considering the chronic and persistent nature of his pain and symptoms of back and left knee pain, it is reasonable to call his injuries permanent at this point. \*\*\*It is my opinion within a reasonable degree of medical certainty that the lumbar intervertebral disc injury (post traumatic L3-L4 disc bulge) and injury to the articular tissues of the left knee are permanent.

Dr. Khandros, in her medical report, also addresses the issue of plaintiff's multiple prior motor vehicle accident. Indeed she details his prior injuries and prior diagnostic tests and states that "although Mr. Lalanne was previously diagnosed with a displaced fracture of the mid patella of the left knee following an accident on November 11, 2003, there were no findings of any damage to the ligaments and therefore, it is my opinion within a reasonable degree of medical certainty that the meniscal tear is from his motor vehicle accident on July 12, 2008."

Further, Dr. Khandros' conclusions are also based upon a recent examination of the plaintiff on March 22, 2011 at which she performed objective tests to arrive at her determination of significant and permanent injuries.

In light of the fact that Dr. Khandros sufficiently deals with the issue of plaintiff's multiple prior motor vehicle accidents, that she reviewed the medical records from the prior accidents, and that she ultimately adequately accounts for the prior accidents and resulting injuries, this Court finds that the plaintiff has raised a triable issue of fact as to whether he sustained a serious injury within the meaning of the statute (*cf. Vidor v Davila*, 37 AD3d 826). The detailed affirmation from Dr. Khandros also establishes, among other things, that she performed several objective tests; as a result of these tests and a review of plaintiff's medical records, Dr. Khandros opined that plaintiff "has a substantial and consequential permanent partial disability" and that said injuries were causally related to the July 2008 accident. Dr. Khandros further described how the limitations and restrictions of movement in plaintiff's cervical and lumbosacral spine regions fell substantially below accepted normal ranges. Significantly, Dr. Khandros's opinion was rendered notwithstanding her specific acknowledgment of the injuries sustained by the plaintiff in his prior accidents.

In light of the foregoing, this Court denies so much of defendants' motion for summary judgment seeking dismissal of plaintiff, Frantz Lalanne's complaint.

Dated: APR 19 2011

Ute Wolff  
UTE WOLFF LALLY, J.S.C.

**ENTERED**  
MAY 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE



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