SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

YVONNE MILES-SMITH and CHANDLER SMITH,	**TRIAL/IAS PART 5**
	INDEX NO. 4952/10
Plaintiff(s),	
	MOTION SEQUENCE
- against -	**NO. 1**
IRMA VILLALOBOS and JOSE ESCOBAR,	**MOTION SUBMISSION DATE: April 26, 2012**
Defendant(s).	

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by defendants for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendants, Jose O. Escobar and Irma C. Escobar, s/h/a Irma Villalobos, and dismissing plaintiffs' Complaint for non-economic loss on the ground that the injuries claimed by plaintiff, Yvonne Miles-Smith, do not satisfy the "serious injury" threshold requirement of the Insurance Law §5102(d), and thus, her principal claim and the derivative claim of her husband, Chandler Smith, for loss of services, are barred by §5104(a) of the Insurance Law and dismissible as a matter of law, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on September 16, 2007 at approximately 5:50 pm at the intersection of Grand Avenue and Stowe Avenue, Baldwin, NY.

The plaintiffs in the plaintiffs' Verified Bill of Particulars sets forth:

> "Yvonne Miles-Smith suffered the following injuries, the sequelae of which are, upon information and belief permanent.
>
> herniated disc at L4-L5, L5-S1 and C4-C7;
> dislocated cervical, thoracic and lumbar vertebrae;
> bulging discs at L2-L4, C3-C4, C7-T2 and at T8-T10;
> cervical and lumbar subluxations;
> tendonitis of the right shoulder;

impingement of the right shoulder;
right shoulder synovial effusion in the glenohumeral joint;
right shoulder hypertrophic change in the acromioclavicular joint extending to impress the spraspinatus;
right shoulder supraspinatus and subscapularis tendinosis/endinopathy;
internal derangement of right shoulder;
synovial effusion of the right knee;
right patellar tendinitis;
strained right anterior and posterior cruciate ligament with adjacent pericruciate inflamation and chondromalacia;
internal derangement left knee;

She underwent the following procedure:

Trigger Poiint musculoskeletal injection AC joint on February 8, 2008 by Dr. Miguel Vargas at the Hempstead Medical Care, P.C."

The defendants in support of the instant application, amongst other things, submit an affirmed letter report dated December 7, 2010 of Robert Israel, MD, an orthopedist of an orthopedic examination of the plaintiff Yvonne Smith conducted on December 7, 2010; four affirmed letter reports all dated May 24, 2011 of Melissa Sapan Cohn, MD, a radiologist of a review of certain MRIs of the plaintiff's lumbosacral spine performed October 11, 2007; cervical spine performed October 19, 2007; left knee and right shoulder performed October 12, 2007 and the plaintiff's Mercy Medical Center's Emergency Department record for a subsequent accident which occurred on January 22, 2010.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law **(see Licaro v. Elliot, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; Palmer v. Amaker, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; Tipping-Cestari v. Kilhenny, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).**

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) **(see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; Wright v. Melendez, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).**

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

> "(d) 'Serious 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, ember, 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."

In pertinent part, the report of Dr. Israel sets forth:

> "PHYSICAL EXAMINATION:
> For identification purposes only, Yvonne Smith is a 42 year-old, right-handed dominant female, who presents today for evaluation. Her stated height is:4 feet 9 inches tall and stated weight is 180 pounds. She appears to have brown eyes and brown hair. Her reported date of birth is: 6/23/68. The claimant presents today in no acute distress or discomfort. She denies taking any pain medication prior to my examination today. She does report taking medication for high blood pressure at 8:00 am today.
>
> . . .
>
> Cervical Spine:
> Examination of the cervical spine reveals a normal lordosis. There is no tenderness or spasm to palpation. Cervical compression testing is negative. The Soto Hall test and Valsalva tests are negative. Spurling is negative. Range of motion of the cervical spine reveals flexion to 50° (50° being normal), extension to 60° (60° being normal), right rotation to 80° (80° being normal), left rotation to 80° (80° being normal), right lateral flexion to 45 ° (45° being normal), and left lateral flexion to 45° (45° being normal). There is intact sensation to pin prick and light touch. Muscle strength is graded 5/5 in the biceps, triceps, wrist flexors and extensors bilaterally. There is no atrophy. Deep tendon brachioradialis, biceps and triceps reflexes are symmetrical. Grasping power is firm in both hands.
>
> Thoracic Spine:
> Examination of the thoracic spine reveals a normal kyphosis. Flexion is 45 (45 normal lateral flexion 45° (45° normal) and lateral rotation is 45 to either side (normal 45) There is no tenderness or spasm to palpation over the spinous processes or paraspinal. Both shoulder blades are symmetrical. Sensation is intact to pinprick.

Lumbar Spine:
The lordotic curve is normal. There is no spasms or tenderness on palpation. The gait is normal. Toe heel walking is normal. Straight leg raising is bilaterally negative to 75° (75° being normal). Bechterew and Hoover are negative. Range of motion of the lumbar spine reveals forward flexion to 60° (60° being normal), extension to 25° (25° being normal), right lateral flexion to 25° (25° being normal), and left lateral flexion to 25° (25° being normal). Sensation is intact to pinprick and light touch. Muscle strength is 5/5 and there is no atrophy. The patella and Achilles' deep reflexes are symmetrical. There is no clonus and the Babinski sign is negative.

Right Shoulder:
There is no atrophy or tenderness on palpation. Range of motion of the shoulder reveals anterior flexion to 180° (180° being normal), abduction to 180° (180° being normal), adduction to 30° (30° being normal), external rotation to 90° (90° being normal), internal rotation to 80° (80° being normal), and posterior extension to 40° (40° being normal). There is no instability present. The drop arm, Yergason's apprehension, Speed and O'Brien andclunk tests are all negative. There is no sign of impingement. The Hawkins test is negative.

Left Knee:
The gait is normal. There is no tenderness or effusion present. The knee is in 7 degrees of valgus and muscle strength is graded at 5/5. The kneewas found to be stable on valgus and varus stress, anterior stress at 30 and 90 degrees. The posterior drawer is negative. Range of motion of the knee is normal from 0 to 150° of flexion (0 to 150° being normal). The McMurray test is negative. There is no patella-femoral crepitus and the patella-femoral compression test is negative.

Right Arm:
There was tenderness present in the arm. There is a full range of motion. The neurovascular status is intact. There was no atrophy present in the arm. The grip strength is normal.

Ranges of motion are measured using a goniometer and are in accordance with AMA Guidelines 5th edition.

IMPRESSION
- Resolved sprain of the cervical spine
- Resolved sprain of the thoracic spine
- Resolved sprain of the lumbar spine
- Resolved sprain of the right shoulder
- Resolved sprain of the right arm
- Resolved sprain of th left knee

DISABILITY
Based on my examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record."

The respective May 24, 2011 reports of Dr. Cohn state:

"LUMBOSACRAL SPINE MRI #1

Lumbosacral spine MRI was obtained with multiple multiplanar pulse sequences on 10/11/2007 at SAtand -Up MRI of Carle Place and is diagnostic.

The normal lumbar lordosis is maintained.

The L1-2, L2-3, L3-4 and L4-5 disc spaces are within normal limits.

At the L5/S1 level, there is disc desiccation, disc space narrowing and circumferential disc bulging. Mild bilateral facet degenerative changes are present. There is mild bilateral neural foraminal stenosis.

The marrow signal is normal. The conus is within normal limits.

IMPRESSION:

L5/S1 disc bulge and facet arthropathy.

DISCUSSION:
This patient has evdience of degenerative disc disease at the L5/S1 level. There is disc desiccation and circumferential disc bulging. Disc desiccation indicates that the disc has dried out and lost its normal water content. This is the commencement of degenerative disc disease. There is circumferential disc bulging. Disc bulging is unrelated to trauma. Disc bulging occurs as the outer fibers of the disc, also known as the annulus fibrosis loses its normal elasticity. This allows the central more gelatinous portion of the disc to bulge circumferentially. This is within the spectrum of degenerative disc disease and is not related to trauma.

Bilateral facet hypertrophic degenerative changes are present. The facets represent articulaions between adjacent vertebral bodies. These commonly enlarge in the setting of the degenerative process. This represents arthritis of the spine.

The presence of disc bulging and facet arthritic changes is resulting in mild narrowing of the neural foramina bilaterally.

In my opinion, this patient has evidence of degenerative disc disease at the L5/S1 lever. There is no evidence of disc herniation or acute traumatic injury on the submitted study."

"CERVICAL SPINE MRI #1

Cervical spine MRI consists of multiple multiplanar pulse sequences and was obtained on 10/19/2007 at Stand-Up MRI of Carle Place and is diagnostic.

There is straightening of the normal cervical lordosis.

The cerebellar tonsils are displaced through the foramen magnum consistent with a Chiari I malformation.

The C2-3 and C3-4 disc spaces are within normal limits.

At the C4-5, C5-6 and C6-7 levels, there is circumferential disc bulging.

The C6-7 and C7/T1 disc spaces are normal.

The marrow signal is normal. No intrinsic spinal cord abnormality is identified.

IMPRESSION:

Chiari I malformation.

Straightening of the normal cervical lordosis.

Disc bulging at C4-5, C5-6 and C6-7.

DISCUSSION:

There is straightening of the normal cervical lordosis. This may reflect muscular spasm. Alternatively this may be the result of the positioning of the patient's neck within the cervical coil necessary to perform the examination.

There is disc bulging at C4-5,C5-6 and C6-7. Disc bulging is unrelated to trauma. Disc bulging occurs as the outer fibers of the disc, also known as the annulus fibrosis loses its normal elasticity. This allows the central, more gelatinous portion of the disc to bulge circumferentially. This is within the spectrum of degenerative disc disease and is not related to trauma.

There is evidence of a Chiari I malformation. This is a congenital malformation meaning that the patient is born this way. The patient's cerebellar tonsils are displayed through the opening of the skull known as the foramen magnum. This is a congenital abnormality and not an acquired condition.

In my opinion, this patient has a Chiari I malformation. There are mild degenerative changes of the cervical spine. There is no evidence for disc herniation or acute traumatic injury on the submitted cervical spine MRI."

"LEFT KNEE MRI #1

Left knee MRI consists of multiple multiplanar pulse sequences and was obtained on 10/20/2007 at Stand-Up MRI of Carle Place and is diagnostic.

The anterior and posterior cruciate ligaments are intact. The extensor

mechanism is within normal limits. The medial and lateral collateral ligaments are intact. Minimal amount of joint fluid is present.

There is variant cellular marrow. This is commonly seen in overweight women or smokers.

No meniscal injury is identified.

IMPRESSION:

Minimal amount of joint fluid.

Variant cellular marrow.

DISCUSSION:

This is essentially a normal left knee MRI. The anterior and posterior cruciate ligaments are intact. There is no evidence of strain or adjacent inflammation. There is a minimal amount of fluid within the joint space which is within the range of physiological normal.

There is a variant cellular marrow. This is conversion of fatty marrow into red marrow which could be seen in overweight women or smokers. This is a variant of normal.

In my opinion, this is essentially a normal left knee MRI. There is no evidence for acute traumatic injury on the submitted study."

"I have reviewed the right shoulder MRI on Yvonne Miles-Smith. The study consists of multiple multiplanar pulse sequences and was obtained on 10/12/2007 at Stand-Up MRI of Carle Place and is diagnostic.

There are acromioclavicular joint hypertrophic degenerative changes. There are downward projecting osteophytes resulting in mass effect upon the underlying rotator cuff. Intermediate signal intensity is present within the supraspinatus and subscapularis tendons consistent with tendinosis. A small amount of fluid is present within the joint space. The long biceps tendon is intact. No labrall injury is identified. The marrow signal is normal.

IMPRESSION:

Acromioclavicular joint hypertrophic degenerative changes.

Supraspinatus and subscapularis tendinosis.

DISCUSSION:

This patient has evidence of acromioclavicular joint hypertrophic degenerative changes. The acromioclavicular joint is a joint space within the shoulder. This

is commonly involved with arthritis. There are downward projecting osteophytes. Osteophytes represent bony spurs which extend off of the joint. This represents actual bone formation and takes years to develop. The presence of bone spurs indicates arthritis. The acromioclavicular joint is the superior border of the tunnel through which the rotator cuff passes. Each time the patient moves her shoulder, there is abnormal stress upon the underlying rotator cuff in the setting of arthritis. Initially, this would lead to fraying of the surface of the tendon. With ongoing use of the shoulder, this can lead to degeneration of the tendon. This is known as tendinosis. This is due to chronic wear and tear and does not represent an acute trauma related injury.

In my opinion, this patient has evidence of arthritis of the shoulder which has secondarily affected the underlying supraspinatus and subscapularis tendons. This is due to chronic wear and tear. There is no evidence of an acute traumatic injury on the submitted right shoulder MRI.

I, Melissa Sapan Cohn, M.D. being a physician duly licensed to practice medicine in the state of New York under the penalty of perjury pursuant to CPLR section 2106 do hereby affirm that contents of the foregoing to be true."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" **(Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694)** and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact **(see Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).**

In opposition to the defendants' requested relief, the plaintiffs submit certain affirmed report of Stand-Up MRI of Carle Place; certain affirmed reports of Turnpike Medical PC by Joseph Perez, MD, respectively dated September 24, 2007, September 28, 2007, October 15, 2007, October 12, 2007, October 26,2007, November 13, 2007, November 23, 2007, November 16,2007, December 13, 2007, February 5, 2008, March 13, 2008, certain reports of Liberty Orthopedics PLLC for November 20, 2007, and February 5, 2008, an unsworn report of chiropractor Marlene Miller and an affirmed report dated March 14, 2012 of Philip M. Rafiy, MD of an examination of the plaintiff Yvonne Miles-Smith on March 14, 2012.

Consistent with Dr. Perez's observation in said physician's respective reports as to pain and limitation of range of motion of the plaintiff's right shoulder (supra), Dr. Rafiy sets forth:

"**DISCUSSION:**

The patient sustained injuries to the cervical spine, lumbar spine, right shoulder and left knee as a direct result of the motor vehicle accident of September 16, 2007.

The patient sustained traumatic impact to the right shoulder resulting in right shoulder rotator cuff tendinitis and superimposed rotator cuff tendon tear. As a result, the patient has ongoing restricted range of motion of the right

shoulder in all planes especially with abduction and flexion. She has difficulties with overhead lifting, pulling, carrying, participating in sports activities, operating a motor vehicle and reaching above her head.

It is medically probable that she will require intraarticular steroid injections of the right shoulder and continue to require physical therapy with strengthening modalities. She has sustained a permanent injury to the right shoulder and will be restricted in her ability to lift, pull or carry as well as participate in sports activities requiring overhead right shoulder use.

She has sustained traumatic injuries to the cervical and lumbar spine resulting in posttraumatic cervical and lumbar disc herniations with restricted range of motion of the cervical and lumbar spine in all planes. She is a candidate for a trial of cervical and lumbar epidural steroid injections. It is medically probable that she will not reach her pre-accident medical status and will continue to require ongoing physical therapy, chiropractic treatment and cervical and lumbar traction. Her neck and low back pain will be aggravated by position, lifting, pulling, carrying, cold or damp days and changes in barometric pressure. The patient is a candidate for a trial of cervical and lumbar epidural steroid injections due to the posttraumatic cervical and lumbar disc herniations. She will require the continued use of anti-inflammatories and remain under the care of a pain management physician.

It is my professional opinion that the patient has sustained traumatic injuries to the cervical spine, lumbar spine, right shoulder and left knee as a direct result of the motor vehicle accident of September 16, 2007. The injuries to the cervical spine, lumbar spine and right shoulder are permanent in nature and are directly and causally related to the motor vehicle accident of September 16, 2007."

Based upon the foregoing, there is an issue of fact as to whether the plaintiff Yvonne Miles-Smith suffered a serious injury pursuant to §5102 of the Insurance Law in the accident in issue. As such, the defendant's application for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendants, Jose O. Escobar and Irma C. Escobar, s/h/a Irma Villalobos, and dismissing plaintiffs' Complaint for non-economic loss on the ground that the injuries claimed by plaintiff, Yvonne Miles-Smith, do not satisfy the "serious injury" threshold requirement of the Insurance Law §5102(d), and thus, her principal claim and the derivative claim of her husband, Chandler Smith, for loss of services, are barred by §5104(a) of the Insurance Law and dismissible as a matter of law, is **denied**.

SO ORDERED.

DATED: 7/3/2012

.....
J.S.C.