

ORDER
SUPREME COURT OF THE STATE OF NEW YORK
Present: HON. TAMMY S. ROBBINS, Acting Justice

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AMANDA HALL, an infant under the age of 18 years
by her parent and natural guardian, GAYLE HALL
CUNNINGHAM and GAYLE HALL-CUNNINGHAM,
individually,

TRIAL/IAS, PART 47

Plaintiff,

- against -

Index No. 2028/05
Motion Seq. 003,004,005
Motion submission: 9/6/06

CHARLENE M. KUHL, as Administratrix of the
Estate of WALTER E. KUHL and VINCENT J.
CUNNINGHAM,

Defendants,

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Motion by defendant Vincent Cunningham for summary judgment dismissing the
complaint in action # 2 is granted in part and denied in part. Cross-motion by defendant
Charlene Kuhl for summary judgment dismissing the complaint in action # 2 is granted in part
and denied in part. Cross-motion by defendant Vincent Cunningham for summary judgment
dismissing all cross-claims asserted by co-defendant Charlene Kuhl in action # 2 is denied.

These are two related actions for personal injuries arising from a motor vehicle accident
which occurred around 9:00 p.m. on May 7, 2004. Defendant in action # 2, Vincent
Cunningham, was making a left turn at the intersection of S. Oyster Bay Road and Amby Avenue
in Plainview. As Cunningham's vehicle was making the turn, it was struck on the rear driver's
side by a motorcycle driven by defendant Walter Kuhl. Plaintiffs allege that Kuhl's motor cycle
was traveling at an excessive rate of speed and that he was intoxicated. Kuhl died as a result of
the accident, and defendant in action # 2, Charlene Kuhl, has been named as his administratrix.

Plaintiff in action # 2, Gayle Hall-Cunningham, and her 14-year daughter, plaintiff Amanda Hall, were passengers in Vincent Cunningham's vehicle. Amanda was in the rear seat on the driver's side and claims to have been wearing a seat belt. According to Amanda, the side wall of the vehicle was crushed in by the impact and came in contact with the side of her body. Amanda also claims that she struck her head against the side airbag, which deployed as a result of the accident. Gayle, the front seat passenger, was married to Cunningham on the day of the accident.

Action # 1 was brought by Charlene Kuhl as Walter's administratrix to recover for his wrongful death and personal injury. Action # 2 was brought by Gayle and Amanda against Kuhl and Cunningham to recover for their personal injuries. Gayle asserts a claim only against Kuhl, but Amanda asserts a claim against both defendants. Cunningham is moving for summary judgment dismissing the complaint in action # 2 on the ground that Amanda did not sustain a "serious injury" within the meaning of § 5102(d) of the Insurance Law. Charlene Kuhl is cross-moving for summary judgment dismissing the complaint in action # 2 on the ground that neither Amanda nor Gayle sustained a threshold serious injury. Finally, Cunningham is moving for summary judgment dismissing Kuhl's cross-claims against him in the event that Kuhl's motion for summary judgment is granted.¹

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in

¹Although CPLR 3212(b) requires that a motion for summary judgment be supported by a copy of all pleadings, Kuhl's answer has not been submitted to the court. Nevertheless, the court notes that even though Gayle did not assert a claim against Cunningham, her husband, Kuhl may cross-claim against Cunningham for contribution with respect to liability for Gayle's personal injury (CPLR § 1401; *Mowczan v. Bacon* 92 NY2d 281 [1998]). Thus, the court will consider Cunningham's motion as encompassing cross-claims by Kuhl for contribution with respect to liability for both plaintiffs' injuries.

among other things “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.”

The legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries(*Dufel v. Green*, 84 NY2d 795, 798 [1995]). Thus, objective proof of plaintiff’s injury is required to satisfy the statutory serious injury threshold(*Toure v. Avis Rent a Car Systems*, 98 N.Y.2d 345, 350 [2002]). Subjective complaints alone are not sufficient (*Gaddy v. Eycler*, 79 NY2d 955, 957-58 [1992]).

With regard to the statutory categories of “permanent consequential limitation” and “significant limitation of use,” the Court of Appeals has stated that whether a limitation of use or function is “consequential” or “significant” relates 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 the body part”(*Toure v. Avis Rent a Car Systems*, supra, 98 N.Y.2d 345, 353 [2002]). Additionally, the doctor’s opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination. *Id.*

On a motion for summary judgment, it is defendant’s burden to present a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §

5102(d) as a matter of law (*Schultz v. Von Voight*, 86 N.Y.2d 865 [1995]). If defendant makes that showing, the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendants' motion by demonstrating that she sustained a serious injury under the No-Fault Law (*Gaddy v. Eycler*, 79 NY2d 955 [1992]). Conclusory assertions of serious injury, including subjective complaints of pain, will not fulfill the statutory definition. Thus, the question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial (*Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]). However, where plaintiff submits objective evidence as to "the extent of the limitation of movement" a factual issue will be presented (*Licari*, 57 N.Y.2d at 238-39 (emphasis in original)).

Amanda Hall's injury

Amanda claims that she sustained injury to her cervical and lumbar spine, more specifically posterior disc bulges in both ranges. After the accident, Amanda complained of pain in her neck and she was taken by ambulance to North Shore Plainview Hospital. At the hospital, X-rays of the neck were negative for fracture. Amanda was given a neck collar to wear and then discharged. A week after the accident, Amanda developed back pain and numbness and tingling in two of her fingers. Amanda received physical therapy which was gradually reduced from three times per week to once a week over a one year period. Amanda claims that she was unable to attend gym class for the remainder of the school year after the accident.

In support of his motion for summary judgment, Cunningham submits the sworn report of Dr. James Sarno, a neurologist who examined Amanda on March 2, 2006. Dr. Sarno noted that Amanda had a restriction in the range of motion of her lumbar spine, flexion of 30 degrees as opposed to a normal of 90 degrees, with pain in both the thoracic and lumbar regions.

Nevertheless, Dr. Sarno concluded that Amanda's neurological examination was normal.

Cunningham also submits the sworn report of Dr. Barry Katzman, an orthopedic surgeon. Dr. Katzman examined Amanda on March 6, 2006. Dr. Katzman found that Amanda had full flexion, extension, rotation, and lateral bending with regard to both the cervical and lumbar spine. Dr. Katzman also found that Amanda had full strength in the upper and lower extremities and symmetrical reflexes. Dr. Katzman's overall conclusion was that Amanda had suffered cervical and lumbar strain which was resolved by the time of his examination.

Based upon the reports of Dr. Sarno and Dr. Katzman, the court concludes that defendants have established a prima facie case that Amanda's injuries were not serious within the meaning of § 5102 of the Insurance Law. Accordingly, the burden shifts to Amanda to demonstrate that she sustained a serious injury.

In opposition to defendants' summary judgment motions, Amanda has submitted, among other documents, a sworn report from Dr. Joseph Gregorace, a doctor of physical medicine. Dr. Gregorace examined Amanda initially on May 21, 2004, and then during follow-up evaluations on June 18, 2004, July 16, 2004, September 24, 2004, October 29, 2004, January 12, 2005, February 16, 2005, and July 21, 2006. Upon her initial consultation, Amanda complained of neck pain, pain in her right arm, numbness in the right arm, and weakness in both arms that traveled down into the left shoulder. Dr. Gregorace determined that Amanda had a restriction in her range of motion of the cervical spine; specifically flexion of 45 degrees as opposed to a normal of 60 degrees, extension of 30 degrees as opposed to a normal of 50 degrees, and right rotation of 30 degrees and left rotation of 45 degrees as compared to 80 degrees, which is normal rotation. There was also a quantified restriction of the range of motion of the lumbar spine with

regard to flexion and extension.

Based upon his initial examination, Dr. Gregorace referred Amanda for both X-ray and MRI testing. An X-ray which was performed on May 28, 2004 indicated that Amanda had cervical spine straightening and thoracolumbar scoliosis, that is a lateral curvature of the spine. An MRI of the cervical spine performed on May 29, 2004 was abnormal. The MRI revealed three disc bulges in the cervical region and straightening of the cervical curvature compatible with reflex muscle spasm. An MRI of the lumbar spine performed on October 4, 2004 was also abnormal. The MRI revealed five disc bulges in the lumbar region. Additionally, an MRI of the right knee performed on May 31, 2005 revealed minimal joint effusion, that is escape of fluid into the knee.

Upon Amanda's most recent visit on July 21, 2006, she continued to complain of neck and lower back pain. Dr. Gregorace observed that cervical range of motion continued to be restricted, particularly with regard to left rotation and flexion. There was a similar restriction in the range of motion of the lumbar spine with regard to flexion. Dr. Gregorace's conclusion was that Amanda had suffered a permanent partial disability stemming from chronic neck and lower back pain as a result of the accident.

Defendants argue that Dr. Gregorace's opinion may not be considered because his report does not make clear whether he personally reviewed Amanda and Gayle's MRI films or merely relied upon diagnostic reports prepared by another doctor. However, the court notes that the sworn reports of Dr. Robert Diamond, the radiologist who read the MRI's and prepared the reports, have been submitted by the plaintiffs (Plaintiffs' Ex. C and F). Moreover, Dr. Gregorace did not merely mention the reports but referred to specific findings in the reports which

supported his diagnosis(*Toure v. Avis Rent A Car Systems*, 98 NY 2d 345, 358 [2002]). Thus, Dr. Gregorace's reports may properly be considered on these summary judgment motions.

Evidence of injury to the soft tissue of the spine, such as a herniated disc, accompanied by a quantified restriction of the range of motion, creates a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of the No-Fault Law(*Brown v. Stark*, 205 AD2d 725 [2d Dep't 1994]). Amanda appears to have suffered a bulging as opposed to a herniated disc. Furthermore, the fact that scoliosis was detected is an indication that her back condition may have been pre-existing.²

Nonetheless, defendant will be liable for all injuries caused by defendant's negligence, even if plaintiff has a physical condition that makes plaintiff more susceptible to injury than a normal, healthy person(PJI 2:283; *Owen v. Rochester-Penfield Bus Co.*, 304 NY 457 [1952]; *Martin v. Volvo Cars*, 241 AD2d 941, 943 [4th Dep't 1997]). On the other hand, where plaintiff has a pre-existing condition that is aggravated as a result of defendant's negligence, defendant is liable only for any increased pain and suffering resulting from the aggravation(PJI 2:282; *Ortiz v. Mendolia*, 116 AD2d 707 [2d Dep't 1986]). Thus, plaintiff may recover only for damage caused by aggravation of a pre-existing condition, not the condition itself(PJI 2:282).

The court concludes that Amanda has offered sufficient evidence as to two of the No Fault thresholds: 1) permanent consequential limitation of use of a body organ or member, and 2) significant limitation of use of a body function or system. Accordingly, defendants' motions for summary judgment are denied as to these two but granted as to the other No-Fault thresholds.

²In most cases, the cause of scoliosis is unknown. In adults, scoliosis may result in back pain and trouble breathing(See www.webmd.com).

Upon the trial of the action, defendants may, if they be so advised, offer evidence that Amanda was suffering from a pre-existing scoliosis condition. Amanda may offer evidence that her condition was aggravated by defendants' negligence.

Gayle Hall-Cunningham's injury

Gayle claims that she suffered injury to her cervical and lumbar spine, including cervical disc herniations and disc bulges in the lumbar region. Gayle also asserts a claim for aggravation or exacerbation of a latent or pre-existing cervical condition. Complaining that she had a headache and her hands were numb, Gayle was taken by ambulance to North Shore Plainview after the accident. Although she was treated and released, Gayle lost about one week of work as a pharmacist as a result of the accident. About two weeks later, Gayle switched from the day shift to the night shift because she had difficulty sitting and standing for prolonged periods of time.

In support of her motion for summary judgment, Kuhl submits, among other documents, the sworn report of Dr. James Sarno. Dr. Sarno examined Gayle on the same date that he examined her daughter. At the time of the examination, Gayle could not sit for more than 20 minutes at a time and could not stand for more than half an hour. Gayle complained of pain radiating from the neck down the right upper extremity to the fingers of her right hand. Gayle also stated that she constantly suffered from headaches which she described as a dull ache at the top of her head. Dr. Sarno observed that Gayle had full range of motion of the cervical spine. With regard to the lumbar spine, Dr. Sarno noted a "deep lordosis," that is an exaggerated forward curvature (Merriam Webster's Medical Desk Dictionary). Through hands-on testing, Dr. Sarno observed that Gayle experienced pain when moving her lower back and she had a "mild

tenderness” over the right buttock. Dr. Sarno also noted that an MRI which had been performed on May 29, 2004 indicated that Gayle had a herniated cervical disc. Nonetheless, Dr. Sarno concluded that Gayle had a normal neurological examination. Dr. Sarno’s overall impression was that Gayle was suffering from degenerative disc disease in the cervical and lumbar regions. Gayle was 38 years old at the time of Dr. Sarno’s examination.

Based upon the report of Dr. Sarno, the court concludes that defendants have established a prima facie case that Gayle’s spinal condition was pre-existing and thus she did not sustain a serious injury within the meaning of § 5102 of the Insurance Law. Accordingly, the burden shifts to Gayle to demonstrate that she sustained a serious injury that was caused by the motor vehicle accident.

In opposition to defendants’ summary judgment motions, Gayle has submitted, among other documents, a sworn report from Dr. Joseph Gregorace. Dr. Gregorace first saw Gayle on May 21, 2004, the same date on which he saw her daughter. At that time, Gayle complained of neck pain that traveled down the right arm and of low back pain that radiated down the right leg. Gayle also complained of weakness in the right arm. Although Dr. Gregorace’s report does not indicate that Gayle disclosed any prior history of back problems, she was taking Vioxx, a well known anti-inflammatory medication, at the time of her initial consultation.³

Dr. Gregorace determined that Gayle had a restriction in her range of motion of the cervical spine; specifically flexion of 45 degrees as opposed to a normal of 60 degrees, extension of 30 degrees as opposed to a normal of 50 degrees, and right rotation of 30 degrees and left rotation of 45 degrees as compared to 80 degrees, which is normal. With regard to the lumbar

³See generally www.webmd.com.

spine, Dr. Gregorace noted that Gayle had full range of motion with regard to extension, but she had a restriction in flexion of 45 degrees as opposed to a normal of 90 degrees. Because of the acute pain which the patient was suffering, Dr. Gregorace prescribed four weeks of physical therapy and referred Gayle for X-rays and MRI examination.

The MRI testing was performed on May 29, 2004. An MRI of Gayle's cervical spine revealed a posterior disc herniation, and an MRI of her lumbar spine showed posterior disc bulges. Gayle saw Dr. Gregorace for follow-up evaluations on June 18, 2004, July 16, 2004, September 24, 2004, October 29, 2004, August 12, 2005, and July 21, 2006.

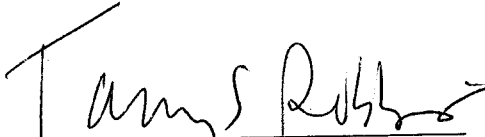
Upon Gayle's most recent examination by Dr. Gregorace, flexion and extension of the cervical spine had improved slightly, but she was still suffering from a restriction. Right and left rotation had improved considerably to 60 and 68 degrees respectively but were still less than the 80 degree range, which is normal. With regard to the lumbar spine, flexion had also improved significantly to 76 degrees as compared to 90 degrees, which is normal. At that time, Gayle was still complaining of low back pain with numbness in her right hand. Dr. Gregorace concluded that Gayle had sustained a significant injury to her cervical and lumbar spine as a result of the accident and that her disability was permanent and partial.

Despite the evidence that Gayle's condition was pre-existing, issue finding rather than issue determination is the function of the court on this summary judgment motion (*Town Board v Lee*, 241 AD2d 958 [4th Dep't 1997]). The court concludes that Gayle has offered sufficient evidence as to two of the No-Fault thresholds: 1) permanent consequential limitation of use of a body organ or member, and 2) significant limitation of use of a body function or system. Accordingly, defendants' motions for summary judgment are denied as to these two but granted

as to the other No-Fault thresholds. Upon the trial of the action, defendants may offer evidence that Gayle's condition was pre-existing, and plaintiff may offer evidence that her condition was aggravated by the automobile accident.

Because Gayle's action is proceeding against Kuhl, defendant Cunningham's motion for summary judgment dismissing Kuhl's cross claims is denied.

This shall constitute the decision and order of the court.


HON. TAMMY S. ROBBINS

Dated: October 13, 2006

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE