SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,
Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

KERVENS METELLUS, an Infant by his Mother Natural Guardian, MARTINE METELLUS and MARTINE METELLUS, Individually,

Plaintiffs,

-against-

MICHAEL MONTEVERDE and PAMELA B. MONTEVERDE,

Defendants.

MOTION DATE: 01/04/06

MOTION SEQ. NO.: 002

INDEX NO.: 1329/04

The following papers read on this motion (numbered 1-3):

Notice of Motion..1
Affirmation in Opposition...2
Reply Affirmation...3

Defendants Michael Monteverde and Pamela B. Monteverde's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Kervens Metellus, age 15, alleges that on July 10, 2002 at approximately 1:00 pm, a bicycle operated by him came into contact with a vehicle operated by defendant Pamela B. Monteverde and owned by Michael Monteverde. The accident occurred at or near the intersection of Plainfield Avenue and Chelsea Street in Nassau County. Defendants Pamela B. Monteverde and Michael Monteverde now move for an order dismissing plaintiffs' complaint pursuant to **CPLR §3212**, on grounds that plaintiff Kervens Metellus ("plaintiff" or "Kervens") failed to sustain a "serious injury" within the

meaning of **Insurance Law §5102(d)**. Plaintiff Martine Metellus, Kervens' mother, makes a derivative claim for loss of services and for medical expenses.

Insurance Law § 5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the court). The court's consideration in this action is confined to whether Kervens' injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The court finds that plaintiffs have demonstrated a *prima facie* failure to prove a medically determined injury which prevented Kervens from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated October 20, 2004 of orthopedist Carl Austin Weiss, MD, an affirmed report of examination, dated November 12, 2004 of neurologist Erik J. Entin, MD and an affirmed report, of radiologist Sheldon P. Feit, MD, dated September 18, 2004, subsequently affirmed in May, 2005 (incomplete date provided) wherein he reviews an MRI of Kervens' cervical spine, dated August 29, 2002 and an MRI of Kervens' lumbosacral spine, dated September 25, 2002.

Dr. Weiss found normal range of motion of the shoulders, full range of motion of the back although movements were carried out very slowly, and painless straight leg

raising. Dr. Weiss commented that "there is no neurological disorder and the young man moves in a more lively fashion when he is not being observed." Dr. Weiss concludes that Kervens is fully recovered from his injuries, that the injuries are not permanent and that "prognosis for the future in all respects [is] good." Dr. Weiss reviewed various records including MRI studies of the cervical and lumbar spines and of the right elbow and hospital emergency room records.

Dr. Entin noted a normal gait, normal strength and no Romberg sign. With respect to coordination, Dr. Entin found normal finger to nose, heel to shin, rapid alternating movements and tandem and heel and toe walking. In addition, Dr. Entin reported normal muscle tone, no muscle atrophy, symmetrical deep tendon reflexes, no Hoffman reflexes and intact primary and sensory modalities. Dr. Entin concluded that Kervens "has an entirely normal neurological examination with no evidence of neurological sequelae or disability referable to the accident of 07/10/2002. Regarding his shoulder injury, I defer to the appropriate orthopedic examiner." Dr. Entin reviewed reports of x-rays, reports of MRIs, emergency room records and reports of Dr. Demetrius of Queens Trauma Medical, PC.

Defendants also submit an affirmed report of Sheldon P. Feit, MD dated September 18, 2004 which concludes that the MRI of Kervens' cervical spine conducted on August 29, 2002 indicated a normal study. With respect to the MRI of the lumbosacral spine conducted on September 25, 2002, Dr. Feit states that the study revealed a "mild disc bulge at the L4-5 level" and "no evidence of focal herniation." Dr. Feit concludes that the MRI revealed "pre-existing degenerative changes" and noted that "disc bulges are not post-traumatic but are degenerative secondary to annular degeneration and/or ligamentous laxity."

The court finds that the report of defendants' examining physicians, taken together, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations so as to satisfy the court that an "objective

basis" exists for their opinions. The court notes that the reports of Drs. Weiss and Entin are not by themselves sufficiently detailed for plaintiffs to establish a prima facie case that Kervens did not sustain a "serious injury." However, the report of radiologist Sheldon P. Feit, MD provides sufficient detail and taken together with the reports of Drs. Weiss and Entin satisfy the court that defendants have made a *prima facie* showing that plaintiff Kervens Metellus did not sustain a serious injury within the meaning of **§§5102(d)**((7)) or ((8)), the only applicable sections. Consequently, the burden shifts to plaintiffs to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In his affidavit sworn to on December 6, 2005, Kervens claims that as a result of the accident, he experienced pain in his neck, back, left arm and left and right shoulders. He stated he received physical therapy for three months which ended due to termination of no-fault benefits. Plaintiff claims that as a result of the accident, he "had trouble doing chores at home, and in gym class. Often I would not participate in the gym activities. I had additional trouble participating in extra-curricular sports." Plaintiff stated that he continues to have pain in his back and shoulders and his neck makes a "cracking sound" and that he "still [has] difficulty sitting, standing, bending and lifting" and cannot fully participate in sports.

In his deposition of March 4, 2005, Kervens testified that after the accident he underwent three months of physical therapy at "Queens Trauma Medical" but did not recall if he saw any other healthcare providers. He also testified that he did not miss any time off from school once he returned in September and that although he never received a doctor's note to excuse him from gym class, he "didn't do anything" in gym. Kervens claims that the pain has interfered with his ability to vacuum and sleep. The court finds that these claims are incredible in view of plaintiff's testimony that he was on the school football team as a defensive tackle in the two school years following the accident and began practicing with the team in August 2002, one month after the accident. Kervens

testified that he never told his coach about the accident and that he played in only one game at the coach's direction but continued to participate in practices. Plaintiff also testified that he joined the track team in March of that school year and ran in all the meets. As to current complaints, plaintiff stated that his shoulders hurt.

Plaintiffs submit a report of September 1, 2002 covering an MRI of Kervens' cervical spine conducted on August 29, 2002 and a report of September 29, 2002 covering an MRI of Kervens' lumbar spine conducted on September 25, 2002. The court notes that both reports are affirmed by Mark Shapiro, MD on November 28, 2005. The MRI report of the cervical spine concludes that there is "straightening of the cervical lordosis with focal disc bulge at C4-5" and the MRI report of the lumbar spine finds "broad based disc bulges at L4-5 and L5-S1."

Plaintiffs also submit affirmed reports of Aric Hausknecht, MD, dated November 28, 2005 and October 27, 2005. Dr. Hausknecht found some limitation in certain movements of plaintiff's cervical and "T/L-S spine" comparing the results to normal range which Dr. Hausknecht asserts is "based on published guidelines by the NYS Division of Disability Determination and the American Medical Association." Dr. Hausknecht states that plaintiff has "received an adequate course of rehabilitation and it is unlikely that he will derive any further benefit from restorative therapy" and that he has "reached maximal improvement and prognosis is poor for any further recovery." Dr. Hausknecht states further that plaintiff's injuries have "caused important limitations to the activities of daily living. He has problems sitting, standing, bending and lifting." Dr. Hausknecht concludes that Kervens' head and neck injuries are causally related to the accident, that Kervens has sustained "permanent consequential limitation of use of his cervical and lumbosacral spine" and "significant limitation of function of his neurological and musculoskeletal system" and that plaintiff's "disc bulges will form the basis of osteoarthritis later on in life."

Plaintiffs also submit unaffirmed reports of Jean Claude Demetrius, MD of Queens

Trauma Medical, PC dated August 8, 2002, August 26, 2002 and October 14, 2002. The court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Kunz v. Gleeson,** 9 AD3d 480; **Magro v. He Yin Huang**, 8 AD3d 245; **Grossman v. Wright**, 268 AD2d 79; **Young v. Ryan**, 265 AD2d 547. Since the reports of Dr. Demetrius are neither affirmed nor in affidavit form, the court has not considered them.

It is the determination of this court that the "gap in treatment" is fatal to plaintiffs' claim that the evidence submitted is sufficient to raise a triable issue as to whether or not Kervens sustained a "serious injury" within the meaning of **Insurance Law § 5102(d)**. "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566, 572. *See* **Neugebauer v. Gill**, 19 AD3d 567; **Mohamed v. Siffrain**, 19 AD3d 561; **Batista v. Olivo**, 17 AD3d 494; **Garces v. Yip**, 16 AD3d 375; **Kearse v. New York City Transit Authority**, 16 AD3d 45; **Kulanda v. Ponce**, 13 AD3d 592; **Mooney v. Edwards**, 12 AD3d 424.

The court finds that the "gap in treatment" between Kervens' last visit to Dr. Demetrius on October 14, 2002 and Kervens' visit to Dr. Hausknecht on October 27, 2005 contradict plaintiffs' claim that Kervens suffered from a "serious injury" within the meaning of **Insurance Law §5102(d)**. "In the present case, the so called gap in treatment was, in reality, a cessation of all treatment." **Pommells v. Perez**, *supra* at 574. There is no evidence that plaintiff sought any medical treatment after October 2002. With the exception of the examination, of October 20, 2004 by Dr. Weiss and the examination, of November 12, 2004 by Dr. Entin, performed for defendant for purposes of this action, there is no evidence that plaintiff saw a medical professional after October 2002 until the

visit to Dr. Hausknecht in October 2005 also in connection with this case. "Any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (citation omitted)." **Grossman v. Wright**, *supra* at 84. *See* **Pommells v. Perez**, *supra*; **Mahabir v. Ally**, 2006 WL 289793; **Zhang v. Wang**, 24 AD3d 611; **Puerto v. Omholt**, 17 AD3d 650; **Garces v. Yip**, *supra*; **Kearse v. New York City Transit Authority**, *supra*; **Kulanda v. Ponce**, *supra*; **Mooney v. Edwards**, *supra*. "While a cessation of treatment is not dispositive–the law surely does not require a record of needless treatment in order to survive summary judgment–a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so." **Pommells v. Perez**, *supra* at 574. Plaintiffs have failed to satisfactorily explain this gap in treatment. In fact, the court notes that plaintiffs provide different explanations for the reason for the cessation of Kervens' treatment. In his affidavit, Kervens claims that he discontinued physical therapy after three months due to termination of "no-fault" not because he "felt better." Dr. Hausknecht makes a conclusory assertion that Kervens "has received an adequate course of rehabilitation and it is unlikely he will derive any benefit from restorative therapy."

The court finds that plaintiffs have failed to submit sufficient notes or other reports from any physician to support the assertion that further treatment would only be palliative in nature. *See* **Pinales v. CSC Holdings, Inc.**, 2002 WL 31355602 (Winslow, J). The court notes that Kervens also fails to provide any support for his claim that he ceased medical treatments because his no-fault insurance stopped paying. In addition, Dr. Hausknecht's report of October 27, 2005 does not adequately provide an explanation for his statement that there is no need for additional treatment or tests. Plaintiff also does not address the recommendation in Dr. Demetrius' unaffirmed report of October 14, 2002 report that plaintiff continue physical therapy twice a week and be re-evaluated in four weeks.

Moreover, the existence of a radiologically confirmed bulging disc alone will not suffice to defeat summary judgment without evidence that there is a causal connection between the bulging disc and the accident. **Pommels v. Perez**, *supra*. Not only must there be evidence of the extent and degree of the alleged physical limitation caused by the disc injury but there must also be evidence of a causal connection between the limitation and the accident. *See* **Howell v. Reupke**, 16 AD3d 377. Dr. Hausknecht makes only a conclusory statement to establish a causal connection between Kervens' alleged injuries and the accident. *See* **Gaddy v. Eyler**, 79 NY2d 955; **McHaffie v. Antieri**, 190 AD2d 780. Moreover, the affirmation of Dr. Shapiro, the examining radiologist, fails to establish a causal connection between the MRI findings and the accident.

There is also insufficient evidence that Kervens' alleged injuries are permanent **§5102(d)**((7)). Dr. Hausknecht's assertion that plaintiff's injuries are permanent in nature is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also*, **Grossman v. Wright**, *supra*; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Any statements of permanency of Kervens' injuries are belied by his deposition testimony that he did not miss any school as a result of the accident and participated in football practice one month following the accident. *See* **Relaford v. Valentine**, 17 AD3d 339

Dr. Hausknecht also makes conclusory assertions regarding plaintiff's abilities which are designed to meet statutory requirements. *See* **Holder v. Brown**, 18 AD3d 815; **Barnes v. Cisneros**, 15 AD3d 514; **Orr v. Miner**, *supra*. In his examination of October 27, 2005, Dr. Hausknecht merely states that Kervens reports "problems with activities of daily living" and that Kervens "especially has difficulty sitting, standing, bending and lifting."

Kervens' complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357. Plaintiff's affidavit does not raise an issue of fact as it consists of self serving and conclusory statemens that the "pain still interferes with [his] life on a daily basis," that he "still [has difficulty] sitting, standing, bending and lifting and "to this day [he] still can not fully participate in sports as [he] did prior to the accident." *See* **Mercado v. Garbacz**, 16 AD3d 631; **Mooney v. Edwards**, *supra*.

We have examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendants MICHAEL MONTEVERDE and PAMELA B. MONTEVERDE's motion for summary judgment dismissing the complaint of plaintiffs KERVENS METELLUS, an infant by his mother and natural guardian, MARTINE METELLUS, and MARTINE METELLUS individually, on the grounds that plaintiff KERVENS METELLUS failed to sustain a "serious injury" within the meaning of **Insurance Law § 5102(d)** is **granted**.

Defendants shall serve plaintiffs with copies of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the court.

Dated: 3/6 ,2006 ENTER:

J.S.C.

ENTERED

MAR 16 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE