

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 6**

**NASSAU COUNTY**

**ALPASLAN AKDOGAN and DOLORES C. AKDOGAN,**

**Plaintiffs,**

**MOTION DATE: 9/28/09**

**-against-**

**MOTION SEQ. NO.: 001, 002**

**INDEX NO.: 4791/08**

**MICHAEL OCHAKOVSKY, HERSCH OCHAKOVSKY and PAULINE OCHAKOVSKY,**

**Defendants.**

**The following papers read on this motion (numbered 1-5):**

Notice of Motion.....	1
Notice of Cross Motion.....	2
Affirmation in Opposition.....	3
Reply Affirmation.....	4
Reply Affirmation.....	5

The motion of defendants Michael Ochakovsky, Hersch Ochakovsky and Pauline Ochakovsky for summary judgment pursuant to **CPLR §3212** and the cross motion of plaintiffs Alpaslan Akdogan and Delores C. Akdogan for partial summary judgment pursuant to **CPLR §3212** are determined as follows.

Plaintiffs Alpaslan Akdogan and Dolores C. Akdogan allege that on September 26, 2007 at approximately 6:50 p.m., a motor vehicle owned and operated by Alpaslan Akdogan ("AKDOGAN"), age 38, came into contact with a vehicle owned by defendants Hersch Ochakovsky and/or Pauline Ochakovsky and operated by defendant Michael Ochakovsky ("OCHAKOVSKY"). The accident occurred on Brower Avenue, at its intersection with Sunnyside Road, Oceanside, Town of Hempstead. Defendants now move for an order dismissing plaintiffs' complaint pursuant to **CPLR §3212**, on grounds that plaintiff AKDOGAN failed to

sustain a “serious injury” within the meaning of **Insurance Law §5102(d)**. Plaintiffs cross move for partial summary judgment pursuant to **CPLR §3212** on the issue of liability.

Defendants’ motion for summary judgment on the grounds that AKDOGAN failed to demonstrate a serious injury within the meaning of **Insurance Law §5102(d)**

**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 AKDOGAN’s 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 AKDOGAN has demonstrated a *prima facie* failure to prove a medically determined injury which prevented him 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 November 6, 2008, of neurologist C.M. Sharma, MD [Defendants’ Ex. H], and a report of examination, dated that date, of orthopedist Harold Kozinn, MD [Defendants’ Ex. I], both reports covering examinations conducted on November 6, 2008, and reports of radiologist Sondra J. Pfeffer, MD, dated December 7, 2008, covering reviews of MRI examinations of AKDOGAN’s cervical spine and left knee conducted on October 23, 2007 and February 29, 2008, respectively [Defendants’ Exs. J & K]. Defendants also submit certain examination reports prepared by plaintiffs’ physiatrist Joseph Gregorace, DO [Defendants’ Ex. G].

Dr. Sharma found normal reflexes (although he noted that testing of the left knee reflex

was omitted at AKDOGAN's request due to pain), no areas of numbness, normal gait, normal heel, toe and tandem walking and no evidence of atrophy. Dr. Sharma also found that AKDOGAN could bend forward and touch his knees and that "straight leg raising is 60 degrees on both sides." Dr. Sharma noted that AKDOGAN's movements of his left shoulder were painful and partially limited in rotation, that AKDOGAN was unable to bring his left hand to his mid spinal region but could reach beyond the left gluteal level, and that movements of AKDOGAN's neck, although within the normal range, elicited pain on both sides. Dr. Sharma diagnosed subjective cervical and lumbar pains. Dr. Sharma concluded that his examination revealed "no causally related neurological problems [or] disability."

Dr. Kozinn provides range of motion testing, comparing the results to normal, of AKDOGAN's cervical and lumbosacral spines and left knee, and noted normal results. Dr. Kozinn found that his examination also revealed negative straight leg raising and Patrick's test bilaterally, no weakness in foot or great toe dorsiflexors, no clonus, no Babinski and intact sensation. With respect to AKDOGAN's left knee, Dr. Kozinn reported that AKDOGAN complained of tenderness in the left knee. Dr. Kozinn reviewed AKDOGAN's medical records and noted that AKDOGAN only complained of left knee pain six months subsequent to the accident. Consequently, Dr. Kozinn concluded that AKDOGAN's "left knee complaints and resulting surgery were not causally related to the accident of 9/26/07." Dr. Kozinn diagnosed lumbosacral and cervical sprain, and a post operative partial medial meniscectomy of the left knee and concluded that "there is no need for further treatment."

Dr. Pfeffer reviewed the MRI of AKDOGAN's cervical spine conducted on October 23, 2007, twenty-seven days post accident. Dr Pfeffer noted *inter alia* multi-level disc desiccation, cervical disc bulges and disc herniations at T1-2 and T2-3. Dr. Pfeffer concluded that all the MRI findings are "pre-existing to the subject accident, being considerably more long standing than 27 days duration" and that "there is no evidence for recently sustained, i.e. trauma-related, discal or vertebral injury at any cervical level." Dr. Pfeffer also reviewed the MRI of AKDOGAN's left knee conducted on February 29, 2008, five months post accident. Dr. Pfeffer found *inter alia* a "tear involving the body and posterior horn of the medial meniscus", but noted that "this tear cannot be attributed to the subject accident given the absence of documentation of left knee

symptomatology.” Dr. Pfeffer concluded that “it would be medically absurd to contend that [AKDOGAN] sustained a traumatically induced medial meniscal tear within his left knee insofar as this type of injury obviously would be symptomatic almost immediately post-inception (as opposed to becoming symptomatic 4-5 months thereafter).”

In determining whether or not defendants have met their *prima facie* burden of establishing that AKDOGAN failed to sustain a serious injury within the meaning of **Insurance Law §5102(d)**, the Court finds that the report of Dr. Sharma cannot be considered. Dr. Sharma opined that AKDOGAN’s neck movements were in the normal range, but failed to set forth objective tests he performed in reaching said conclusion. *See Nirenberg v. Public Administrator of Westchester County*, 62 AD3d 844; *Giammalva v. Winters*, 59 AD3d 595; *Stern v. Oceanside School Dist.*, 55 AD3d 596; *Spahn v. Wohlmacher*, 52 AD3d 815; *Perez v. Fugon*, 52 AD3d 668. Moreover, although Dr. Sharma noted in his report that AKDOGAN could accomplish straight leg raising to sixty degrees, Dr. Sharma failed to compare this finding to a normal range. *See Walker v. Public Administrator of Suffolk County*, 60 AD3d 757; *Marshak v. Migliore*, 60 AD3d 647; *Giammalva v. Winters, supra*; *Perez v. Fugon, supra*; *Page v. Belmonte*, 45 AD3d 825; *Fleury v. Benitez*, 44 AD3d 996. In addition, Dr. Sharma noted that although AKDOGAN’s movements of his left shoulder were partially limited in rotation, Dr. Sharma “failed to quantify the limitation to establish it was insignificant.” *Moore v. Stasi*, 62 AD3d 764, 765.

Although portions of the report of Dr. Kozinn must be disregarded because he “recite[s] unsworn findings of other doctors” (*Casiano v. Zedan*, 2009 WL 3298531; *see also McNeil v. New York City Transit Authority*, 60 AD3d 1018), the Court finds, however, that the remaining portions of his report and the reports of Dr. Pfeffer, taken together, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during Dr. Kozinn’s examination and in the review of MRI records conducted by Dr. Pfeffer, so as to satisfy the Court that an “objective basis” exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, although marginally, that plaintiff AKDOGAN did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, 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.

Plaintiffs submit the following medical records which are not affirmed in accordance with **CPLR §2106**: (1) medical records from South Nassau Communities Hospital (“South Nassau”) [Plaintiffs’ Ex. F]; (2) records from Island South Physical Medicine & Rehabilitation (“Island South”), including progress notes and billing records [Plaintiffs’ Ex. G]; (3) reports of examination of physiatrist Joseph Gregorace, DO, dated September 28, 2007, October 19, 2007, November 16, 2007, February 6, 2008, May 30, 2008 and July 2, 2008 [Plaintiffs’ Ex. G]; (4) report covering an EMG of AKDOGAN’s cervical spine, dated May 30, 2008 [Plaintiffs’ Ex. G]; (5) records of pain management physician Robert Iadavaio, MD covering a cervical epidural steroid injection administered to AKDOGAN on March 3, 2008 [Plaintiffs’ Ex. I]; (6) reports of examination of orthopedist Dov J. Berkowitz, MD, including records covering arthroscopic surgery performed on AKDOGAN’s left knee on May 20, 2008 [Plaintiffs’ Ex. J]; and (7) report of examination, dated June 13, 2008, of orthopedist Sebastian Lattuga, MD, covering an examination of that date [Plaintiffs’ Ex. K]. Plaintiffs submit the following medical evidence affirmed in accordance with **CPLR §2106**: (1) affirmation of radiologist John Himelfarb, MD covering MRIs of AKDOGAN’s cervical spine conducted on October 23, 2007 and left knee conducted on February 29, 2008 [Plaintiffs’ Ex. H]; (2) report of examination, dated May 4, 2009, of neurologist Kerin B. Hausknecht, MD covering an examination of that date [Plaintiffs’ Ex. L]; and (3) affirmation of orthopedist Dr. Berkowitz, dated September 18, 2009 [Plaintiffs’ Ex. O].

The Court notes at the outset that the report of a physician or osteopath 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; **Ponciano v. Schaefer**, 59 AD3d 605; **Pompey v. Charney**, 59 AD3d 416; **Sapienza v. Ruggiero**, 57 AD3d 643; **Marrache v. Akron Taxi Corp.**, 50 AD3d 973; **Patterson v. NY Alarm Response Corp.**, 45 AD3d 656; **Verette v. Zia**, 44 AD3d 747; **Nociforno v. Penna**, 42 AD3d 514. *See also* **Pagano v. Kingsbury**, 182 AD2d 268. Specifically, **CPLR §2106** permits the submission of an affirmation in lieu of an affidavit provided the affirmation is “subscribed and affirmed by [the physician, osteopath] to be true under the penalties of perjury.” The Court finds that the records from South Nassau, certain records

from Island South, the records of Drs. Iadavaio and Berkowitz and the report of examination of Dr. Lattuga are not properly affirmed in accordance with CPLR §2106 and, therefore, cannot be considered. Although Dr. Gregorace's reports of examination are purportedly in affirmation form, said reports fail to comply with CPLR §2106. In his reports, Gregorace attests that "I, Joseph Gregorace, being a physiatrist duly licensed to practice medicine in the state of New York, under the penalties of perjury, pursuant to CPLR, Section 2106, do hereby affirm the contents of the foregoing." The reports are not "subscribed and affirmed to be *true* under the penalties of perjury (*emphasis supplied*)" CPLR §2106. See **Offman v. Singh**, 27 AD3d 284; **Magro v. He Yin Huang**, 8 AD3d 245; **Bourgeois v. North Shore University Hospital at Forest Hills**, 290 AD2d 525.

The Court notes, however, that plaintiffs' reports of examination of Dr. Gregorace, dated September 28, 2007, October 19, 2007, November 16, 2007, February 6, 2008 and March 19, 2008 (but not the reports of May 30, 2008 and July 2, 2008), were submitted by defendants in support of their motion for summary judgment. Consequently, the above-referenced reports submitted by defendants may be considered by the Court. See **Dietrich v. Puff Cab Corp.**, 63 AD3d 778; **Kearse v. NYC Transit Authority**, 16 AD3d 45; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, *supra*.

Consequently, with respect to medical evidence submitted in opposition to defendants' motion, the Court can only consider the reports of examination of Dr. Gregorace submitted by defendants, the affirmed MRI reports of Dr. Himelfarb covering AKDOGAN's cervical spine and left knee, the affirmed report of Dr. Hausknecht, and the affirmation of Dr. Berkowitz. The Court finds that said evidence is sufficient, although marginally, to raise a triable issue of fact as to whether or not AKDOGAN sustained a serious injury under the permanent consequential limitation (7) and/or significant limitation (8) categories.

Dr. Himelfarb's report covering an MRI of AKDOGAN's cervical spine performed on October 23, 2007, notes multi-level disc bulges and herniations, and Dr. Himelfarb's report covering an MRI of AKDOGAN's left knee performed on February 29, 2008, notes *inter alia* a tear of the posterior horn of the medial meniscus. The Court notes that the existence of a radiologically confirmed disc injury or tear alone will not suffice to defeat summary judgment.

*See Pommells v. Perez*, 4 NY3d 566 at 574; *Yun v. Barber*, 63 AD3d 1140; *Caraballo v. Kim*, 63 AD3d 976; *Ferber v. Madorran*, 60 AD3d 725; *Ponciano v. Schaefer*, 59 AD3d 605; *Byrd v. J.R.R. Limo*, 61 AD3d 801; *Niles v. Lam Pakie Ho*, 61 AD3d 657; *Magid v. Lincoln Services Corp.*, 60 AD3d 1008; *Ferber v. Madorran*, 60 AD3d 725; *Pompey v. Carney*, 59 AD3d 416; *Luna v. Mann*, 58 AD3d 699; *Sealy v. Riteway-1, Inc.*, 54 AD3d 1018; *Kearse v. New York City Transit Authority*, *supra*. However, other physicians of plaintiff expressed opinions as to whether the injuries set forth in said MRI were caused by the accident.

In his various reports dated contemporaneously with the accident *to wit* two days to five months after the accident, Dr. Gregorace found reduced range of motion of AKDOGAN's cervical spine, cervical spasms and tenderness, positive straight leg raising test and refers to the MRI findings of bulging and herniated discs and the cervical spine epidural procedure performed by Dr. Iadavaio. The Court notes that Dr. Gregorace also provides range of motion results of AKDOGAN's left knee but not until the March 19, 2008 examination when AKDOGAN purportedly first complained to Dr. Gregorace of left knee pain.

Upon examination on May 4, 2009, Dr. Hausknecht found that cervical range of motion testing, using a goniometer, revealed right rotation with pain to 55 degrees (normal 80 degrees), left rotation to 60 degrees (normal 80 degrees), flexion to 25 degrees (normal 45 degrees) and extension to 25 degrees (normal 35 degrees). Dr. Hausknecht noted tenderness around the C3 to C7 area bilaterally and moderate spasms at C4-C6, trigger point in the left trapezius and left scapular border, and positive compression sign reproducing pain in AKDOGAN's left shoulder. Dr. Hausknecht also found tenderness over the medial aspect of the left knee joint and noted a slight click on manipulation. In addition, Dr. Hausknecht reported normal strength in the upper and lower extremities except for "4+/5 weakness of left shoulder abduction/elevation and 4+/5 weakness of left wrist flexion/extension", "normal sensation in the upper and lower extremities" except for "complaints of paraesthesias in the left arm and forearm", and "mild sensory loss to pinprick in the C5/6 distribution of the forearm and hand." Dr. Hausknecht opined that AKDOGAN "has made a good functional recovery in terms of his back injury."

Dr. Hausknecht stated that although AKDOGAN had "initially developed some knee pain after the accident, AKDOGAN did not attend any treatment" as an explanation for why

AKDOGAN did not seek treatment for the left knee until five months after the accident. Dr. Hausknecht diagnosed “cervical whiplash injury with musculoligamentous strain/sprain, traumatic cervical spine herniation at C5/6, C6/7, T1/2 and T2/3, persistent left sided cervical radiculopathy, lumbar strain and internal derangement of the left knee, status arthroscopy. Although portions of the report of Dr. Hausknecht must be disregarded because he “recite[s] unsworn findings of other doctors” (*Casiano v. Zedan*, 2009 WL 3298531; *see also McNeil v. New York City Transit Authority*, 60 AD3d 1018), to the extent his opinions are based on an examination of AKDOGAN and properly affirmed records, they can be considered by the Court. Dr. Hausknecht opined that said injuries are causally related to the accident and acknowledged that AKDOGAN denied that he has had any pain or injuries in the past. Dr. Hausknecht concluded that AKDOGAN’s cervical injuries are significant and have resulted in a permanent limitation of functioning in the cervical and upper extremities. Dr. Hausknecht deferred discussion of AKDOGAN’s knee injury to “appropriate orthopedic review.”

In an affirmation, dated September 18, 2009, orthopedist Dov Berkowitz, MD reviews his treatment of AKDOGAN as of February 2008, when AKDOGAN presented to his office with complaints of knee pain. Dr Berkowitz states that at that time, AKDOGAN reported to him that he had not sought out any therapy for his knees even though he had initially complained of knee pain. Dr. Berkowitz reports that an MRI performed on February 29, 2008 revealed a tear of the posterior horn of the medial meniscus, and that on May 20, 2008, Dr. Berkowitz performed an “arthroscopy, synovectomy, partial medial meniscectomy and abrasion arthroplasty with chondroplasty of the patellofemoral joint” of AKDOGAN’s left knee. Dr. Berkowitz also reported that his surgical findings revealed no evidence of a chronic tear or degenerative meniscal pathology and that AKDOGAN denied any pre-accident history of injury to his left knee. Dr. Berkowitz opined that AKDOGAN has a “ninety percent chance of developing degenerative arthritis in his left knee secondary to the loss of meniscal tissue.”

The Court finds that the totality of plaintiffs’ evidence as set forth in the reports of Drs. Gregorace, Himelfarb, Hausknecht and Berkowitz is sufficient to raise a triable issue of fact as to whether or not AKDOGAN sustained 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). Drs. Hausknecht and Berkowitz opined that AKDOGAN’s injuries were significant and permanent and causally



related to the accident. Dr. Hausknecht, concluded based on his review of the MRIs and his examination of AKDOGAN, that AKDOGAN's injuries were caused by the accident. Dr. Berkowitz opined that arthroscopic surgery revealed an acute rather than a chronic or degenerative tear. In addition, both Dr. Hausknecht and Dr. Berkowitz acknowledged and addressed the fact that AKDOGAN did not seek immediate treatment post accident for injuries to his left knee. Defendants, however, have submitted examination reports of plaintiffs' physiatrist Dr. Gregorace supporting their contention that AKDOGAN's first complained of knee pain five months after the accident (*cf* **Cariddi v. Hassan**, 45 AD3d 516) and have proffered affirmations of their radiologist Dr. Pfeffer who opined that AKDOGAN's cervical injuries are degenerative and that AKDOGAN's left knee injury was not traumatically induced. These conflicting opinions are sufficient to create an issue of fact. *See* **Gaviria v. Alvarado**, 65 AD3d 567; **Noel v. Choudhury**, 65 AD3d 1316; **Gonzalez v. MTA Bus Co.**, 63 AD3d 999; **Pearson v. Guapisaca**, 61 AD3d 833.

Plaintiffs' cross motion for partial summary judgment on the issue of liability

Plaintiffs claim that OCHAKOVSKY failed to yield right of way to AKDOGAN's vehicle, and to exercise reasonable care to see what there was to be seen. In support, plaintiffs submit the deposition testimony of AKDOGAN wherein he testified that he was traveling east on a two-way road way, with one lane in each direction (deposition testimony, pp. 20-21), and encountered OCHAKOVSKY's vehicle traveling westbound in his eastbound lane (deposition testimony, p. 33). In opposition, defendants allege that AKDOGAN failed to steer his vehicle away from the OCHAKOVSKY vehicle. OCHAKOVSKY testified at his deposition that he was making a left turn, that AKDOGAN's vehicle was speeding and came out of nowhere (deposition testimony, p. 37) and that he attempted to move away before impact but was unable to do so (deposition testimony, p. 49).

The Court finds that AKDOGAN has made a *prima facie* showing that OCHAKOVSKY violated **Vehicle and Traffic Law §1141** by making a left turn into AKDOGAN's lane of traffic and that OCHAKOVSKY's actions are causally related to the occurrence. However, the Court

determines there are issues of fact as to AKDOGAN's operation of his vehicle, including whether or not he was operating his vehicle at an excessive speed, which precludes the granting of summary judgment to plaintiffs. See **Lynch v. Dobler Chevrolet, Inc.**, 49 AD3d 509. Consequently, the question of AKDOGAN's contributory negligence awaits determination by a jury.

The Court has examined the parties' remaining contentions and finds them to be without merit.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants Michael Ochakovsky, Hersch Ochakovsky and Pauline Ochakovsky for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiffs Alpaslan Akdogan and Dolores C. Akdogan, on the grounds that plaintiff Alpaslan Akdogan failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **denied**; and it is further

ORDERED, that the cross motion by plaintiffs Alpaslan Akdogan and Dolores C. Akdogan for partial summary judgment pursuant to **CPLR §3212** on the issue of liability is **denied**.

This constitutes the Order of the Court.

Dated: Dec 15, 2009

  
J.S.C.

**ENTERED**  
DEC 28 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE