

At an IAS Term, Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, 9<sup>th</sup> day of September, 2002

P R E S E N T:

HON. GERARD H. ROSENBERG,  
Justice.

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JAMES MONTREUIL, SHANEL MONTREUIL,  
an infant by her father and natural guardian,  
JAMES MONTREUIL, and JAMES MONTREUIL,  
individually,

Plaintiffs,

- against -

Index No. **36854/00**

MELVIN C. BUGGS and WATCHTOWER  
BIBLE SOCIETY, INC.,

Defendants.

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The following papers numbered 1 to 11 read on this motion:

|   | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause/<br>Petition/Cross Motion and<br>Affidavits (Affirmations) Annexed _____ | <u>1-4</u>             |
| Opposing Affidavits (Affirmations) _____  | <u>5-8</u>             |
| Reply Affidavits (Affirmations) _____   |                        |
| <u>Supplemental</u> _____ Affidavit (Affirmation) _____   | <u>9-11</u>            |
| Other Papers _____  |                        |

Upon the foregoing papers, defendants Melvin C. Buggs and Watchtower Bible Society, Inc. ("Watchtower") move for an order granting summary judgment dismissing the complaint on the ground that neither plaintiff James Montreuil ("Mr. Montreuil") nor Shanel Montreuil ("Shanel") sustained a serious injury within the meaning of Insurance Law § 5102.

Plaintiffs commenced this action seeking to recover compensatory and derivative damages allegedly sustained on June 10, 2000 when a vehicle operated by Mr. Montreuil and owned by his father collided with a garbage truck owned by Watchtower and operated by Buggs on Hamilton Avenue, near its intersection with Second Avenue in Brooklyn. Shanel, then three years old, was a passenger in the Montreuil vehicle.

In support of their motion, defendants rely upon plaintiffs' bill of particulars; the deposition testimony of Mr. Montreuil; and independent medical examinations conducted on their behalf by Dr. Barbara Freeman, an orthopedic surgeon, on February 6, 2002.

### **Mr. Montreuil**

In the bill of particulars, Mr. Montreuil claimed that as a result of the subject accident, he sustained injuries including bulging discs at C5-C6 and L4-L5, deforming the thecal sac; a herniated disc at L4-S1; lumbar and cervical radiculopathy, radiculitis, sprain, and strain; nerve root impingement; straightening and reversal of the cervical lordosis; radiculopathy of the left arm, left shoulder, right arm, and right shoulder; cerebral concussion; and post-traumatic headaches and stress disorder. Mr. Montreuil further claimed that following the accident, he was confined to bed for one week, confined to home for two months, and missed two months of work.

At his deposition, Mr. Montreuil testified that he was not treated at the scene of the accident, although later that day he sought treatment in the emergency room of the Coney Island Hospital for complaints of pain in his right arm, neck, and lower back. A few days

later, Mr. Montreuil was examined by Dr. Jean Claude Compas, and thereafter underwent physical therapy two to three times a week for approximately six months. Mr. Montreuil further testified that he missed two and one-half months of work and when he returned, Dr. Compas told him not to perform any heavy lifting; a copy of a letter dated June 15, 1999 from Dr. Compas so indicating also stated that Mr. Montreuil was able to return to work on June 14, 1999. Mr. Montreuil further testified that he still could not play basketball or ride a bicycle.

After examination, Dr. Freeman found that Mr. Montreuil had a mild left sacroiliitis, but he was not disabled and required no treatment or restriction on his activities.

### **Shanel Montreuil**

In the bill of particulars, Shanel claimed that as a result of the subject accident, she sustained injuries including cervical hyperextension syndrome; cervical and lumbar sprain, strain, and radiculitis; concussion; post-concussion syndrome; headaches; and feelings of fright.

At her examination, Dr. Freeman noted that Shanel, who was then five years old, was running, playing, and moving freely from the chair to the floor to the exam table. Dr. Freeman concluded that Shanel's examination was normal, that she had no orthopedic disability, and that there was no restriction on her activity.

## **Defendants' Burden of Proof**

Based upon plaintiffs' bill of particulars, Mr. Montreuil's deposition testimony, and the opinion of Dr. Freeman, defendants met their initial burden of making a prima facie showing that plaintiffs did not sustain a serious injury (*see Gaddy v Eyler*, 79 NY2d 955; *Ocasio v Henry*, 276 AD2d 611; *Grossman v Wright*, 268 AD2d 79). In so holding, the court notes that it has been held that a defendant can establish that the plaintiffs' injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective medical findings support the plaintiffs' claim (*Espinal v Galicia*, 290 AD2d 528; *Villalta v Schechter*, 273 AD2d 299; *Grossman, id.* at 84, *citing Turchuk v Town of Wallkill*, 255 AD2d 576).

Accordingly, the burden shifts to plaintiffs to come forward with sufficient evidence to raise a triable issue of fact (*Gaddy*, 79 NY2d 955; *Ocasio*, 276 AD2d 611; *Grossman, id.*). In order to establish that he or she suffered a permanent loss or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, plaintiffs are required to provide objective evidence of the extent or degree of the limitation and its duration (*see Gaddy, id.*; *Beckett v Conte*, 176 AD2d 774, *appeal denied* 79 NY2d 753). In the alternative, plaintiffs must prove that he or she sustained a medically determined injury or impairment which prevented him or her from performing substantially

all of the material acts which constituted his or her usual and customary daily activities for 90 days of the 180 days immediately following the accident.

### **Plaintiffs' Contentions**

In opposition to this motion, plaintiffs rely upon their bill of particulars; an affirmation by counsel; an affidavit from Mr. Montreuil; and affirmations from Dr. Compas, Dr. Eric A. Lubin (a radiologist), and Dr. Renan Macias (a neurologist). In his affirmation, Dr. Compas alleged that he was the primary treating physician for Mr. Montreuil and Shanel following the accident.

#### **Mr. Montreuil**

Dr. Compas stated that he first examined Mr. Montreuil on June 13, 2000 and treated him 81 times thereafter. Range of motion examination performed at that time revealed that Mr. Montreuil's motion in his cervical spine was reduced 14 to 42 degrees and motion in his lumbar spine was reduced 20 to 37 degrees. Dr. Compas diagnosed Mr. Montreuil as suffering from post-traumatic headaches; cervical and lumbar sprain/spasm, with possible radiculopathy; and post-traumatic stress disorder. A course of physical rehabilitation three times a week was advised and Mr. Montreuil was referred for radiological studies and to a psychologist and an acupuncturist.

Dr. Compas' final diagnosis for Mr. Montreuil was post-traumatic headaches, anxiety disorder, and stress disorder; sprain in the cervical and lumbar spines; bulging discs at C5-C6 and L4-L5; a herniated disc at L5-S1; straightening and reversal of the cervical lordosis;

cervical hypertension syndrome; radiculopathy; cerebral concussion syndrome; and mood disorder with depressive features. Dr. Compas was of the opinion that Mr. Montreuil's impairment had reached a clinical plateau, was permanent, was unlikely to improve, and constituted a significant limitation of the use of the injured areas.

Dr. Compas last saw Mr. Montreuil on May 7, 2002. In his brief report, Dr. Compas noted that Mr. Montreuil continued to complain of pain in his head, neck, and back and stated that "[e]xamination revealed Mr. Montreuil to be 5'9" tall and to weigh 164lbs." Dr. Compas referred to no tests performed during this exam, nor did he note any limitations in Mr. Montreuil's range of motion. Dr. Compas concluded, however, that Mr. Montreuil's injuries resulted from the car accident and were of a permanent nature.

In a narrative report dated June 9, 2001, Dr. Compas reiterated the findings of the June 13, 2000 examination and referred to Mr. Montreuil's MRIs; a neurological examination conducted by Dr. Macias; a nerve conduction test done by Dr. Schwartz; a psychological examination conducted by Dr. Feldmar; the diagnosis of Dr. Macias; acupuncture treatment received from Bo-Tao Gu through March 7, 2001; a psychological evaluation conducted on July 25, July 27 and August 1, 2000; and the opinion of Avi Latchaw, M.A., the consulting psychotherapist, that Mr. Montreuil suffered from emotional instability and moderate depression and anxiety as a result of the accident. Physical therapy

reports for the period from June 15, 2000 through April 23, 2001 are also attached to the affirmation,' as are copies of reports from Dr. Macias.

Dr. Lubin submits an affirmation in which he alleged that ~~an~~ MRI conducted of Mr. Montreuil's lumbar spine on July 10, 2000 revealed a bulging disc at L4-L5 and a herniated disc at L5-S1. An MRI taken of Mr. Montreuil's cervical spine on June 20, 2000 indicated straightening and reversal of the cervical lordosis and a bulging disc at C5-C6.

In his affirmation, Dr. Macias alleged that he treated **Mr.** Montreuil on June 27, 2000 and re-evaluated him on August 15, 2000. His initial diagnosis of cervical hyperextension syndrome with neck pain, radiculopathy, lumbosacral muscle sprain and radiculitis with coccalgia, cerebral concussion syndrome, post-concussion syndrome, nausea, and loss of balance was confirmed upon re-evaluation. Dr. Macias' prognosis for Mr. Montreuil was guarded.

### **Shanel Montreuil**

Dr. Compas alleged that he examined Shanel on June 13, 2000 for complaints of headaches and nightmares. He referred her for neurological and psychological evaluations and the findings were consistent with cervical hyperextension syndrome, abnormal behavior, irritability, frightened feelings, cerebral concussion syndrome, and post-concussion syndrome and headaches. Dr. Compas so diagnosed Shanel, based upon his examination of her and Dr. Macias' diagnosis. When Dr. Compas examined Shanel again on May 7, 2002, he

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<sup>1</sup> From these reports, it cannot be determined how often Mr. Montreuil was treated.

noted that her exam was unremarkable and opined that the above-noted injuries were sustained in the subject accident and that her prognosis was guarded.

In a second affirmation, Dr. Macias alleged that he examined Shanel on June 27, 2000, when his examination revealed stiffness of the cervical and lumbosacral spine, shoulders, arms, hips and legs, and decreased range of motion. Dr. Macias diagnosed Shanel as having sustained cervical hyperextension syndrome with neck pain, abnormal behavior, insomnia, frightened feelings, cerebral concussion syndrome and post-concussion headaches.

### **Discussion**

Plaintiffs have failed to establish that either sustained a permanent loss or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system. As a threshold issue, the court notes that the affirmation of counsel, made without personal knowledge, is without evidentiary value (*see Feratovic v Lun Wah, Inc.*, 284 AD2d 368; *Carpluk v Friedman*, 269 AD2d 349; *Sloan v Schoen*, 251 AD2d 319). Thus, counsel's conclusion that plaintiffs sustained a serious injury in the accident will not be addressed. Similarly, Mr. Montreuil's self-serving affidavit, as it addressed both his injuries and those allegedly sustained by Shanel, is without probative value, and hence is insufficient to establish that he or his daughter sustained a serious injury (*Fisher v Williams*, 289 AD2d 288; *Holmes v Hanson*, 286 AD2d 750, 751, *citing Young v Ryan*, 265 AD2d 547; *Rum v Pam Transp.*, 250 AD2d 751).



## **James Montreuil**

Similarly, Dr. Compas' affirmation is insufficient to establish that Mr. Montreuil sustained a serious injury. The affirmation is unavailing to the extent that Dr. Compas relied upon unsworn reports of other physicians in reaching his conclusions (*see Delpilar v Browne*, 282 AD2d 647; *Kiernan v Town of Hempstead*, 282 AD2d 575, *lv denied* 97 NY2d 604; *Grahman v Shuttle Bay*, 281 AD2d 372; *Trent v Niewierowski*, 281 AD2d 622; *Rozengauz v Ha*, 280 AD2d 534; *Monaco v Davenport*, 277 AD2d 209; *Goldin v Lee*, 275 AD2d 341; *Napoli v Cunningham*, 273 AD2d 366; *Diaz v Wiggins*, 271 AD2d 639). Hence, the issue of plaintiff's alleged mental disabilities is not properly before the court.<sup>2</sup>

Further, Dr. Compas' examination of **Mr.** Montreuil on May 7, 2002 was cursory, at best. Neither his affirmation nor his report discusses any limitations in Mr. Montreuil's range of motion or any tests conducted on that day. The only testing discussed by Dr. Compas appears to have been conducted on June 13, 2000 and the only range of motion limitations appear to have been noted during that exam. It must accordingly be concluded that Dr. Compas' opinions—which were based on the examination performed on June 13, 2000, almost two years before the motion was made—provide insufficient proof of the duration of Mr. Montreuil's alleged injuries (*see Kooblall v Morris*, 276 AD2d 595 [the

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<sup>2</sup> Even if the court were to consider Mr. Montreuil's psychological evaluation, it is insufficient to demonstrate that he sustained a significant limitation of use of a body function or system since plaintiff fails to provide that objectively measured quantum of evidence necessary to satisfy this category of serious injury (*see Mazzotta v Vacca*, 289 AD2d 305; *Sellitto v Casey*, 268 AD2d 753; *Nolan v Ford*, 100 AD2d 579, *aff'd* 64 NY2d 681).

evidence at trial was insufficient, as a matter of law, to prove that plaintiff sustained a serious injury where the testimony of one of the injured plaintiffs medical experts was based upon an examination which took place several years before trial, rather than upon a recent examination]; *Diuz v Wiggins*, 271 AD2d 639 [the affidavit of the plaintiffs treating physician was deficient as a matter of law because the opinion expressed therein regarding a "significant limitation of use of a body function or system" was based upon an examination conducted over one year earlier rather than on a recent medical examination]; *Kosto v Bonelli*, 255 AD2d 557 [the affidavit of plaintiffs' chiropractor was deficient as a matter of law since it failed to indicate that the opinion expressed therein was based upon a recent medical examination rather than on an earlier examination conducted over two years prior thereto]; *Gutierrez v Metro. Suburban Bus Auth.*, 240 AD2d 469 [the affidavit of plaintiff's physician was deficient insofar as it failed to indicate that the opinion expressed therein was based upon a recent medical examination]). Dr. Macias' affirmation suffers from the same deficiency, since he last treated Mr. Montreuil on August 15, 2000.

In addition, the affirmation lacks evidence of any objective tests performed to confirm the plaintiffs subjective complaints after that date, rendering it insufficient to establish that Mr. Montreuil sustained a serious injury (*see Duldulao v City of New York*, 284 AD2d 296 [although plaintiffs chiropractor stated that plaintiff was unable to move her neck through a normal range of motion without continuous pain, he neither explained the objective medical tests he performed to support his determination, nor specified the degree or extent of the

alleged motion restriction]; *see also Sanchez v Romano*, 292 AD2d 202,202, *citing Mobley v Riportella*, 241 AD2d 443; *Bucci v Kempinski*, 273 AD2d 333, *citing Schultz v Von Voight*, 216 AD2d 451, *affd* 86 NY2d 865; *Beckett*, 176 AD2d 774; *see generally Junco v Ranzi*, 288 AD2d 440; *Kallicharan v Sooknanan*, 282 AD2d 573; *Funderburk v Gordon*, 273 AD2d 196; *Logarzo v D'Angelis-Hall*, 248 AD2d 597; *Lincoln v Johnson*, 225 AD2d 593, 594). The law is also well settled that the opinions of Drs. Compas and Macias are unavailing to the extent that they are based upon plaintiffs representations of continuing pain since subjective complaints are insufficient to support a finding of serious injury (*see Scheer v Koubek*, 70 NY2d 678; *Savattere v Barnathan*, 280 AD2d 537; *Palivoda v Sluberski*, 275 AD2d 1036; *Kauderer v Penta*, 261 AD2d 365). Similarly, it has been held that a guarded prognosis is insufficient to establish a serious injury (*see Becker v Coiro*, 222 AD2d 543; *LaGreca v Ebeling*, 156 AD2d 337).

Moreover, Dr. Compas' allegations that Mr. Montreuil was partially disabled as a result of the accident as set forth in his affirmation is belied by the letter dated June 15, 2000, only four days after the accident, in which Dr. Compas stated that Mr. Montreuil was able to return to his work activities on a full time basis as of June 14, 2000, albeit with no heavy lifting or pushing or **pulling**.<sup>3</sup> Hence, the affirmations of Drs. Compas and Macias, which consist of "conclusory assertions tailored to meet the statutory requirements," are

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<sup>3</sup> In relying upon this letter, the court notes that "[i]t is well established that a moving defendant may rely upon the unsworn reports of the plaintiffs own physicians in support of a motion for summary judgment" (*Vignola v Varrichio*, 243 AD2d 464,464, *quoting Torres v Micheletti*, 208 AD2d 519, 519-520).

insufficient to support a finding that Mr. Montreuil sustained a serious injury in the subject accident (*see Harney v Tombstone Pizza*, 279 AD2d 609; *Watt v Eastern Investigation Bur.*, 273 AD2d 226; *Wadi v Tepedino*, 242 AD2d 327).

### **Shanel Montreuil**

Plaintiffs failed to submit admissible proof contemporaneous with the accident that establishes any initial range of motion restrictions with regard to Shanel<sup>4</sup> (*see Lanza v Carlick*, 279 AD2d 613, *citing Passarelle v Burger*, 278 AD2d 294; *Jimenez v Kambli*, 272 AD2d 581). Further, neither Dr. Compas nor Dr. Macias indicated what, if any, objective medical tests were performed to support the conclusion that Shanel suffered a loss of range of motion (*see Junco*, 288 AD2d 440; *Kallicharan*, 282 AD2d 573; *Funderburk*, 273 AD2d 196; *Logarzo*, 248 AD2d 597; *Lincoln*, 225 AD2d 593, 594).

More significantly, Dr. Compas treated Shanel once, on June 13, 2000. Similarly, Dr. Macias examined her once, on June 27, 2000. There is therefore no evidence before the court to establish that Shanel received any treatment whatsoever thereafter (*see Palasek v Misita*, 289 AD2d 313 [plaintiff failed to establish that she sustained a serious injury where the affidavit of her examining physician failed to explain the nature of her medical treatment]; *Greco v Jackson*, 287 AD2d 539 [the record does not contain any medical evidence indicating the treatment the plaintiff received for her alleged injuries during the nine-month period after the accident]; *Guevara v Conrad*, 273 AD2d 198 [plaintiff failed

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<sup>4</sup> While the court recognizes that Shanel was a young child at the time of the accident, neither physician alleges that she was too young for such testing to be performed.

to raise a triable issue of fact as to whether he sustained a serious injury under circumstances where he did not submit any medical records in admissible form, indicating the treatment, if any, he received for his alleged injuries in the more than two-and-one-half-year period between the accident and the examination conducted by his expert]; *Diaz v Speedy Rent A Car*, 259 AD2d 726 [dismissal of the complaint was affirmed under circumstances where the chiropractor's affidavit contained no statement that he ever treated the plaintiff, mentioned no ongoing or prior history of treatment by any other health care provider, and did not provide any explanation for the two-year gap between the plaintiffs emergency room treatment and the examination]; *Medina v Zalmen Reis & Assocs.*, 239 AD2d 394 [the physician's affirmation was insufficient to establish that plaintiff suffered a serious injury because it did not provide any information concerning the nature of the plaintiffs medical treatment or any explanation for the two-year gap between the medical treatment in January 1994 and her subsequent visit to the examining physician in April 1996)].

Further, when Dr. Compas re-examined Shanel on May 7, 2002, no limitations in her range of motion were noted and her examination was found to be unremarkable; Dr. Compas did nothing more than to note Mr. Montreuil's statements that the child continued to suffer from headaches and nightmares when he reiterated his original diagnosis.

Hence, plaintiffs have failed to refute defendants' showing that Shanel did not sustain a serious injury in the accident.

## **90/180 Days**

Plaintiffs have also failed to raise a triable issue of fact as to whether either sustained an injury that prevented him or her from performing substantially all of the material acts constituting his or her usual and customary daily activities for at least 90 days of the 180 days immediately following the accident. There is no evidence before the court to establish that Shanel's activities were limited in any way as a result of the accident. Similarly, Mr. Montreuil's claim that he was unable to work for two and one-half months is belied by the letter from Dr. Compas discussed above, which established that Mr. Montreuil was able to return to work on June 14, 2000, only four days after the accident. In addition, the other limitations of activity complained of by Mr. Montreuil fail to satisfy the statutory criteria (see *Cassese v Leister*, 291 AD2d 350 [plaintiffs deposition testimony that he was unable to work for five months following the accident and that he had back surgery during that time, with no supporting documentation of either the surgery or the time missed from work and no physician's affidavit substantiating his claims of injury or impairment, does not suffice to raise a triable issue of fact as to whether he was incapacitated as required by the statute]; *Pierre v Nanton*, 279 AD2d 621 [although the plaintiff claimed that he did not work for almost four months after the accident, he was not ordered by a doctor to stay home]; *Sherlock v Smith*, 273 AD2d 95 [plaintiffs self-serving claim that he was unable to perform substantially all of the material acts which constituted his usual and customary activities for not less than 90 days of the 180 days following the accident was insufficient to defeat


defendant's motion for summary judgment without a physician's affidavit substantiating that plaintiffs alleged impairment was attributable to a medically determined injury)).

### **Conclusion**

For the above-stated reasons, defendants' motion is granted and the action is dismissed.

**The** foregoing constitutes the decision, order and judgment of the court.

E N T E R ,

  
HON. GERARD H. ROSENBERG  
J. S. C.