SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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TANICKA SMITH, Individually and a Mother and Natural Guardian of MELLIK ERKHARD, an Infant,

Plaintiffs,

-against-

DOROTHY TAYLOR, RICHARD WILLIAMSON, and CRAIG GOODMAN,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 23187/09
Motion Seq. Nos.: 04 & 05

DECISION AND ORDER

Papers Read on these Motions:

Plaintiffs' Notice of Motion	04
Plaintiffs' Affirmation in Opposition	xx
Defendant Craig Goodman's Reply	xx
Defendants Dorothy Taylor and Richard Williamson's Notice of Motion	05
Plaintiffs' Affirmation in Opposition	xx
Defendants Dorothy Taylor and Richard Williamson's Reply	xx

By motion sequence numbers four and five respectively, the defendants move for an order pursuant to CPLR §3212 for summary judgment dismissing the complaint and all cross claims asserted against them, predicated on the grounds that the infant-plaintiff failed to sustain a serious injury as required by Insurance Law § 5106(d).

This action arises from a motor vehicle accident which occurred on September 12, 2008 at the intersection of Broadway and Park Avenue, Huntington, New York, in which the infant-plaintiff, Mellik Erkhard, then a third grader, was injured while riding as a passenger in a 1990 Lexus automobile driven by co-defendant Richard Williamson. Mellick's alleged injuries include:

broad bulging disc at L5-S1;
neck pain;
persistent low back pain; and
abnormal nerve involvement

as a result of which plaintiffs allege Mellik was "totally incapacitated and unable to participate in physical education from September 12, 2008 up to and including January 2009." (Plaintiff's Bill of Particulars). They also allege Mellik was partially incapacitated and confined to his bed intermittently from the day of the accident until February 11, 2010.

Predicated on the contention that plaintiff's injuries do not satisfy the serious injury statutory threshold set forth in Insurance Law § 5102(d), defendant Craig Goodman, and defendants Dorothy Taylor and Richard Williamson, have separately moved for summary judgment dismissing the complaint. In so moving, defendants have the initial burden of establishing *prima facie* entitlement to judgment as a matter of law. *Rizzo v Torchiano*, 57 AD3d 872 [2d Dept 2008]. In support of dismissal, defendants' expert must specify the objective tests on which his opinion is based, and with respect to an opinion regarding range of motion, the expert must quantify his findings and compare them with normal results. *Coburn v Samuel*, 44 AD3d 698, 699 [2d Dept 2007].

A movant's failure to satisfy his burden on a summary judgment motion requires denial of the motion regardless of the sufficiency of the opposing papers. *Staubitz v Yaser*, 41 AD3d 698, 700 [2d Dept 2007]; *Hughes v Cai*, 31 AD3d 385 [2d Dept 2006]. It is only if defendants successfully make the necessary showing that the burden shifts to plaintiff to proffer competent medical evidence, based on objective medical findings and diagnostic tests, to support the serious injury claim or to show, by the submission of objective proof of the nature and degree of the injury, the existence of questions of fact *vis a vis* whether the purported injury falls within the ambit of the statute. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept 2006]; *Garcia v Morgan*, 305 AD2d 634 [2d Dept 2003]. Conclusions, even of an examining doctor, which are unsupported by acceptable objective proof, are insufficient to defeat a

summary judgment motion on the threshold issue of whether plaintiff has suffered a serious physical injury. *Mobley v Riportella*, 241 AD2d 443, 444 [2d Dept 1997].

To substantiate a claim under the category of either permanent consequential limitation of use of a body organ or member, or significant limitation of use of a body function or system, as alleged here, the medical evidence submitted by plaintiff must contain objective, qualitative evidence with respect to a percentage loss of range of motion, or a qualitative assessment, comparing plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member, function or system. *DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Alvarez v Green*, 304 AD2d 509, 510 [2d Dept 2003]. The claimed limitation must be more than mild, minor or slight. *Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Palmer v Moulton*, 16 AD3d 933, 935 [3d Dept 2005].

Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, use of a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995]. A recent medical examination is required to sustain a claim of permanent loss of use of a body organ, member, function or system; and/or significant limitation of use of a body organ or member. *Berkowitz v Taylor*, 47 AD3d 740, 741 [2d Dept 2008]. Subjective complaints of pain alone are insufficient to establish a *prima facie* case of serious injury. *Lopez v Zangrillo*, 251 AD2d 382 [2d Dept 1998]. The mere existence of a herniated or bulging disc, even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent and duration of the alleged physical limitations resulting from the injury. *Sharma v Diaz,* 48 AD3d 442, 443 [2d Dept 2008]; *Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656 [2d Dept 2007]; *Tobias v Chupenko*, 41 AD3d 583, 584 [2d Dept 2007].

In support of his motion for summary judgment dismissing the complaint, defendant Craig

Goodman relies on the affirmed report of orthopedist Alan J. Zimmerman, M.D., who conducted an orthopedic evaluation of the infant-plaintiff on May 11, 2011 and opines that Mellik "has no injury to his lower back as a result of the accident of September 12. 2008 other than a minor sprain." He further states that "there is no evidence of nerve involvement" and notes that Mellik was involved in a subsequent motor vehicle accident on September 2, 2010 wherein he injured his neck, back and one of his knees. Plaintiffs make no reference to either a prior or subsequent accident.

Dr. Zimmerman measured and quantified full ranges of motion in Mellik's cervical and lumbar spines and delineates the specific tests performed, i.e., Soto-Hall and Lasegue Sign – both of which yielded negative results. He found no disability and no permanency. He commented that Mellik, who was then attending school, might continue to do so without restriction. There was no treatment medically necessary from an orthopedic perspective.

Defendant Craig Goodman has also submitted the affirmed statement of Steven L. Mendelson, M.D. who reviewed the MRI films of the infant-plaintiff's lumbar spine taken on October 15, 2008 and February 12, 2009 which he found revealed normal results with no evidence of diffuse bulging or focal disc herniation and no evidence of stenosis.

Inasmuch as the affirmed medical reports of Drs. Zimmerman and Mendelson, submitted by defendant Craig Goodman, establish that the infant-plaintiff did not sustain serious injury within the ambit of Insurance Law § 5102(d) (*Toure v Avis Rent A Car Systems*, 98 NY2d 345, [2002]), it became incumbent upon plaintiffs to offer admissible proof sufficient to raise a factual issue with respect to the existence of a serious injury.

Plaintiffs' evidentiary submissions in opposition to defendant Craig Goodman's[1] showing are deficient in that they fail to support the infant-plaintiff's claim of serious injury and fails to connect his alleged injuries to the subject accident. The affirmed narrative report of James M. Liquori, M.D., who examined the infant-plaintiff on September 14, 2009; the MRI report of the infant-plaintiff's lumbar spine; sensory nerve conduction report dated October 23, 2008; and the narrative report of Mellik's chiropractor all lack probative value in the absence of a recent examination. *Cornelius v Cintas Corp.*, 50 AD3d 1085, 1086 [2d Dept 2008]; *Larkin v Goldstar Limo Corp.*, 46 AD3d 631, 632 [2d Dept 2007]. Significantly, the record is devoid of any evidence as to when the infant-plaintiff was last examined/treated; and/or where, by whom and for how long he was treated.

To the extent that plaintiffs allege a permanent serious injury, and a significant limitation of use, they are required to submit objective medical evidence based upon a recent examination. *Perl v Meher*, 18 NY3d 208 (2011). They have failed to meet this burden and have failed to raise a triable factual issue sufficient to defeat summary judgment. *Ali v Mirshah*, 41 AD3d 748 [2d Dept 2007].

While the requirement of a recent physical examination does not apply where plaintiff does not allege a permanent or significant injury (both of which have an extended durational component) but alleges, instead, "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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102[d]), here plaintiffs' claim under the 90/180 days category is deficient in the absence of a medical determination as to the extent of

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[1]Defendants Dorothy Taylor and Richard Williamson have adopted the arguments/exhibits submitted by defendant Craig Goodman.

the injury sustained and its impact on the injured party's ability to perform his usual customary activities for the statutory period.

According to Mellik's own deposition testimony, he did not know how long he was confined to home or bed after the accident but, in any event, it was *de minimis*. Both he and his mother, Tamika Smith, testified that he did not miss any time from school after the accident. They could not recall for how long a period of time Mellik was not allowed to participate in gym class.

Although Mellik alleges he was not able to participate in gym class (or play football or basketball), this is insufficient to show that he was unable to perform substantially all of the material acts that constituted his usual and customary activities as a third grader. *Ayala v Douglas*, 57 AD3d 266, 267 [1st Dept 2008]; *Burns v McCabe*, 17 AD3d 1111 [4th Dept 2005]. Even Mellik's and his mother's subjective descriptions of his injuries do not establish that for 90 of the 180 days following his injury he was unable to perform "substantially all" of his usual activities. The medical evidence provided by plaintiffs fails to indicate that any restrictions were, in fact, placed on Mellik's daily activities for the required statutory period. As such, the defendants' motions are ***granted***. It is hereby

ORDERED, that the plaintiff's complaint is ***dismissed*** in its entirety.

This constitutes the Decision and Order of the Court.

DATED: February 1, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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