SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

KATHLEEN VAUGHAN-WARE and RICHARD WARE,

Plaintiffs,

- against -

DREW R. DARCY,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 24665/09
Motion Seq. No.: 01
Motion Date: 09/21/11
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition, Affidavit and Exhibits and Memorandum of Law	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment to him on the ground that plaintiffs did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiffs oppose the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiffs as a result of an automobile accident with defendant which occurred on June 10, 2007, at approximately 3:00 p.m., at the intersection of Merrick Road and East Shore Drive, Massapequa, Nassau County, New York. The accident involved two vehicles, a 2005 Nissan owned and operated by plaintiff Kathleen Vaughan-Ware and a 1994 BMW owned and operated

by defendant.

As a result of the collision, plaintiff Kathleen Vaughan-Ware claims that she sustained the following injuries:

posterior hyperintense annular tear at L4-5;

central disc herniations at L3-4, L4-5, and L5-S1;

disc bulge at L2-3 resulting in canal narrowing;

internal derangement of the lumbar spine and severe strain/sprain of the lumbar spine. *See* Defendant's Affirmation in Support Exhibit D ¶5.

Plaintiff Richard Ware's claims are derivative in nature.

At her sworn Examination Before Trial ("EBT"), plaintiff Kathleen Vaughan-Ware testified that, following this accident, she was confined to her bed for two weeks and to her home for an additional four weeks. *See* Defendant's Affirmation in Support Exhibit F pp. 75-76. Plaintiff Kathleen Vaughan-Ware testified that she was unemployed at the time of the subject accident. As to activities, she stated that, as a result of this accident, she can no longer play volleyball, tend to her vegetable garden, cook, lift heavy objects, wash dishes or drive for longer than thirty minutes at a time. She did, however, testify that, in September 2010, following the subject accident, she joined a local gym where she uses the recumbent bicycle.

Plaintiff Kathleen Vaughan-Ware, who was forty-three years old at the time of the accident, has failed to identify the specific categories of the serious injury statute into which her injuries fall. Nevertheless, whether she can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of the admissible evidence. *See Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519, 747 N.Y.S.2d 451 (1st Dept. 2002). Based upon a plain reading of the papers submitted herein, it is obvious that plaintiffs are not claiming that plaintiff Kathleen Vaughan-Ware's injuries fall within the first five categories

of "serious injury:" to wit, death; dismemberment; significant disfigurement; a fracture or loss of a fetus.

Further, inasmuch as plaintiffs have failed to allege and claim that plaintiff Kathleen Vaughan-Ware has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law. *See* New York State Insurance Law § 5102(d); *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d (2001).

Similarly, any claims that plaintiff Kathleen Vaughan-Ware's injuries satisfy the 90/180 category of Insurance Law § 5102(d) are also contradicted by her own EBT testimony wherein she states that she was only confined to her bed for two weeks and to her home for a total of six weeks as a result of this accident. Further, no where do plaintiffs claim that, as a result of plaintiff Kathleen Vaughan-Ware's alleged injuries, she was "medically" impaired from performing any of her daily activities (*Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001)) or that she was curtailed "to a great extent rather than some slight curtailment." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). *See also Sands v. Stark*, 299 A.D.2d 642, 749 N.Y.S.2d 334 (3d Dept. 2002). In light of these facts, this Court determines that plaintiffs have effectively abandoned their 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion. *See Joseph v. Forman*, 16 Misc.3d 743, 838 N.Y.S.2d 902 (Sup. Ct. Nassau County 2007).

Thus, the Court will restrict its analysis to the remaining two categories as it pertains to plaintiff Kathleen Vaughan-Ware; to wit, a permanent consequential limitation of use of a body organ or member (Category 7) and a significant limitation of use of a body function or system (Category 8).

Under the no-fault statute, to meet the threshold significant limitation of use of a body

function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Licari v. Elliot*, *supra*; *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Scheer v. Koubeck*, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute. *See Licari v. Elliot*, *supra*; *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. *See Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345; 746 N.Y.S.2d 865 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *See id.*

That being said, recently the Court of Appeals, in *Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655 (2011), held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation. *See id.*

With these guidelines in mind, this Court will now turn to the merits of defendant's motion.

In support of his motion, defendant relies upon plaintiff Kathleen Vaughan-Ware's unsworn hospital records, the sworn report of Dr. Isaac Cohen, MD, FAAOS, an orthopedist who performed an independent orthopedic examination of plaintiff Kathleen Vaughan-Ware on February 16, 2011, the sworn report of Dr. Melissa Sapan Cohn, M.D., a radiologist who

reviewed the MRI scans of plaintiff Kathleen Vaughan-Ware's lumbosacral spine and the sworn report of Dr. Frank D. Oliveto, M.D., an orthopedic surgeon who performed an independent orthopedic examination of the plaintiff Kathleen Vaughan-Ware on September 4, 2007.

Initially, it is noted that, while the affirmed report of Dr. Oliveto constitutes admissible medical evidence, it is nonetheless insufficient and incompetent. That is, Dr. Oliveto claims to have performed range of motion testing of plaintiff Kathleen Vaughan-Ware's lumbosacral spine. However, he clearly states, in pertinent part, that "range of motion is *subjectively* limited to 30% of normal, with *subjective* paralumbar spinal musculature discomfort with motion." *See* Defendant's Affirmation in Support Exhibit I. This is wholly insufficient. Not only does Dr. Oliveto fail to set forth the objective medical testing he performed to support *his* conclusions (relying instead upon the subjective complaints of the patient) (*see Vasquez v. Basso*, 27 A.D.3d 728, 815 N.Y.S.2d 626 (2d Dept. 2006); *Walters v. Papanastassiou*, 31 A.D.3d 439, 819 N.Y.S.2d 48 (2d Dept. 2006)), but he also fails to quantify and compare the findings of his range of motion testing to a normal range of motion. *See Abraham v. Bello*, 29 A.D.3d 497, 816 N.Y.S.2d 118 (2d Dept. 2006); *Forlong v. Faulton*, 29 A.D.3d 856, 814 N.Y.S.2d 530 (2d Dept. 2006). This is clearly insufficient.

Notably, the recent Court of Appeals decision of *Perl v. Meher*, *supra*, does not help the defendant in saving the affirmed report of Dr. Oliveto. In *Perl*, the Court of Appeals reconciled the need to require both quantitative proof of a "serious injury" and "contemporaneous" evidence of a "serious injury." *See id.* It stated, in pertinent part, as follows:

> ***[A] rule requiring "contemporaneous" numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery. *Id.*

This does not save Dr. Oliveto's affirmed report, which consisted of an independent

medical examination, performed at the defendant's request, in connection with litigation, on September 4, 2007.

Despite the incompetency of Dr. Oliveto's report, defendant has nonetheless established his *prima facie* entitlement to judgment as a matter of law.

Specifically, the affirmed report of Dr. Melissa Sapan Cohn, M.D., who avers that she personally reviewed the *actual* MRI films of plaintiff Kathleen Vaughan-Ware's lumbosacral spine (*Dioguardi v. Weiner*, 288 A.D.2d 253, 733 N.Y.S.2d 116 (2d Dept. 2001); *Beyel v. Console,* 25 A.D.3d 636, 811 N.Y.S.2d 687 (2d Dept. 2006)) and who also reports an opinion as to the causality of her findings, to wit, "[t]hese [findings] are associated with underlying degenerative changes suggesting that they are chronic in nature," constitutes admissible evidence in support of the defendant's motion. *See* Defendant's Affirmation in Support Exhibit H. *See also Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004); *Betheil-Spitz v. Linares*, 276 A.D.2d 732, 715 N.Y.S.2d 435 (2d Dept. 2000).

Further, read together with the affirmed report of Dr. Isaac Cohen, who examined plaintiff Kathleen Vaughan-Ware and performed quantified range of motion testing on her cervical and thoracolumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal, defendant's medical evidence sufficiently demonstrates that plaintiff Kathleen Vaughan-Ware did not sustain a "serious injury" as a result of this accident. *See* Defendant's Affirmation in Support Exhibit G. Dr. Cohen also notes that plaintiff Kathleen Vaughan-Ware has a significant pre-existing history of musculoskeletal pathology consistent with osteogenesis imperfecta, also known as "brittle bone disease." *See id.* In addition, Dr. Cohen performed motor and sensory testing and found no deficits, and, based on his clinical findings and medical records review, concluded that plaintiff Kathleen Vaughan-Ware sustained a cervical and lumbosacral strain and

multiple soft tissue contusions all of which have since resolved. *See id.*; *Staff v. Yshua*, 59 A.D.3d 614, 874 N.Y.S.2d 180 (2d Dept. 2009); *Cantave v. Gelle*, 60 A.D.3d 988, 877 N.Y.S.2d 129 (2d Dept. 2009).

Having made a *prima facie* showing that plaintiff Kathleen Vaughan-Ware did not sustain a "serious injury" within the meaning of the statute, the burden shifts to plaintiffs to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005). *See also Grossman v. Wright, supra.*

In opposition, counsel for plaintiffs relies upon, *inter alia*, plaintiff Kathleen Vaughan-Ware's unsworn hospital records; the affirmation of Lawrence V. Crafa, M.D., plaintiff Kathleen Vaughan-Ware's primary care physician; the sworn affidavit of Dion Visconti, D.C., a chiropractor who apparently treated plaintiff Kathleen Vaughan-Ware seventeen times between February 14, 2005 and May 30, 2007 for "some minor muscle tension and stress relief;" plaintiff Kathleen Vaughan-Ware's unsworn records from Winthrop Orthopedic Associates, P.C.; the unsworn MRI report of Dr. Robert Young, M.D. and the affirmation of Dr. Omid S. Barzideh, M.D., an orthopedist who first examined plaintiff Kathleen Vaughan-Ware on June 12, 2007 and then again on October 27, 2011.

This proof is insufficient to raise a triable issue of fact herein.

First, the unsworn, unaffirmed MRI report of Dr. Robert Young does not constitute competent medical evidence in opposition to defendant's *prima facie* showing of entitlement to judgment as a matter of law. Not only is it unclear whether Dr. Young had the MRI of plaintiff Kathleen Vaughan-Ware's lumbar spine taken under his supervision, his failure to report an opinion as the causality of his findings renders said report deficient. *See* Plaintiffs' Affirmation in Opposition Exhibit G. *See also Collins v. Stone, supra*; *Betheil-Spitz v. Linares, supra.*

Similarly, the unsworn reports of Winthrop Orthopedic Associates, P.C., are insufficient to defeat summary judgment. *See* Plaintiffs' Affirmation in Opposition Exhibit F. It is unequivocally clear that said reports are neither sworn nor affirmed; accordingly, they are presented in inadmissible form and are devoid of any probative value. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991); *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). Further, plaintiffs' attempt to submit said reports into evidence with the submission of a certificate of Roel Escueta, dated July 13, 2011, who identifies himself as being an "Authorized Custodian of Records for Winthrop Orthopedic Associates, P.C." is unavailing. Said certificate is not sworn to by Roel Escueta and, beyond the foregoing, Roel Escueta does not represent that he has any personal knowledge of the facts stated in said reports. *See Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 (2d Dept. 2008). Finally, said reports are also precluded from being considered by this Court on the grounds that they are business records under CPLR § 4518. Medical reports, including interpretations of examinations and testing, as opposed to day to day business entries of a treating physician, cannot be properly considered by this Court as business records. *See Komar v. Showers*, 227 A.D.2d 135, 641 N.Y.S.2d 643 (1st Dept. 1996) *citing Rodriguez v. Zampella*, 42 A.D.2d 805, 346 N.Y.S.2d 558 (3d Dept. 1973).

Although the balance of plaintiffs' evidence may properly be considered by this Court, it is nonetheless insufficient to present a triable issue of fact.

Initially, it is noted that since defendant submitted plaintiff Kathleen Vaughan-Ware's unsworn hospital reports in support of his motion for summary judgment, in so doing, he opened the door for plaintiffs to rely upon the same unsworn reports and records in opposition to the motion. *See Pech v. Yael Taxi Corp.*, 303 A.D.2d 733, 758 N.Y.S.2d 110 (2d Dept. 2003).

Furthermore, Dr. Crafa's Affirmation (*see* Plaintiffs' Affirmation in Opposition Exhibit

D) and Mr. Visconti's Affidavit (*see* Plaintiffs' Affirmation in Opposition Exhibit E) are properly before this Court and help explain the pre-existing nature of plaintiff Kathleen Vaughan-Ware's brittle bone disease. Both reports, however, only offer an opinion as to the state and health of the plaintiff Kathleen Vaughan-Ware *before* the subject accident (emphasis added). Thus, the only competent medical evidence submitted by plaintiffs that speaks to the subject accident is the affirmation of Dr. Barzideh. *See* Plaintiffs' Affirmation in Opposition Exhibit H. However, his report falls short of raising an issue of fact because of the physician's large gap in treatment.

That is, Dr. Barzideh attests that he first examined plaintiff Kathleen Vaughan-Ware two days after the accident on June 12, 2007, and then not again until October 27, 2011, four years and four months after the subject accident. There is no concrete explanation offered by Dr. Barzideh for said gap or cessation in the treatment. *See Pommels v. Perez, supra. See also Neugebauer v. Gill*, 19 A.D.3d 567, 797 N.Y.S.2d 541 (2d Dept. 2005). This is insufficient.

Moreover, Dr. Barzideh states that, in arriving at his conclusions, he relied upon the MRI report of Dr. Young which, as stated above, was not tendered by plaintiffs in admissible form. In light of the fact that Dr. Barzideh's conclusions were reached in reliance upon the unsworn and incompetent report of Dr. Young, the affirmation of Dr. Barzideh is without probative value on the issue of whether plaintiff Kathleen Vaughan-Ware suffered a serious injury. *See Govori v. Agate Corp.*, 44 A.D.3d 821, 843 N.Y.S.2d 459 (2d Dept. 2007); *Besso v. Demaggio*, 56 A.D.3d 596, 868 N.Y.S.2d 681 (2d Dept. 2008). A plaintiff's treating physician may not rely upon his review of an unsworn medical report prepared by another doctor, where a sworn copy of such report has not been attached to the treating physician's affidavit or affirmation. *See Merisca v. Alford*, 243 A.D.2d 613, 663 N.Y.S.2d 853 (2d Dept. 1997). This is because, plaintiff's doctors, just like plaintiffs, cannot rely on unsworn medical evidence to

establish a serious injury.

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury, defendant's motion seeking summary judgment dismissal of the plaintiffs' Verified Complaint is hereby **GRANTED**.

This shall constitute the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
March 6, 2012