SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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MICHELE MCCURRY and DARREN MCCURRY,

Plaintiffs,

-against-

HELEN L. MEDINA, JUNE M. CANNARIATO and MARK F. JOHNSTON,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 1542/2011
Motion Date: March 13, 2012
(adjourned to May 4, 2012)

The following papers numbered 1 to 6 were read on the motion for summary judgment by defendant Medina alleging that the plaintiff Michele McCurry did not meet the serious injury threshold as defined in Insurance Law § 5102(d):

Notice of Motion-Affirmation-Exhibits A-E. 1-3

Affirmation in Opposition-Exhibits A-J. 4-5

Reply Affirmation. 6

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action stemming from a motor vehicle accident on June 6, 2008 wherein it is alleged that defendant Medina crossed over from the northbound Route 9W lane into the southbound lane in which the plaintiffs' vehicle was traveling, causing a collision. Mrs. McCurry was a passenger in her husband's vehicle at the time of the accident.

Defendant Medina moves this Court for summary judgment, claiming that Mrs. McCurry failed to sustain a serious injury as defined by Insurance Law § 5102(d). To that end, defendant

submits the pleadings, an MRI report from June, 2011 and the plaintiff's deposition transcript. Additionally, defendant submits two affirmed reports of Dr. Robert Hendler. According to Dr. Hendler's first report, he concludes that "Mrs. McCurry sustained a cervical spine, with a possible temporary aggravation of pre-existing degenerative joint disease and degenerative disc disease." The Court notes that Dr. Hendler's first report did not contain a conclusion concerning the cervical spine as he failed to indicate what was the specific cervical spine injury. Dr. Hendler notes that his physical examination of plaintiff was normal and lacked any positive objective findings correlating to a herniated disc of the cervical spine. Moreover, Dr. Hendler concludes that the MRI testing demonstrates that any changes are degenerative in nature and finds no causation

Dr. Hendler further concludes that Mrs. McCurry may have sustained a lumbrosacral sprain as well as an aggravation of pre-existing scoliosis, but finds no causation. Dr. Hendler's second report deals essentially with plaintiff's right foot complaints. Dr. Hendler notes that the surgery performed on plaintiff's right foot was not causally related to this accident, but rather on a pre-existing condition.

In opposition, plaintiff submits certified copies of her medical records as well as the affirmed medical report of Dr. John T. Hughes, a neurologist, who based his findings on physical examination, and EMG, and multiple MRIs and consultations with various medical providers. He concluded that plaintiff suffered disc herniations, cervical injuries and a right foot injury which itself required surgical intervention. He causally related these injuries to the subject motor vehicle accident. Dr. Hughes noted that plaintiff's complaints of pain and weakness correlate to the objective MRI and EMG studies. Moreover, Dr. Hughes noted that while plaintiff did suffer a pre-existing neck injury, she was asymptomatic until this accident, and recommends surgical intervention.

Dr. Mitchell Garden, an orthopedic surgeon, noted in his report that plaintiff's cervical

injuries are permanent in nature as they had been consistent for the three years following the accident. He recommended a steroid injection and the likelihood of further surgery.

Dr. Brian Reade, a podiatric surgeon, treated Mrs. McCurry for foot pain she claimed to be caused by the subject accident. Dr. Reade noted localized pain in plaintiff's right big toe. Dr. Reade ultimately performed a surgical procedure wherein he excised an osteochndroma of plaintiff's right big toe. Dr. Reade causally related this injury to the accident, noting that upon impact, her right foot got caught in the door panel and was asymptomatic prior to the subject accident.

"Summary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of a triable issue' (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted)." *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept., 1965).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.'" *Wanger v Zeh*, 45 Misc2d 93, 94, (Sup. Ct., Albany County, 1965), *aff'd* 26 AD2d 729 (3rd Dept.1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bakerian v H.F. Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See*

also, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395, 404 (1957).

The movant has the burden of submitting evidence, in admissible form, to support his motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Unsworn documents are inadmissible evidence and thus a party's reliance thereon in support of a motion for summary judgment is improper. *See, Huntington Crescent Country Club v M & M Auto & Marine Upholstery, Inc.*, 256 AD2d 551, 551 (2nd Dept. 1998). It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center,* 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 480 (1974). *Finkelstein v. Cornell University Medical College*, 269 AD2d 114, 117 (1st Dept. 2000). The moving party must affirmatively demonstrate the merits of its claim or defense, and cannot obtain summary judgment merely by "pointing to gaps in its opponent's proof." *Kajfasz v Wal-Mart Stores, Inc.,* 288 AD2d 902, 902 (4th Dept. 2001); *Dodge v City of Hornell Industrial Development Agency,* 286 AD2d 902, 903 (4th Dept. 2001)*; Frank v Price Chopper Operating Co., Inc.,* 275 AD2d 940 (4th Dept. 2000).

A serious injury is defined in the Insurance Law §5102(d) as:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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.

It is a well established principle that conflicting expert opinions may not be resolved on a motion for

summary judgment. *Bieman v Thurn*, 295 AD2d 970 (4th Dept. 2002); *Pittman v Rickard*, 295 AD2d 1003, 1004 (4th Dept. 2002); *Peebles v New York City Housing Authority*, 295 AD2d 189, 190-191 (1st Dept. 2002); *Rosenbaum v Camps Rov Tov*, 285 AD2d 894, 895 (3rd Dept. 2001); *Salva v Blum*, 277 AD2d 985, 986 (4th Dept. 2000); *Gleeson-Casey v Otis Elevator Co.*, 268 AD2d 406, 407 (2nd Dept. 2000); *Williams v Lucianatelli*, 259 AD2d 1003 (4th Dept. 1999).

In *Gleeson-Casey*, *supra*, the Court held that " 'the weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury [cit. om.].' " *Gleenson-Casey*, 268 AD2d at 407.

This case presents a classic battle of the experts which cannot be resolved on a motion for summary judgment. Therefore, defendant's motion must be denied in its entirety.

The foregoing constitutes the decision and order of this Court.

Dated: May 8, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.