SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

Index No.: xxxxx/05

XXXXXXX, an infant over the age of
fourteen years by her parent and natural guardian
XXXXXXX and XXXXXXX,
Individually,

AFFIRMATION IN
OPPOSITION

Plaintiffs,

-against-

xxxxxxxxxxxxxx,

Defendant.
----------X

MAURICE J. RECCHIA, an attorney at law duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury as follows:

1. I am associated with the law firm of KORNFELD, REW, NEWMAN & SIMEONE, attorneys for the Plaintiffs, Xxxxxxx, an infant over the age of fourteen years by her parent and natural guardian XXXXXXX and XXXXXXX, individually, and as such am fully familiar with the facts and circumstances surrounding this matter.

2. I submit this affirmation in opposition to the defendant's motion for summary judgment. Defendant's motion has no merit. As outlined below, defendant's own motion raises issues of fact regarding whether plaintiffs Xxxx and Xxxxxxx have suffered serious injuries under New York State Insurance Law 5102(d) and thus should be denied. Furthermore, defendants have failed to provide *prima facie* proof that plaintiffs' injuries and their medical treatment do not meet the statutory threshold of a serious injury.

FACTS

3. Plaintiffs Xxxx and Xxxxxxx were injured in a virtually head-on collision on xxxxxxxxxx Road in the Town of xxxxxxxx during the early evening of December 15, 2004 (A copy of plaintiff Xxxxxxx's examination before trial, condensed to reduce bulk, is attached as **Exhibit "A"**, p. 18). Xxxxxxx had just picked up her daughter Xxxx from a xxxxxxxxxx and the pair were headed to pick up pizza for their family (**Exhibit "A"**, pp. 24, 26, 66). Both mother and daughter were wearing seat belts at the time of the accident (**Exhibit "A"**, pp. 17, 26). Xxxx was the driver and her daughter Xxxx was in the front passenger seat (**Exhibit "A"**, p. 26).

4. As mother and daughter approached the area of xxxxxxxxxxx, a car driven by the defendant and proceeding in the opposite lane of travel attempted an unsafe left turn and struck their car practically head-on at the front driver's side of their car (**Exhibit "A"**, pp. 39-47; photographs of the respective cars attached as **Exhibit "C"**). Both the driver's side and front passenger side airbags deployed (**Exhibit "A"**, p. 63). Xxxxxxx felt pain in her neck immediately after impact (**Exhibit "A"**, p. 68). Xxxxxxx struck both of her knees on the dashboard and felt pain in both of her knees immediately after impact (a condensed copy of Xxxxxxx's examination before trial transcript is attached as **Exhibit "B"**, p. 46). Both mother and daughter were placed on stretchers by EMS personnel (**Exhibit "A"**, pp. 68-69, **Exhibit "B"**, pp. 46-47), and transported to xxxxxxxxxxx Hospital (**Exhibit "A"**, p. 76, **Exhibit "B"**, pp. 54-55).

5. At the emergency room Xxxxxxx was placed in a cervical collar, given pain and anti-inflammatory medications, and diagnosed as having suffered a cervical sprain (a certified copy of her emergency room records is attached as **Exhibit "D"**).

6. At the emergency room, an x-ray of Xxxxxxx's right patella revealed she had suffered a non-displaced fracture. She was given crutches and a right knee immobilizer (a certified copy of Xxxxxxx's emergency room records is attached as **Exhibit "I"**).

7. Following the accident, Xxxxxxx received treatment from board certified orthopedic physicians xxxxxxxxxxxx and xxxxxxxxxxxx of Community Orthopedic Associates. Magnetic Resonance Imaging (MRI) studies ordered by Dr. Xxxxxxxxxxx within less than six weeks of the accident revealed Xxxxxxx had sustained two herniated discs, one in her cervical spine, and another in her lumbar spine (records from Community Orthopedic Associates with MRI results are attached here as **Exhibit "G"**).

8. Her orthopedic doctors referred Xxxxxxx for physical therapy which she began in January 2005 and which she continues to receive today. (Physical therapy records are attached as **Exhibit "F"**).

9. Dr. Xxxxxxxxxxx affirms unequivocally in his narrative report that both of xxxxxxxxxxx herniated discs are causally related to this accident (a copy of Dr. Xxxxxxxxxxx's narrative report is attached here as **Exhibit "H"**; Xxxxxxxxxxx medical treatment is discussed more fully below at Point III). Xxxxxxxxxxx continues receiving treatment under Dr. Xxxxxxxxxxx's care. He has recommended that she undergo pain management injections and a cervical discectomy and fusion.

ARGUMENT

POINT I
DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN – THEIR OWN MOTION RAISES ISSUE OF FACT WHETHER XXXXXXX HAS SUFFERED A SERIOUS INJURY

10. Defendants have failed to demonstrate *prima facie* that plaintiff Xxxxxxx has not suffered a serious injury. Indeed their motion only raises an issue of fact to be resolved by a jury about whether Xxxxxxx has suffered a serious injury and should therefore be denied. As discussed more fully in Point II below, the Court of Appeals in *Winegrad v. New York University Medical Center* has held that it is the proponent of a summary judgment motion who must make a *prima facie* showing of entitlement to summary judgment and that failure to make such a showing requires a denial of the motion 64 N.Y. 2d 851, 487 N.Y.S. 2d 316 (1985). Defendant's motion fails to make such a showing.

11. Insurance Law §5102(d) lists a fracture as one of the enumerated categories of serious injury. Plaintiff Xxxxxxx did suffer a non-displaced linear fracture of her right patella (kneecap) as a result of this accident.

12. Attached as **Exhibit "I"** is a certified copy of emergency room records from xxxxxxxxxxxxx Hospital in xxxxxxxxxx, New York. As part of the treatment rendered to Xxxxxxx at the emergency room on the day of the accident, an x-ray was taken of her right knee. This x-ray, taken by radiologist xxxxxxxxxxx, states that "there is a linear non-displaced fracture through the patella".

13. Attached as **Exhibit "L"** is an affirmation from Dr. xxxxxxxxx affirming his finding of the non-displaced patellar fracture on the date of the accident.

14. Attached as **Exhibit "M"** is an affirmation from Dr. Arthur Xxxxxxxxxx, a board certified orthopedic physician who rendered treatment to Xxxxxxx following the accident. This affirmation states that Dr. Xxxxxxxxxxx saw Xxxxxxx in his office on December 16, 2004, a day after the accident. On his examination, he found she suffered from facial bruising and had tenderness to both of her knees. Dr. Xxxxxxxxxxx further affirmed that he reviewed the right knee x-ray from the emergency room of xxxxxxxxxx Hospital and that this showed a questionable non-displaced patella fracture which he could not rule out as a fracture based on Xxxx's history of recent trauma deriving from the accident. He advised Xxxx to wear a right knee immobilizer and to try to bear weight on the joint as she could tolerate it.

15. Inexplicably, there is no mention, in either defendant's moving papers, or in any of the three independent medical examination (IME) reports performed by the defendant, of Xxxxxxx's non-displaced fracture. In support of his motion, defendant has offered an IME report from radiologist John T. Rigney. Dr. Rigney's IME report utterly ignores the x-ray finding of a non-displaced fracture from the emergency room and incorrectly concludes that "multiple radiographs were obtained which demonstrate no fracture" (See Dr. Rigney's IME report attached to defendant's motion as Exhibit "G"). Note that Dr. Rigney doesn't disagree with the fracture finding, as one might expect, but rather specifically states that there was no fracture.

16. Dependent also performed an orthopedic IME of Xxxxxxx by Dr. James R. Dickson (attached as Exhibit "E" to defendant's motion). Dr. Dickson in his report also overlooks the emergency room x-ray finding of a fracture, merely stating blandly that an

"ambulance took them both to xxxxxxxxx Hospital where x-rays were taken and they were discharged" (Dr. Dickson's report to defendant's motion as Exhibit "E" p.1).

17. Dr. Rigney and Dr. Dickson's reports clearly raise an issue of fact. Defendant cannot avoid a material issue of fact by simply ignoring it or mistakenly overlooking it as he has apparently done. Xxxxxxx's emergency room records as well as a follow-up orthopedic visit to a treating physician indicate that she suffered a non-displaced linear fracture of her right patella as a result of this accident. The defendant has offered nothing to refute or rebut this evidence, but has simply ignored it in his attempt to deprive Xxxxxxx of her day in court. Thus the record indicates that Xxxxxxx suffered a non-displaced patella fracture which, if not affirmatively establishing that she suffered a legally cognizably serious injury, at least creates an issue of fact to be resolved by a jury at trial whether she suffered such an injury.

18. Case law from the Second Department also supports our assertion that at the very least there is an issue of fact whether Xxxxxxx suffered a serious injury as a result of this accident. In *Keevins v. Drobbin*, 303 A.D. 2d 463, 758 N.Y.S. 2d 76 (App. Div. 2nd 2003) the defendant – unlike here - had made a *prima facie* showing of her entitlement to summary judgment on the threshold question and the trial court granted the motion. The Appellate Division then reversed, finding that there was an issue of fact where plaintiff had submitted an affidavit and a supporting medical report from plaintiff's treating orthopedist stating that this doctor had reviewed x-rays of plaintiff's spine taken three days after the accident and had found a fracture. The Appellate Division held that this evidence "was sufficient to raise an issue of fact whether plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d). Accordingly, the court erred in awarding summary judgment to the defendant". *id* at 464, 77; see also *I Mei Chou* 15 A.D. 3d 622, 791 N.Y.S. 579 (App. Div. 2nd Dept. 2005)

(affirming the trial court's denial of summary judgment to defendant even though defendant had made a *prima facie* showing on threshold where plaintiff submitted an affirmation from a physician stating his examination of a CT scan revealed a fracture of the lumbar spine).

19. Similarly here, there is both a certified hospital record and an affirmation from an emergency room radiologist indicating that an x-ray taken of plaintiff Xxxxxxx on the date of the accident revealed a non-displaced fracture, as well as an affirmation from a treating orthopedist a day after the accident stating he could not rule out this fracture. Put simply, this evidence creates an issue of fact warranting trial.

POINT II
DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN – THEIR OWN MOTION RAISES ISSUES OF FACT REGARDING PLAINTIFF XXXXXXX

20. Defendant's motion also fails to make a *prima facie* showing that plaintiff Xxxxxxx has not suffered a serious injury. Therefore his motion should be denied regardless of the sufficiency of plaintiffs' opposing papers.

21. At the outset we note that defendant has entirely mistake the burden of proof in his motion by stating in the heading on page 15 of his motion and elsewhere throughout the motion that the "Defendants [sic] are entitled to summary judgment because plaintiff Xxxxxxx has failed to meet the serious injury threshold requirements". This completely misconstrues the burden of proof. As the Court is well aware, it is the *proponent* of a summary judgment motion who must carry the initial burden. It is only after the proponent has made a *prima facie* showing that the opponent must come forward with evidence which raises a triable issue of fact. Failure to do so warrants a denial of the motion.

22. The Court of Appeals set forth the applicable standard in the seminal case of *Winegrad v. New York University Medical Center*: "the 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. Failure to make such a showing *requires* denial of the motion, regardless of the sufficiency of the opposing papers" 64 N.Y.2d 851, 487 N.Y.S. 2d 316 (1985) [emphasis added].

23. Here, rather than making a *prima facie* showing of entitlement to summary judgment, defendant's own motion raises issues of fact about whether or not plaintiff Xxxxxxx has suffered a serious injury. Defendant's IME reports themselves raise issues of fact about whether plaintiff has suffered a serious injury. These facts, standing alone, are sufficient to support denial of defendant's motion.

POINT II A
DR. JAY COBLENTZ' IME REPORT RAISES ISSUES OF FACT AND FAILS TO MEET DEFENDANT'S BURDEN OF PROOF

24. Dr. Coblentz, a board certified neurologist, performed a neurological IME of plaintiff Xxxxxxx on January 16, 2006, more than a year after the accident. His 5-page report contains several entries which, rather than demonstrating defendant's *prima facie* entitlement to summary judgment, instead only raise triable issues of fact.

25. On page 3 (1st full paragraph) he finds that Xxxxxxx had pain and limitation of movement to her neck, noting that "she demonstrates marked limitation in turning her head on her neck to the left – no more than 15° and to the right about 30°. She is careful in turning her head to the left to avoid immediate pain. To the right, there is, as noted, slightly greater range of motion, but no pain. Flexion of her head forward on her neck is also productive of the same kind of symptoms in her left postero-lateral neck."

26. Under the "Examination" portion of his report (top of page 4), Dr. Coblentz further notes "Range of motion of her neck – there is *some* [emphasis added] restriction and

movement to the left with resulting pain in the left postero-lateral neck. To the right there is less restriction. There is also *mild restriction* [emphasis added] with flexion and extension. The right and left trapezius muscles are tight."

27. While he notes regarding Xxxxxxxxxx lower back that she can bend forward, back, and to the right without pain, he does note "with movement to the left, she feels discomfort on the left." These findings are insufficient as a matter of law and fail to prove defendant's *prima facie* entitlement to summary judgment. Instead they raise issues of fact.

28. Our assertion that defendants have failed to meet their burden of proof is amply supported by relevant case law from the Second Department. In *Burns v. Stranger* 2006 WL 1851304 (A.D. 2d Dept. July 5, 2006) the Second Department recently reversed a trial court's grant of summary judgment to a defendant, holding that "the report of the Defendant's examining neurologist indicated the existence of limitations in the range of motion of the Plaintiff's cervical spine in all directions, without rendering an opinion that such limitations were unrelated to the accident". In the case at bar, while Dr. Coblentz did not find limitations in all directions, he did note significant limitations in Xxxxxxxxxx neck - "marked limitation" - and did not state that these limitations were unrelated to her accident.

29. In *Rodriguez v. Ross*, 796 N.Y.S. 2d 398 (2nd Dept. 2005) the Appellate Division reversed a trial court's grant of summary judgment to the defendant in a case with similar medical facts, finding that defendant had failed to meet their burden of proof. As here, in *Rodriguez*, the defendants' physician had made positive findings of limitation during his independent medical examination. In reversing, the *Rodriguez* court held that the "defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines and his right shoulder, in addition to a positive impingement

sign for the right shoulder" *id.* 398-399. See also *McDowell v. Abreu* 11 A.D. 3d 590, 782 N.Y.S. 2d 866 (2nd Dept. 2004) (affirming a trial court's denial of summary judgment where a defense physician found that plaintiff continued to have restrictions in her back a year and a half after the accident).

30. Here, although the medical facts are not identical, they are analogous to the *Rodriguez* case. Dr. Coblentz found plaintiff suffering – more than a year after the accident - from "marked limitation in turning her head on her neck to the left" and that "she was careful in turning her head to the left to avoid immediate pain". He also states that she had no more than 15 degrees of neck rotation (head turning) to the left and to the right "about 30 degrees" without stating what normal ranges of motion are for these maneuvers. He also found forward bending of her neck (flexion) to produce similar pain and concluded there was "mild restriction" of flexion and extension. Dr. Coblentz further found that Xxxxxxxxxx had "some" unspecified restriction in neck movement to the left, with "less restriction" in movement to the right. He does not state that she has full or pain free range of motion to her neck either right or left. He also found she had pain on bending her back to the left.

31. In *Omar v. Bello* the Second Department affirmed a trial court's denial of a defense motion for summary judgment where " the defendant's neurologist indicated the existence of limitations in motion of the plaintiff['s] . . . cervical and lumbar spine" 13 A.D. 3d 430, 786 N.Y.S. 2d 563, 564 (2nd Dept. 2004). In *Scotti v. Boutureira*, 779 N.Y.S. 2d 255 (2nd Dept. 2004) the Appellate Division again reversed a trial court's grant of summary judgment to the defendant holding that the "conclusions of the defendants' examining physicians that Scotti had recovered from his injuries and was not disabled were directly contradicted by the observations of limitations that they had made when examining Scotti. Since the defendants

failed to establish a *prima facie* case, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact." See also *Rich-Wing v. Baboolal* 795 N.Y.S. 2d 706 (2nd Dept. 2005) (reversing a trial court's grant of summary judgment to defendants with a similar holding); *Smith v. Delcore* 29 A.D. 3d 890, 814 N.Y.S. 2d 554 (2nd Dept. 2006) (reversing a trial court's award of summary judgment to the defense where "defendant's neurologist conceded the existence of limitations in motion of the plaintiff's lumbar spine."); *Tchjevskaia v.* Chase, 15 A.D. 3d 389, 790 N.Y.S. 2d 175 (2nd Dept. 2005) (affirming denial of summary judgment where defendant doctor recorded limitations in plaintiff's ranges of motion); *Marquez v. Oballe* 789 N.Y.S. 2d 287 (2nd Dept. 2005) (reversing a trial court's grant of summary judgment to defendant where defendant physicians found restrictions in plaintiff's cervical and lumbar spines); *Coppage v. Svetlana Hacking Corp.* 2006 WL 1851272 , (A.D. 2nd Dept. July 5, 2006) (affirming a trial court's denial of a defense motion on threshold in part because "the defendants' examining neurologist stated that he had found limited range of motion in the plaintiff's lumbar spine"); *Ramirez v. Parache* 2006 WL1850095 (A.D. 2nd Dept. July 5, 2006) (reversing a grant of summary judgment to a plaintiff where the defense orthopedist found limitations in the plaintiff's right shoulder).; and *Spuhler v. Khan* 789 N.Y.S. 2d 228 (2nd Dept. 2005) (affirming trial Court's denial of summary judgment with similar holding).

32. Dr. Coblentz's finding of specific degrees of limitation of motion in Xxxxxxxxxxx neck on page 3 of his report without sufficiently quantifying these or comparing these findings to the normal range of motion also raises issues of fact and is further ground for denial of the defendant's motion. In *Kaminsky v. Waldner* 796 N.Y.S. 2d 175 (2nd Dept. 2005) the Second Department affirmed a trial court's denial of summary judgment to defendants

holding that the "opinions of the defendants' examining physicians that the plaintiff did not sustain a serious injury were belied by their own findings of restrictions of range of motion which *were not sufficiently quantified or qualified* to establish the absence of a significant limitation of motion" *id.* [emphasis added]. *See also Aronov v. Leybovich* 3 A.D. 3d 511, 770 N.Y.S. 2d 741 (2nd Dept. 2004) (reversing a grant of summary judgment where the defense physician failed to compare his findings to the normal range of motion); *Claude v.Clements* 301 A.D. 3d 554, 756 N.Y.S. 2d 57 (2nd Dept. 2003) (reversing a grant of summary judgment to one plaintiff where the defense physician failed to compare his findings to the normal range of motion); *Paulino v. Dedios* 24 A.D. 3rd 741, 807 N.Y.S. 2d 397 (2nd Dept. 2005) (reversing an award of summary judgment for failure to compare findings to the normal range of motion); *Manceri v. Bowe* 19 A.D. 3d 462, 798 N.Y.S. 2d 441 (2nd Dept. 2005) (reversing a trial award of summary judgment with similar holding).

POINT II B
DR. JAMES DICKSON'S IME REPORT FAILS TO MEET DEFENDANT'S BURDEN

33. Dr. James R. Dickson, a board certified orthopedist performed an orthopedic IME of plaintiff Xxxxxxx on October 5, 2005. His bare, conclusory 2-page report is nothing but a *pro forma* recitation of what clearly appears to have been a very short examination. The report utterly fails to prove defendant's *prima facie* case that Xxxxxxx has not suffered a serious injury. Dr. Dickson in his report fails to mention what objective tests he performed while examining Xxxxxxxxxxx yet with a straight face Dr. Dickson concludes in bald fashion that "there are no objective findings whatever in today's examination (Dr. Dickson's report is attached to defendant's motion as Exhibit "F"). This report fails to meet even the minimum requirements of law. It is also well settled that where a defendant physician fails to state what

objective tests he or she performed to support a defense of claim of no serious injury, this failure warrants denial of a threshold motion.

34. In *Facci v. Kaminsky* 18 A.D. 3d 806, 795 N.Y.S. 2d 457 (2nd Dept. 2005) the Second Department found that the "failure of Defendants' examining physician to set forth the objective test or tests performed supporting [her] claims that there was no limitation of range of motion warrants denial of summary judgment on the ground that the Defendant failed to establish her entitlement to judgment as a matter of law" *id* at 806, 457-458.

35. In *Black v. Robinson* 305 A.D. 2d 438, 759 N.Y.S. 2d 741 (2nd Dept. 2003) the Second Department reversed a trial court's award of summary judgment to the defense holding that the "defendant's orthopedist also concluded that there was no objective evidence of orthopedic disability. However, the defendant's examining physicians do not assert that any objective tests were performed to support their clinical findings. Their failure to set forth the objective test or tests performed supporting their claims that there was no limitation of range of motion warrants denial of summary judgment on the ground that the defendant failed to establish her entitlement to judgment as a matter of law" *id.* at 439, 742. See also *Meiheng Qu v. Doshna*, 310 A.D. 3d 554, 785 N.Y.S. 2d 112 (2nd Dept. 2004) (reversing a trial court's grant of summary judgment to the defendant on the threshold question finding that the "medical reports of the defendants' examining physicians failed to set forth the objective tests that were performed to support their conclusory assertions of normality" *id.* at 554, 112); *Daley v. Shahzad* 13 A.D. 3d 475, 786 N.Y.S. 2d 308 (2nd Dept. 2004) (affirming the trial court's denial of summary judgment to the defense where the affirmations of defense physicians were conclusory in nature and failed to set forth what objective tests were performed); *Hanna v. Alverado* 791 N.Y.S. 2d 440 (2nd Dept. 2005) (denial of summary judgment to defendant

affirmed with similar holding); *Barrett v. Jeannnot* 18 A.D. 3d 679, 795 N.Y.S. 2d 727 (2nd Dept. 2005); *Nembhard v. Delatorre* 16 A.D. 3d 390, 791 N.Y.S. 144 (2nd Dept. 2005) (reversing a trial court's grant of summary judgment to the defense with similar holding); *Edwards v. New York City Transit Authority* 794 N.Y.S. 2d 109 (2nd Dept. 2005) (affirming trial court's denial of summary judgment with similar holding); *Naydis v. La Transportation Corp.* 789 N.Y.S. 2d 259 (2nd Dept. 2005) (affirming denial of summary judgment to Defendant with similar holding); *Rodriguez v. J&K Taxi*, 783 N.Y.S. 2d 843 (2nd Dept. 2004) (reversing grant of summary judgment to Defendant with similar holding).

POINT II C
DR. JOHN RIGNEY'S REPORT FAILS TO MEET DEFENDANT'S BURDEN

36. Dr. Rigney reviewed MRIs of Xxxxxxx, one of her lumbar spine taken on January 5, 2005, 21 days after the accident, and one of her cervical spine taken on January 20, 2005, 36 days after the accident. [MRIs attached here as part of **Exhibit "G"**].

37. While Dr. Rigney confirms herniations at L5-S1 and C5-C6, he does his best to minimize these findings as degenerative and unrelated to the accident. However, Dr. Rigney's IME report does nothing more than raise an issue of fact regarding whether the herniations in Xxxxxxxxxxx cervical and lumbar spine are causally related to the accident.

38. Regarding her lumbar spine, Dr. Rigney finds "a small posterior midline to left sided disc herniation at L5-S1 into the epidural fat impinging the anterior sac margin" (Dr. Rigney's IME report attached to defendant's motion as Exhibit "H", p. 2, last paragraph). Discounting the idea that Xxxxxxxxxxx suffered a recent trauma and using the fact that this woman, in her early 40's has some degenerative changes in her spine, Dr. Rigney concludes "there is no reason to think this small herniation is other than chronic in nature and unrelated to

the accident" (*id.*). Note however, that Dr. Rigney does not *rule out* Xxxxxxxxxx automobile accident as a possible cause for his findings. On its face therefore, Dr. Rigney's report fails to prove *prima facie* that the lumbar herniation at L5-S1 did not result from the accident.

39. Regarding Xxxxxxxxxx cervical spine, Dr. Rigney first notes that the cervical MRI demonstrates straightening of the curvature of the spine – a frequent consequence of "whiplash" when muscle spasming causes the spine's normal S-shaped curve to straighten – but dubiously dismisses this as a "non-specific finding which need not be abnormal" (Dr. Rigney's report p. 3).

40. Dr. Rigney next notes that there is indeed a "broad based posterior herniation at C5-C6 with cord compression. This herniation is noted to abut the existing right C6 nerve." (Dr. Rigney's report p. 3). Despite this finding, he once again dismisses it as "not unexpected" and concludes that this cervical herniation is unrelated to the accident and that nothing can prove the herniation is "due to the accident in question and not due to causes of other nature" (*id.*). Again, Dr. Rigney does not rule out the accident as a possible cause of the herniation, but only attempts to show there could be other causes. Dr. Rigney's statements are insufficient as a matter of law and fail to prove *prima facie* that Xxxxxxxxxx two herniations did not result from the accident. His IME report does nothing to eliminate the accident as a possible cause and thus only creates an issue of fact requiring a trial.

41. In *Basmajian v. Wang* 12 A.D. 3d 471, 758 N.Y.S. 468 (2nd Dept. 2004) the Second Department reversed a trial court's award of summary judgment to a defendant under similar circumstances. In that case the defendant had submitted a report from a radiologist from a review of an MRI taken of the plaintiff within three months of the accident with findings, among others, of a herniation with ventral impingement of the thecal sac at L5-S1.

This positive evidence of injury from the defendant asking for summary judgment on the threshold question was found to be insufficient. In reversing, the Court held that the "defendant failed to demonstrate that the herniation was *not* causally related to the subject accident, or that the injury was not serious within the meaning of Insurance Law §5102(d)" *id.* at 472, 469 [emphasis added].

42. Using the *Basmajian* holding as a guide, Xxxxxxx has an even stronger case than the plaintiff in *Basmajian*. Here, Xxxxxxxxxx first MRI with a finding of a herniation at L5-S1 was taken within three weeks of the accident, not three months, and the second MRI with a finding of a cervical herniation was taken within five weeks of the accident. Here as in *Basmajian*, the defense radiologist found a lumbar herniation into the thecal sac though Dr. Rigney phrases this only as into the "sac margin"; but in addition to this, Xxxxxxxxxx also suffered a cervical herniation which even Dr. Rigney concedes is "broad based" "at C5-C6 *with* cord compression" and "is noted to abut the existing right C6 nerve" [emphasis added].

43. Despite his speculation about the cause of this finding, Dr. Rigney – like the defense radiologist in *Basmajian* – "failed to *demonstrate* that the herniation was not causally related" to Xxxxxxxxxx accident [emphasis added]. It is when Dr. Rigney steps over the line from his finding of a herniation into the territory of speculation about causes that he crosses the line from physician to partisan. Without any evidence of any prior MRIs taken of Xxxxxxx from any time prior to the accident to be used for comparison, Dr. Rigney's speculation about causes of her herniations – which from all available medical information points to having followed directly from the trauma she suffered in the accident – does nothing but raise an issue of fact.

44. In sum, as noted above, where the proponent of a motion for summary judgment fails to make a *prima facie* showing of entitlement to summary judgment by tendering evidence sufficient to eliminate *any* material issue of fact, summary judgment must be denied, regardless of the sufficiency of the opposing papers see *Weingrad*, *supra.* It is respectfully submitted that the defendant has failed to prove a *prima facie* case of entitlement to summary judgment. Rather than eliminating any material issues of fact, his own papers raise issues of fact requiring denial of his motion and so that these issues can be resolved at trial. To recapitulate, the defendant has wholly and inexplicably ignored the finding of a fracture to Xxxxxxx's knee; his neurologist himself has found "marked" limitations in Xxxxxxx's cervical spine, his orthopedist's report fails to meet applicable standards, and his radiologist has not demonstrated that Xxxxxxx's herniations did not derive from this accident. Thus, summary judgment should be denied to the defendant.

POINT III
DR. XXXXXXXXXXX'S AFFIRMATION RAISES ISSUES OF FACT WHETHER XXXXXXXXXXX HAS SUFFERED "SIGNIFICANT LIMITATION" AND "PERMANENT CONSEQUENTIAL LIMITATION" CATEGORIES OF SERIOUS INJURY

45. As noted above, defendant's own motion fails to prove his *prima facie* case and thus must be denied regardless of the sufficiency of plaintiff's opposing papers. Nonetheless, the affirmation of Dr. Xxxxxxxxxxx, a board certified orthopedic physician who provided and continues to provide treatment to Xxxxxxxxxxx, also raises issues of fact and serves as an independent ground for denial of defendant's motion.

46. An affirmed narrative report by Dr. Xxxxxxxxxxx is attached here as **Exhibit "H"**. In that report Dr. Xxxxxxxxxxx states that Xxxxxxxxxxx first came to his office on January 19, 2005, about a month after the accident, and saw Dr. Xxxxxxxxxxx. At that time

she was complaining of neck and low back pain and pain to the right collarbone. She was found to be in significant distress due to her complaints. She was noted to have already sustained a herniated lumbar disc with spasm. Her treatment plan included physical therapy and anti-inflammatory and spasm medication (**Exhibit "H",** p. 1).

47. Based on her complaints of neck pain she was referred by Dr. Xxxxxxxxxx for a cervical MRI which indicated a C5-C6 herniation with compression of the ventral cord.

48. Dr. Xxxxxxxxxx saw Xxxxxxxxxx for the first time on February 17, 2005. At that time he noted that she had neck pain going into her left arm and right-sided pain into her collarbone. On physical examination Dr. Xxxxxxxxxx found Xxxxxxxxxx had "marked pain" in the neck with extension (backward bending) and "significant discomfort with extension" in her lower back. Dr. Xxxxxxxxxx read Xxxxxxxxxx lumbar MRI as showing "a tear in the annulus with a high intensity zone at L5-S1 as well as a small protrusion". He read her cervical MRI as showing a "fairly prominent disc herniation that was more right sided at C5-C6". He recommended light duty for her at work (Xxxxxxxxxx works part-time as a xxxxxxxxx xxxxxxxxxx and at a xxxxxxxxxx) with a prescription for work and discussed the possibility of pain management injections; she was also to continue with physical therapy (**Exhibit "H"**, pp. 1-2).

49. Dr. Xxxxxxxxxx saw Xxxxxxxxxx again on April 15, 2005 with Xxxxxxxxxx continuing to complain of pain in her neck, low back, and right shoulder. He discussed with her the possibility of additional scans for the right shoulder if it did not improve. At that time, four months after the accident, Dr. Xxxxxxxxxx noted she had a "significant partial disability". She was also continuing in physical therapy (**Exhibit "H"**, p. 2).

50. Dr. Xxxxxxxxxxx saw Xxxxxxxxxxx again on June 16, 2005 when she continued to have "significant complaints" of pain to her neck and low back. She was continuing in physical therapy (*id*.).

51. During a visit on August 18, 2005, Dr. Xxxxxxxxxxx again noted "significant complaints" in Xxxxxxxxxxx neck with "loss of motion in the neck" and he discussed the possibility of pain management injections and operative care if she did not improve (*id.*).

52. During Xxxxxxxxxxx next visit on October 20, 2005, Dr. Xxxxxxxxxxx again noted significant complaints, more so with her neck but also to her back. She remained on anti-inflammatory and spasm medication. He also noted on that date – some ten months after the accident – a "loss of normal lordosis [S-curve] of her cervical spine as well as pain with extension and rotation". He also discussed with her the possibility that "operative care with an anterior cervical discectomy and fusion" would have to be strongly considered if she was not improving. He also referred her to a pain management physician for injections (which Xxxxxxxxxxx declined to receive) (**Exhibit "H"**, pp. 2-3).

53. Dr. Xxxxxxxxxxx saw Xxxxxxxxxxx again on February 2, 2006. She was continuing with physical therapy. She continued to have "significant" neck pain and low back pain, though the physical therapy was providing some short-term relief. He again discussed the possibility of operative care since she was not improving (**Exhibit "H"**, p. 3).

54. Xxxxxxxxxxx returned to Dr. Xxxxxxxxxxx on March 16, 2006 with continuing neck and low back pain. Although he discussed operative care again, Xxxxxxxxxxx declined at that time (*id.*).

55. Dr. Xxxxxxxxxxx performed a physical examination of Xxxxxxxxxxx most recently on May 18, 2006. On that date he found her suffering from continued "marked pain"

in her neck as well as back pain. Her neck extension was limited to about 30° with 45° being normal. He found her to have an ongoing partial disability and discussed pain management and operative care (*id.*).

Dr. Xxxxxxxxxx's Assessment

56. Under the "Assessment" portion of Dr. Xxxxxxxxxx's narrative report he states that her complaints of neck and low back pain have not resolved "despite a long period of time as well as extensive physical therapy" and that Xxxxxxxxxx "is receiving ongoing physical therapy and will need that for the foreseeable future". He further states that Xxxxxxxxxx is at a "very high risk of needing additional treatment including either pain management injections or operative care. Patient does have a cervical herniated nucleus pulposus with ventral cord compression and would likely need an anterior cervical discectomy and fusion". He further notes that Xxxxxxxxxx "continues to complain of intermittent low back pain and has symptoms consistent with a lumbar annular tear with low back pain" and "marked sitting intolerance".

Causal Relationship

57. Under the "Causal Relationship" portion of his narrative report, Dr. Xxxxxxxxxx states that based "on her history as well as her MRI findings of both the neck and low back, within a reasonable degree of medical certainty, patient's cervical complaints and disc herniation are causally related to her motor vehicle accident. Additionally, patient's lumbar complaints and her MRI finding of an annular tear are causally related to her motor vehicle accident." (**Exhibit "H"**, p. 3).

Future Treatments

58. Under the "Future Treatments" portion of his narrative report, Dr. Xxxxxxxxxx states that Xxxxxxxxxx is "partially disabled and continues to be, and she has limitations that have not allowed her to get back to her full activities at work and she should be limited from doing any significant heavy lifting or bending. Additionally, overhead activities that require her to extend her neck will continue to have to be minimized." He further states that future surgery is "quite likely as her symptoms have been going on for a long period of time and have not resolved, patient would need new studies of the cervical spine with an MRI and even possibly a myelogram and CT scan." Regarding her lower back he does not believe surgery is likely at this time though he does state it may have to be considered if her low back complaints increase and physical therapy or pain management techniques cannot control the pain **(Exhibit "H"**, p. 4).

59. Finally, Dr. Xxxxxxxxxx concludes that Xxxxxxxxxx "continues to have restricted range of motion of her cervical spine with extension limited to 50% of normal with increased pain with extension and rotation of her cervical spine. Patient's lumbar spine when she is symptomatic has limitations of approximately 30% of her normal motion" (**Exhibit "H"**, p. 4).

60. Dr. Xxxxxxxxxx's affirmation raises issues of fact about whether Xxxxxxx has suffered a serious injury under both the "significant limitation" category of injury and the "permanent consequential limitation of use" category of serious injury. In discussing the "significant limitation" category of serious injury, the Court of Appeals has held in *Toure v. Avis Rent A Car Systems, Inc.* that

> Whether a limitation of use or function is significant or consequential (ie important) relates to medical significance and

> involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. While [the physician's] affirmation doesn't ascribe a specific percentage to the loss of range of motion in Plaintiff's spine, he sufficiently described the "qualitative nature" of Plaintiff's limitations based on the normal function, purpose, and use of the body part . . . . We cannot say that the alleged limitations of Plaintiff's back and neck are so minor, mild or slight as to be considered insignificant within the meaning of Insurance Law §5102(d). As our case law further requires, Dr. Waltz's opinion is supported by objective medical evidence including MRI and CT scan tests and reports, compared with his observations of muscle spasms during his physical exam of Plaintiff. Considered in the light most favorable to Plaintiff this evidence was sufficient to defeat Defendants' motion for summary judgment.

Toure v. Avis Rent A Car Systems, Inc., 746 N.Y.S. 2d 865, 869-870.

61. Dr. Xxxxxxxxxxx's report meets and exceeds this criteria. He does ascribe specific percentages to Xxxxxxxxxxx loss of range of motion and his opinion is supported by the objective evidence of MRI scans.

62. Case law from the Second Department also supports our assertion that defendants have failed to prove that Xxxxxxx has not suffered from a "significant limitation" category of serious injury. In *Sclafani v. City of New York*, 22 A.D. 3d 387, 803 N.Y.S. 2d 182 (2nd Dept. 2005). The Appellate Division affirmed the Trial Court's denial of summary judgment to the defendant on the serious injury question holding that the affirmation of plaintiff's physician, which asserted that plaintiff had suffered restrictions in motion based on computerized range-of-motion testing, was sufficient to raise a triable issue of fact. Here, although no computerized range-of-motion testing was performed, Dr. Xxxxxxxxxxx did find limitations in the range of motion of Xxxxxxxxxxx cervical and lumbar spine and has expressed these limitations in numeric terms. Moreover, Dr. Xxxxxxxxxxx found during his most recent examination of May 18, 2006 that Xxxxxxxxxxx was still suffering from

"marked" pain in her neck and has an "ongoing partial disability". These findings are sufficient to raise a triable issue of fact and warrant denial of defendant's motion.

63. In *Panton v. Spann*, 792 N.Y.S. 2d 343 (2nd Dept. 2005) the Appellate Division affirmed a Trial Court's denial of defendant's motion for summary judgment even where defendant had made a *prima facie* showing, holding that plaintiff's physician in that case "examined the plaintiff and . . . identified and quantified specific limitations in movement, which he said were of a significant nature and substantially impaired the plaintiff's ability to perform her usual and customary work and daily living activities". Similarly here, Dr. Xxxxxxxxxxx has identified and quantified specific limitations of movement in both the cervical and lumbar spine and has concluded that these limitations render Xxxxxxxxxxx partially disabled, continue to cause her pain, and prevent her from resuming her "full activities at work." See also *Ali v. Agboglo*, 789 N.Y.S. 2d 222 (2nd Dept. 2005) (affirming a Trial Court's denial of summary judgment where plaintiff's treating chiropractor found diminished deep tendon reflexes and restrictions in ranges of motion of the plaintiff's cervical and lumbar spines and had quantified those restrictions); *Kerzhner v. N.Y. Ubu Taxi Corp.*, 792 N.Y.S. 2d 622 (2nd Dept. 2005) (affirming a Trial Court's denial of summary judgment finding the affirmation of plaintiff's treating physician which stated an MRI showing only a bulging disc along with quantified range of motion limitations raised an issue of fact).

POINT IV
NEW YORK LAW REGARDING SUMMARY JUDGMENT FAVORS PLAINTIFFS XXXX AND XXXXXXX

64. It is well settled New York law that "the drastic remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issue of fact" *Marine Midland Bank N.A. v. Dino & Artie's Automatic*

Transmission Co. 563 N.Y.S. 2d 449 (2nd Dept. 1990) see also *Krup v. Aetna Life and Casualty Company*, 479 N.Y.S. 2d 992 (2nd Dept. 1984). Summary judgment should not be granted where there is any doubt about the existence of a triable issue of fact or where the existence of an issue is arguable *American Home Assurance Company v. Amerford International Corp.*, 606 N.Y.S. 2d 229 (1st Dept. 1994). Moreover, "on a defendant's motion for summary judgment, opposed by the plaintiff, we are required to accept the plaintiff's pleadings as true, and our decision must be made on the version of facts most favorable to . . . plaintiff" *Henderson v. City of New York et al*, 576 N.Y.S. 2d 562, 564 (1st Dept. 1991), and where "the Court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied" *Daliendo v. Johnson* 543 N.Y.S. 2d 987, 990 (2nd Dept. 1989). See also *Ielpi Ringling Bros. Barnum & Bailey Combined Shows Inc.*, 731 N.Y.S. 2d 889 (2nd Dept. 2001).

65. The defendant has failed to prove a *prima facie* case and have thus failed to demonstrate his entitlement to judgment as a matter of law. He has failed to prove that there are no disputed issues of facts regarding whether plaintiffs have suffered serious injuries. Indeed, defendant's own submissions alone, themselves, raise questions of fact; therefore, defendant's motion should be denied in its entirety.

WHEREFORE, plaintiffs XXXXXXX and XXXXXXX respectfully request that this Court deny defendant's motion for summary judgment in its entirety and that this Court grant such other and further relief that it deems just and proper.

Dated: Suffern, New York
July 17, 2006

Yours, etc.,

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