5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 21

NORA STACK and PATRICK STACK,

Plaintiffs,

Index No. 16594/02

- against -

Sequence No. 1, 2, 3
Motion Date: September 15, 2004

KEVIN J. SIZEMORE,

Defendants.

KEVIN J. SIZEMORE,

Third-Party Plaintiff,

- against -

TONY SMITH and EVELYN RUSSELL,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion **1**
Affirmation in Opposition **2**
Notice of Cross Motion **3**
Affirmation in Opposition **4**
Reply Affirmation **5**
Notice of Cross-Motion **6**
Affirmation in Opposition **7**

Motion, pursuant to CPLR 3212, by plaintiff, Nora Stack ("Stack"), and Patrick Stack for an order, granting summary judgment against the defendant, Kevin J. Sizemore ("Sizemore"), on the issue of liability is granted.

Cross-motion, pursuant to CPLR 3212, by third-party defendants, Tony Smith ("Smith") and Evelyn Russell ("Russell"), for an order granting summary judgment against the defendant/third-party plaintiff, Sizemore, on the issue of liability is granted.

Cross-motion, pursuant to CPLR 3212 and New York Insurance Law Section 5102, by the defendant/third-party plaintiff, Sizemore, for an order dismissing plaintiffs' complaint herein upon the ground that the plaintiff, Stack, did not sustain a statutorily defined "serious injury" as a proximate result of the motor vehicle accident, that is the subject of the instant action, is granted.

On October 17, 2001, at or about 8:30 a.m., plaintiff, Stack, operated a 1999 Honda Civic with New York Registration No. D855WH. Plaintiff was traveling northeast in the right lane on Peninsula Boulevard in the Town of Hempstead, County of Nassau, which, after crossing Fulton Avenue, is renamed Bennett Avenue. At its intersection with Bennett Avenue, plaintiff's vehicle was struck by a 1990 Toyota Camry with New York Registration No. AEJ6989, which was owned and being operated by defendant, Kevin Sizemore. Defendant was traveling westbound in the far right lane on Fulton Avenue. It is undisputed that the plaintiff had a green traffic light in her favor when the defendant's vehicle, admittedly entered the intersection, without excuse or explanation, against a red traffic light and caused a collision with plaintiff's vehicle. As a result of said collision, plaintiff's vehicle was caused to collide with another vehicle

being operated by third-party defendant, Tony Smith. Smith was operating a 1988 BMW with the permission and consent of the owner, third-party defendant, Evelyn Russell. Smith was also heading northeast on Peninsula Boulevard intending to continue his journey onto Bennett Avenue. It is undisputed that it was cold and sunny on this date and that the roads were dry at the time of the incident.

Shortly after the collision, the police arrived and apparently generated a police report. The plaintiff was picked up by her husband and taken back to her home.

On October 11, 2002, Stack, together with her husband, commenced the instant negligence action against defendant, Sizemore, seeking to recover for personal injuries she sustained as a result of the above-referenced car accident. Plaintiff further alleges that she has sustained a "serious injury" as set forth in section 5102(d) of the Insurance Law of the State of New York and, therefore, has sustained an economic loss in excess of "basic economic loss," and therefore, she is a "covered person" as defined in the insurance law.

On December 6, 2002, Sizemore, interposed an answer denying the material allegations of the complaint and asserting two affirmative defenses; namely: (1) plaintiff's damages should be reduced as a result of the failure to utilize available safety devices and restraints; and (2) any injuries or damages sustained by the plaintiff were the result of plaintiff's own negligence and culpable conduct without any negligence or culpable conduct on the part of the defendant.

On February 11, 2003, defendant, Sizemore, served his third-party summons and complaint on the third-party defendants, Smith and Russell, seeking to recover as

contribution to the judgment according to his proportionate share of fault in causing plaintiff's injuries and damages. Plaintiffs served their amended verified complaint on May 20, 2003, and Sizemore served his answer to the amended complaint on June 17, 2003. Third-party defendants, Smith and Russell, served their answer to the cross-claim on May 13, 2003 and the third-party answer to amended complaint on September 23, 2003. Thereafter, plaintiffs served their verified bill of particulars on December 12, 2003 and amended verified bill of particulars on April 21, 2004.

Upon the instant applications, plaintiff's motion, pursuant to CPLR 3212, for summary judgment on the issue of liability is granted.

Similarly, third-party defendant's cross-motion, pursuant to CPLR 3212, for summary judgment on issue of liability is also granted.

Defendant's cross-motion, pursuant to CPLR 3212 and New York Insurance Law Section 5102, on the ground that plaintiff did not sustain a statutorily defined "serious injury" as a result of the motor vehicle accident is granted.

It is well settled that on a motion for summary judgment to dismiss the complaint the movant must establish his or her defense sufficiently to warrant a court's grant of judgment in his or her favor as matter of law. *See, Zuckerman v. City of New York,* 49 N.Y. 2d 557, 562; 427 N.Y.S.2d 595; 404 N.E.2d 718. The initial burden is on the movant to establish by means of admissible evidence his or her *prima facie* entitlement to judgment as a matter of law. *See, McCormack v. Graphic Mach. Servs.,* 139 A.D.2d 631, 632; 527 N.Y.S.2d 271. Here, plaintiff has demonstrated her entitlement to judgment as a matter of law by establishing that the defendant violated Vehicle and

Traffic Law § 1110 and 1111 when he proceeded through a red traffic signal light directly into the path of her vehicle.

Pursuant to Vehicle and Traffic Law §1110, "Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title." *See, NY Veh. & Traf. §1110.* Pursuant to §1111 of the Vehicle and Traffic Law, "Traffic . . . facing a steady circular red signal . . . shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection . . . and shall remain standing until an indication to proceed is shown . . ." *See, NY Veh. & Traf. §1111.*

It is well settled that the admission of a defendant that his vehicle entered the intersection where the accident occurred, while the light was red, establishes, *prima facie*, that he is solely at fault for the accident. *See, Diasparra v. Smith,* 253 A.D.2d 840; *Guerriero v. Timberlake,* 254 A.D.2d 393; *Salenius v. Lisbon,* 217 A.D.2d 692. In the instant case, defendant, Sizemore, has clearly admitted that he was unable to prevent his vehicle from entering the intersection despite being faced with a red light. Moreover, defendant, Sizemore, acknowledges he has no excuse nor explanation for violating the above-referenced Vehicle and Traffic Laws. Thus, plaintiff has met her initial burden to establish by means of admissible evidence her *prima facie* entitlement to judgment as a matter of law.

Once the proponent of a motion for summary judgment makes a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to rebut the movant's case by presenting evidentiary facts in admissible form sufficient to require a trial of any material issue of fact. *See, Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320; 508 N.Y.S.2d 923; 501 N.E.2d 572. In this case, the defendant submits that there is a question of fact as to whether the plaintiff could have taken steps to avoid the subject accident.

It is well settled that a traffic light signal in favor of a driver does not give him the absolute right of way; rather he is obliged to enter the intersection with care and caution. *See, Shea v. Judson,* 283 N.Y. 393; 28 N.E.2d 885; *Brothers v. Sanchez, et al.,* 283 App.Div. 912; 129 N.Y.S.2d 881. However, it is clear from the papers submitted for this Court's consideration that plaintiff looked both ways before proceeding to cross the intersection. *See, Plaintiff, EBT Testimony,* page 23, lines 16-19. It is further evident from the testimony of the plaintiff that "[I] was halfway to three quarters of the way into the intersection when I saw his car coming barreling towards me." *See, Plaintiff's EBT Testimony,* page 31, lines 16-19. The defendant, in this case, properly states that the law of New York State to be that under CPLR 1411, pursuant to the doctrine of comparative negligence, a driver who proceeds in the face of a green light may be found partially responsible, if he does not use reasonable care to avoid the accident. *See, Costalas v. The City of New York,* 143 A.D. 573. However, defendant has failed to produce any evidence that the plaintiff did not use reasonable care to avoid the accident. In fact, it is clear from the testimony of the plaintiff that once she saw the

defendant's vehicle approach her, she "put the brake on." *See, Plaintiff's EBT Testimony,* page 32, lines 20-23. Consequently, the opposition submitted by the defendant herein fails to raise any triable issue of fact as to whether the plaintiff had been negligent in failing to exercise reasonable care in entering the intersection or in avoiding the collision. *See, Zuckerman v. City of New York,* 49 N.Y.2d 557, 562; *Diasparra v. Smith, supra; Delasoudas v. Koudellou,* 236 A.D.2d 581. Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Similarly, the cross-motion by third-party defendants, Smith and Russell, for an order granting summary judgment against the defendant on the issue of liability is also granted. Defendant, Sizemore, argues that Smith and Russell's motion for summary judgment contains no evidence that the third-party defendants acted in a non-negligent manner. Nevertheless, it is apparent from the law of the State of New York that the admission of the defendant that he entered the intersection in which the accident occurred while the light was red makes out a *prima facie* case that he was solely liable for the accident. *See, Salenius v. Lisbon,* 217 A.D.2d 692; *Hill v. Luna,* 195 A.D.2d 1000. Again, the burden then shifts to the non-movant, namely, Sizemore, to raise a triable issue of fact as to whether Smith and Russell had been comparatively negligent in failing to exercise reasonable care in entering the intersection or avoiding the collision. From the papers submitted for this Court's consideration, defendant, Sizemore, has failed to raise such an issue. It is clear that Smith was also moving at the time of the collision (*see, Smith's EBT Testimony,* page 12, lines 13-15) and that the first time Smith saw defendant's vehicle was "[w]hen it proceeded to pass a red light" (*see,*

Smith's EBT, page 12, lines 22-24) and when defendant first crashed into the Stack vehicle (*see, Smith's EBT Testimony,* page 17, lines 3-8). Moreover, Smith admits that when he saw the collision between the Sizemore and Stack vehicle he "tried to get out the way, but it was too late." *See, Smith,* page 17, lines 20-25, page 18, line 2. Thus, it is apparent that defendant/third-party plaintiff, Sizemore, fails to raise any triable issue of fact as to whether third-party defendants, Smith and Russell, had been negligent in failing to exercise reasonable care in entering the intersection or avoiding the collision. Consequently, the third-party defendants' cross-motion is granted on the same grounds.

The cross-motion brought by the defendant/third-party plaintiff in the above-captioned action for an order of this Court, pursuant to CPLR 3212 and New York Insurance Law Section 5102, dismissing the plaintiffs' first and second causes of action herein upon the ground that the plaintiff, Nora Stack, did not sustain a "serious injury" as a proximate result of the motor vehicle accident that is the subject matter of the instant action is granted.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Department, in *Stewart Title Insurance Company v. Equitable Land Services, Inc.* 207 A.D.2d 880, 881:

> It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State

> Bank v McAuliffe, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York, supra*, at 562).

New York Insurance Law Section 5102(d) defines "serious injury" as:

> "Serious injury" means 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.

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *See, Licari v. Elliot,* 57 N.Y.2d 230. The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *See, Alvarez v. Prospect Hospital,* 68 N.Y.2d 320; *Winegrad v. New York Univ. Medical Center,* 64 N.Y.2d 851. In the present action, the burden rests on the defendant to establish, by the submission of evidential proof in admissible form, that the plaintiff has not suffered a "serious injury." *See, Lowe v. Bennett,* 122 A.D.2d 728, *affirmed,* 69 N.Y.2d 701. When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden

shifts, and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim for serious injury. *See Licari, supra.*

In support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. *See Pagano v. Kingsbury,* 182 A.D.2d 268. Once the burden shifts, it is incumbent upon the plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form."

When a claim is raised under the "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 eight days immediately following the occurrence of the injury or impairment," then, in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage is acceptable. *See, Toure v. Avis Rent A Car Systems, Inc.,* 98 N.Y.2d 345. 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, Toure v. Avis Rent a Car Systems, Inc., supra.*

In support of the instant motion, the defendant has submitted the following: (1) report of plaintiff's doctor, Dr. Shih Wang of Doctors Immedicare, dated February 7, 2002 concerning an examination of the plaintiff on December 3, 2001; (2) a no-fault verification of treatment form of plaintiff's doctor, Dr. Jonathan E. Dashiff, orthopedic surgeon, dated April 1, 2002; (3) MRI reports of the plaintiff's left knee (dated December 16, 2001); left shoulder (dated December 22, 2001); left shoulder again (dated September 14, 2002) and right knee (dated September 14, 2002); (4) the affirmed report of Dr. Michael J. Katz, orthopedic surgeon, who examined the plaintiff on behalf of the defendant, dated April 29, 2004; (5) the affirmed reports of Dr. David G. Steiner, neurologist, who examined the plaintiff on behalf of the defendant during an independent medical review, dated May 3, 2004.

In this case, the unsworn report of the plaintiff's examining physician, Dr. Wang, concerning an examination of the plaintiff on December 3, 2001, less than 2 months from the date of the accident, discloses, in pertinent part, the following:

> Examination: Left shoulder: Abduction 100%, Flexion 100% induced pain, Tenderness was noted on the left knee. There was a normal range of motion on the left knee.
>
> Diagnosis: Left shoulder sprain/contusion.

It is well settled that a minor, mild, or slight limitation of use should be classified as insignificant within meaning of statute providing that a serious injury for purposes of the No-Fault Act is one which results in a significant limitation of use of a body function or system. *See, Licari v. Elliott,* 441 N.E.2d 1088. The Court of Appeals held in *Licari* that to fulfill the legislative mandate of the No-Fault laws, serious injury ". . . should be

> Diagnosis: Motor Vehicle accident-severe muscle spasm on back and left shoulder. Left knee contusion. Right thumb sprain.

Nevertheless, the Appellate Division, Second Department, takes a restrictive view of muscle spasms as a basis for "serious injury." *See, e.g. Davis v. New York City Transit Authority,* 294 A.D.2d 531, 742 N.Y.S.2d 658 (2nd Dept.2002) (observation of spasm by plaintiff's doctor was insufficient to withstand grant of motion for summary judgment; plaintiff failed to meet burden of demonstrating the extent or degree of the physical limitations); *Keller v. Terr,* 176 A.D.2d 921, 575 N.Y.S.2d 534 (2nd Dept. 1991) (spasm of jaw did not raise triable issue). *See also, Coyoc v. New York City Housing Authority,* 2002 WL 1396031, 2002 N.Y. Slip. Op. 50231(U).

In the present case, while there exists medical evidence to suggest that the spasm is connected to a "permanent consequential limitation" or "significant limitation," there is no evidence that the limitations are supported by objective medical evidence (*Mastrantuono v. United States,* 163 F Supp 2d 244, 254-255 [S.D.N.Y.2001] [applying New York law]. *See also, Barth v. Harris,* 2001 WL 736802 [S.D.N.Y. 2001].

The defendant also submits the affirmed medical findings of Dr. Michael Katz, an orthopedic surgeon who examined the plaintiff on behalf of the defendant. In order for a physician's findings to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations, and review of the record rather than manifesting only the plaintiff's subjective complaints. *See,*

O'Sullivan v. Atrium Bus Co., 246 A.D.2d 418, 668 N.Y.S.2d 167; *see also, Giandolfo v. Howarth,* 3 Misc.3d 1104(A), 2004 WL 1064523. It is well settled that subjective complaints of pain, unsupported by objective medical evidence, are not sufficient to support a finding of "significant limitation." *See, Scheer v. Koubek,* 70 N.Y.2d 678; *Delaney v. Lewis,* 256 A.D.2d 895; *Rivera v. Pula,* 173 A.D.2d 1000. Dr. Katz's report establishes that plaintiff did not suffer any "permanent" or "significant" loss of limitation of use of her knees, left shoulder, right hand or wrist. Although the diagnosis was founded, in part, on subjective complaints and the physicians' observations of plaintiff, there was insufficient evidence to support the diagnosis or to substantiate plaintiff's subjective complaints. Specifically, Dr. Katz's findings were based on objective medical tests and were clearly not a mere recitation of plaintiff's complaint.

The defendant also submits MRI reports of plaintiff's left and right knees and left shoulder. It is well settled that unsworn MRI reports are not competent evidence unless both sides rely on those reports. *See, Gonzalez v. Vasquez,* 301 A.D.2d 438; *Ayzen v. Melendez,* 299 A.D.2d 381. In this case, the MRI reports are in fact unsworn; yet, they are relied upon by both sides. Consequently, these reports constitute competent evidence. It should be noted that, in this case, MRIs of plaintiff's left shoulder were unremarkable; however, MRI reports of the right knee revealed an "intrameniscal degeneration posterior horn of the medial meniscus, without definitive tear" and MRI of left knee disclosed a small diffuse joint effusion. This case involves a claim of damage to both knees and left shoulder alleged to be the result of an automobile accident caused by defendant's negligence. The exact nature of the injuries is in controversy and hence,

as this is a motion for summary judgment, the evidence and inferences reasonably drawn must be viewed in the light most favorable to plaintiff. *See, Gutton v. Gottleib,* 653 N.Y.S2d 553; *see also, Cohen v. Hallmark Cards,* 410 N.Y.S.2d 282.

This Court finds that the hereinabove set forth evidence taken collectively satisfies the defendant's initial burden of proof demonstrating, *prima facie*, that the plaintiff did not sustain a statutorily defined "serious injury."

In opposition to the instant motion, the plaintiff has submitted an affidavit from the plaintiff outlining in detail the extent of her injuries and disabilities and an affirmation from Jonathan E. Dashiff, an orthopedic surgeon. Dr. Dashiff, in his August 24, 2004 affidavit, states, in pertinent part:

> "9. As a result of these injuries, the plaintiff, suffers with persistent chronic pain, as well as significant restricted range of motion of her left shoulder and knees, which is permanent. As a result of these injuries, Mrs. Stack will continue to have complaints of pain, with severely restricted use and function of her left upper extremity and her knees will be permanently restricted from performing many of her pre-accident activities and/or will be severely limited in performing same . . . These physical limitations are natural and expected medical consequences of her injuries.
>
> 10. In addition, as a result of these injuries and the resulting limitation of use and function of her left shoulder and knees, the plaintiff will be unable to resume her normal pre-accident activities and will be limited to light duty and non-strenuous physical activities for the rest of her life. In addition, the plaintiff . . . will require continued medical care and treatment. In my opinion, as a result of these injuries, the plaintiff will eventually require injections in her shoulder to relieve her pain and discomfort and surgical intervention for her knees, including athroscopic scoping to improve her function

and relieve her pain . . .

> 11. My most recent examination of the plaintiff on 8/18/04, revealed increased pain and tenderness of her right knee with further loss of range of motion, strength and function. The plaintiff has now agreed to submit to right knee athroscopy, which has been scheduled for 9/21/04. The plaintiff will be totally disabled for 4-6 weeks following the surgery and then will probably require a course of physical therapy during her rehabilitation. I will not be able to fully assess the damage suffered to plaintiff's right knee until after the surgery.

* * *

Based upon Dr. Dashiff's affidavit, the Court finds that the plaintiff's submissions fail to raise an issue of fact. From his affidavit, it appears that Dr. Dashiff did not base his findings on objective medical observations nor objective testing. Furthermore, Dr. Dashiff fails to provide a qualitative assessment of a plaintiff's condition setting forth the objective basis of his opinion; nor does he compare the plaintiff's limitations to the normal function, purpose, and use of the affected body organ, member, function, or system (*Toure v. Avis Rent A Car Systems, Inc., supra*). In fact, Dr. Dashiff recorded in an entry from April 14, 2004:

> "While we cannot definitely prove that this finding [intrameniscal degeneration of the posterior horn of the medial meniscus of the right knee] is the result of the 10/17/2001 accident, we can say that to our knowledge there is no previous history of injury to or treatment for a right knee injury. And so, it is our *assumption* that the right knee problem is consequential to the left knee as she tried to off-load it and put most of the weight bearing on her right side."
> (*emphasis added*)

There is no causal connection with the subject accident and the plaintiff's right knee injuries. Moreover, it is well established that unsupported conclusions and unsubstantiated allegations are insufficient to raise a triable issue of fact. *See, Coleman v. Village of Head of the Harbor,* 163 A.D.2d 456; *Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966.

Likewise in the last category of the statute – "[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"– the words "substantially all" should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment. *See, Moreno v. Roberts,* 557 N.Y.S. 2d 657. The Legislature has made it abundantly clear that disability falling within this threshold period -- "for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" -- must be proved along with the other statutory requirements in order to establish a *prima facie* case of serious injury. *See, Licari v. Elliott.*

In the instant case, Nora Stack has offered no proof of her usual daily activities, nor, consequently, that she was curtailed from performing those activities to a greater extent for at least 90 days. *See, Horowitz v. Clearwater,* 176 A.D.2d 1083. Plaintiff returned to work two days after the accident. Also, she resumed her normal full-time schedule. Plaintiff's ability to lift files at work was affected for only one week. Her

affidavit in opposition claims that her ability to perform some of her work responsibility was "extremely limited and restricted." This does not meet the statutory standard of inability to perform "substantially all" usual daily activities. *See, Christopher v. Caldarulo,* 608 N.Y.S.2d 998. The fact that she cannot perform certain tasks for lengthy periods without pain does not constitute curtailment from performing substantially all of her usual activities to a great extent. *See, Licari, supra; see also, Crane v. Richard,* 180 A.D.2d 706. Taken collectively and viewing the evidence in the light most favorable to the plaintiff, it is this Court's conclusion that the plaintiff has not demonstrated an issue of fact as to whether she suffered a "serious injury."

Accordingly, the defendant's cross-motion, pursuant to CPLR 3212 and New York Insurance Law Section 5102, is hereby granted, and the plaintiff's complaint is herewith dismissed.

This constitutes the decision and order of the Court.

Dated: 10/28/04

J.S.C.