

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

SCAN

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**KESHA BANDY,**

**Motion Sequence #1  
Submitted January 11, 2008**

**Plaintiff,**

**-against-**

**INDEX NO: 21391/06**

**DEBORAH CURRAN-HELD, KEVIN J.  
MECCHELLA and SHALICIA REESE,**

**Defendants.**

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**The following papers were read on these motions:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affirmation.....</b>	<b>3</b>
<b>Sur-Reply Affirmation-not considered by the Court.....</b>	<b>4</b>

Defendants, DEBORAH CURRAN-HELD and KEVIN J. MECCHELLA (hereinafter referred to as "moving defendants"), move, for an order dismissing plaintiff's complaint and granting them summary judgment, pursuant to CPLR §3212, on the ground that the claimed injuries of plaintiff, KESHA BANDY, do not meet the no-fault threshold requirements of a "serious injury" as defined in Insurance Law §5102(d). Plaintiff, opposes the motion which is determined as follows:

Plaintiff seeks to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred on March 22, 2006, at approximately 8:45 P.M. in the Eastbound lane of the Southern State Parkway in Nassau County, New York. The complaint alleges that on said date, the motor vehicle owned and operated by defendant, SHALICIA REESE, came into contact with the motor vehicle owned by the defendant, DEBORAH CURRAN-HELD and operated by defendant, KEVIN J. MECHELLA, which also came into contact with the motor vehicle owned and operated by plaintiff, KESHA BANDY. It is alleged that as a result of said accident, KESHA BANDY was injured, which was caused solely by the negligence of the defendants in the ownership, maintenance and operation of their vehicles. In her bill of particulars, plaintiff alleged that she sustained the following permanent personal injuries:

- a) MRI evidence of posterior disc herniation L5/S1 with ventral thecal sac impression;
- b) Loss in range of motion to lumbar spine;
- c) Pain, numbness, tingling and weakness to lower extremities;
- d) Lumbar radiculopathy;
- e) Difficulty sleeping due to pain and discomfort.

*Plaintiffs Bill of Particulars, Exhibit "C" to the moving papers, ¶4.*

As the proponent of the motion for summary judgment, defendants have the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury causally related to the motor vehicle accident (*Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 [C.A.2003]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. If the initial burden is met, the

burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law § 5102(d) (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197[ C.A.2002]; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100, 779 NYS2d 7 [1<sup>st</sup> Dept. 2004]).

In support of the motion and cross-motion, defendants have submitted the affirmed medical report of Harold A. Kozinn, M.D., a Diplomate of the Board of Orthopedic Surgeons, and of C.M. Sharma, M.D., a Diplomate of the American Board of Psychiatry and Neurology.

Dr. Kozinn's report, dated July 5, 2007, is based upon an interview of plaintiff and an orthopedic examination, found normal range of motion, flexion and rotation in the cervical spine, shoulders and lumbosacral spine, and negative bilateral leg raising test, Lasegue test and Fabere Patrick Test. Dr. Kozinn concluded that plaintiff has a resolved neck, shoulder and lumbosacral sprain and that she had no disability and no need for further treatment.

Dr. Sharma's report, dated July 5, 2007, based upon an interview of plaintiff and a neurological examination, found a fully normal patient, with no neurological limitations too usual work and activities. Dr. Sharma concluded that there will be no permanent neurological problems of a causally related nature.

Counsel for defendants' asserts that plaintiff did not sustain a "serious injury" and did not incur economic loss of greater than \$50,000.00 that the motion for summary

judgment dismissing the complaint should be granted.

Defendants have made their initial burden of establishing that plaintiff has not sustained a serious injury within the ambit of Insurance Law § 5102(d).

In opposition to the motion, counsel for plaintiff states that her deposition testimony reflects that she underwent an exhaustive amount of treatment following the accident, including treatment by her primary care physician, Dr. Vadigharri, the day after the accident, treatment by Stephen Geiger, M. D. A physician certified in physical and rehabilitation medicine, physical therapy at Physical Solutions for sixteen (16) visits, and additional chiropractic treatment at Choice Chiropractic Care, as well as with Massapequa Spine and Sports Rehabilitation. Counsel relates that Ms. BANDY's no-fault benefits were denied, but she later learned that she was permitted to see a chiropractor. Counsel states that on September 1, 2006, plaintiff had an MRI of the lumbar spine that revealed a herniated disc at the L5-S1 level, and that she underwent a surgical procedure that involved an epidural injection to her lumbar spine on September 21, 2006. Thereafter, she was seen by Frank Telang, M.D. for a neurological examination, who found her back spasms "quite impressive".

Additionally, in opposition to the motion, plaintiff has submitted the affirmed medical report of Marc Chernoff, M.D., who specializes in orthopedic spinal surgery, the after affirmed report of Stephen Geiger, M.D. who administered an epidural steroid injection to plaintiff on September 21, 2006, the after affirmed report of Frank Telang, M.D., a neurologist who administered EMG testing on plaintiff on November 6, 2006, and the sworn to report of Dr. Michael Gramse, a chiropractor, who evaluated plaintiff on September 11, 2006.

Dr. Chernoff diagnosed plaintiff with a Central L5-S1 herniated disc. He stated that, although treated with a prolonged course of physical therapy and subsequent chiropractic treatment, as well as epidural injections to the lumbar spine, the patient continue to have back pain and a positive MRI for a herniated disc. He opines that the patient's pain is directly and causally related to the motor vehicle accident on March 22, 2006.

Dr. Geiger states, that after exhausting all other remedies, the epidural steroid injection was the procedure medically indicated for further diagnostic and therapeutic value, however he does not relate the procedure to the subject motor vehicle accident. Dr. Telang found that the needle EMG revealed acute denervation changes in the left S1 muscles. Dr. Gramse's report, dated December 8, 2007, based upon an interview and examination of the plaintiff and a review of her medical records, concludes that plaintiff has sustained significant injuries to her spine, resulting in mid back pain with painful mid back movements and low back pain with painful low back movements, and radiation to the lower extremities as a direct result of the trauma from the subject accident. He states that the prognosis for a complete recovery is poor and that these areas will be permanently affected causing restriction, immobility, pain and future degenerative and arthritic changes in the spinal discs and joints. He concludes that plaintiff's injuries have altered her ability to function as she did prior to the accident and have resulted in limitations in work and normal day to day activities, symptoms that are casually related to the accident and permanent.

### The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact

(see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2<sup>nd</sup> Dept. 2001]. Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2<sup>nd</sup> Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2<sup>nd</sup> Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2<sup>nd</sup> Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party’s pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2<sup>nd</sup> Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The Court finds that the differences of opinion among the medical experts as to the nature, cause and extent of plaintiff’s injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2<sup>nd</sup> Dept. 1999). Based on the foregoing, it is hereby

**ORDERED**, that defendants’ motion for summary judgment is denied

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 4, 2008

**ENTERED**  
WILLIAM L. LAMARCA, J.S.C.

APR 10 2008

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