

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

NICOLE MOOERS,

TRIAL/IAS PART 8

INDEX NO. 12883/08

Plaintiff(s),

MOTION SEQUENCE
NO. 1 & 2

- against -

MICHAEL J. PIACQUADIO,

MOTION SUBMISSION
DATE: August 5, 2009

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	X
Reply Affirmation	XX
Affirmation in Opposition	X

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR §3212 and §3211(a)(7), granting summary judgment dismissing the complaint of the plaintiff Nicole Mooers, on the grounds that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of §5102(d) of New York State Insurance Law and the cross motion by the plaintiff for an Order pursuant to CPLR §3212 granting summary judgment on liability to plaintiff Nicole Mooers on grounds that defendant Piacquadio caused a rear-end collision with plaintiff's vehicle, are both determined as hereinafter provided:

This personal injury action arises out of a rear-end motor vehicle accident that occurred on Friday 11, 2007 at approximately 11:45 am on Route 454 at or near the intersection of Route 347 in Islip, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"6. As a result of the subject accident, plaintiff Nicole Mooers suffered serious injuries, including C5/6 posterior disc bulge indenting the CSF space, bilateral shoulder impingement, sprains to the left sterno clavicular joint, disc herniation at L4/5 and associated injuries to ligaments, muscles, tendons and blood vessels. All of these injuries suffered by plaintiff Nicole Mooers are permanent in nature and are a result of the subject accident. Plaintiff reserves the right to supplement and amend this response during the ongoing

course of discovery.

7. See response 6 herein.

8. Plaintiff Nicole Mooers suffered "serious injury" as defined by §5102 of the Insurance law. See ¶6 hereinabove. Plaintiff suffered significant limitation of use of a body function or system and/or an impairment of a non-permanent nature which prevented her from performing all of the material acts which constituted her usual and customary daily activities for a period not less than 90 days during the 180 days immediately following the injuries she sustained in the subject accident."

The plaintiff's Supplemental Bill of Particulars sets forth:

"6. As a result of the subject accident, plaintiff Nicole Mooers suffered serious injuries, including C5/6 posterior disc bulge indenting the CSF space, bilateral shoulder impingement, fracture of the distal clavicle, sprains to the left sterno clavicular joint, posterior disc herniations at L4/5 with ventral thecal sac deformity, posterior disc bulge at L5/S1, right shoulder rotator cuff tendinitis, proximal bicep tenosynovitis with fluid noted around the proximal bicep tendon and associated injuries to ligaments, muscles, tendons and blood vessels. All of these injuries suffered by plaintiff Nicole Mooers are permanent in nature, including marked limitation in motion, and are a result of the subject accident. Plaintiff reserves the right to supplement and amend this response until the time of trial."

The defendant, amongst other things, submits an affirmed letter report dated May 16, 2007 of Acupuncture and Chiropractic Alternative PC by Janice C. Salayka DC of a chiropractic examination performed on May 16, 2007; an affirmed letter report dated May 31, 2007 of Ravi Tikoo, MD, a neurologist of a May 31, 2007 neurological examination of the plaintiff; an affirmed letter report dated February 23, 2009 of Leon Sultan, MD an orthopedist of an orthopedic examination of the plaintiff performed on February 23, 2009 and four affirmed letter reports of Scott S. Cayne, MD a radiologist of a respective review of an MRI of the plaintiff's Cervical Spine performed on February 21, 2007; an MRI of the plaintiff's Lumbosacral Spine also performed on February 21, 2007; an MRI of the plaintiff's left shoulder performed on February 26, 2007 and an MRI of the plaintiff's right shoulder performed on March 2, 2007.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"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. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). 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 of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), 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 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) '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."

The Court initially observes that the defendant submits an affirmed letter report from a chiropractor Janice C. Salayka. Pursuant to CPLR §2106 a chiropractor is not authorized to affirm a submission (also see, *Doumanis v Conzo*, 265 AD2d 296, 696 NYS2d 201 (Second Dept., 1999). In light of the fact that Dr. Salayka's letter is not in admissible form, same has not been considered herein.

In pertinent part, the report of Dr. Tikos provides:

"Review of medical Records

A medical note dated 4/4/07 by Dr. Scarpinato is reviewed. A medical note dated 2/19/07 by Dr. Haddad is reviewed. A peer review report dated 3/15/07 by Dr. Goldstein is reviewed. A medical note dated 2/13/07 from Eastern Island Medical Care PC is reviewed. A pelvis MRI report dated 3/5/07 by Dr. Mayerfield is reviewed. A cervical spine MRI report dated 2/22/07 by Dr. Mayerfield is reviewed. A lumbar spine MRI report dated 2/22/07 by Dr. Mayerfield is reviewed. A brain MRI report dated 3/1/07 by Dr. Mayerfield is reviewed. A left shoulder MRI report dated 3/1/07 by Dr. Mayerfield is reviewed. A right shoulder MRI report dated 3/1/07 by Dr. Mayerfield is reviewed. An x-ray report of the cervical spine dated 2/11/07 by Dr. Klayman is reviewed. An x-ray report of the left clavicle dated 3/13/07 by Dr. Gray is reviewed. Physical therapy notes are reviewed. Chiropractic progress notes

dated 2/23/07 through 4/18/07 are reviewed. Physical therapy notes dated 2/19/07 through 4/4/07 are reviewed. Physical therapy evaluation dated 2/19/07 from Long Island Integrated Medical PC is reviewed. Re-evaluation report dated 2/21/07, signature illegible is reviewed.

Physical Examination

Ms. Nicole Mooers is a 27-year-old right-handed woman, well nourished, well developed, in no acute distress, who appears her stated age. Examination of the head was normocephalic and atraumatic.

Cognitive exam revealed the claimant to be alert and oriented x3. Speech, language and attention were all intact.

Cranial nerve examination revealed that the visual fields were full. Pupils were equally round and reactive to light. The extra-ocular movements were intact. There was no facial asymmetry or sensory loss. Hearing was intact, the tongue was midline, and the palate moved symmetrically. SCM strength was intact.

Deep tendon reflexes were 1-2+ throughout and bilaterally symmetrical.

Motor examination revealed normal bulk, tone and strength throughout.

No atrophy, fasciculations, or adventitious movements were noted.

Sensory examination was intact to light touch in all extremities.

Coordination exam revealed no odysmetria, ataxia or nystagamus.

The claimant's gait was normal-based and she performed heel, toe, and tandem walking normally.

There was mild tenderness of the cervical and lumbar spine. No associated spasm was noted. Straight leg raising was possible up to 90 degrees bilaterally in the sitting position (normal=90).

Diagnosis

Based upon the claimant's history, and current exam, it is my opinion, with a reasonable degree of medical certainty, that Ms. Nicole Mooers has the following diagnoses: (1) Subjective complaints of headaches, (2) Resolved cervical strain, (3) Resolved lumbosacral strain.

Need for Treatment/Testing

Based on today's evaluation there were no objective findings to substantiate the claimant's subjective complaints. It is my opinion there is no need for neurological treatment.

Specific Questions

From a neurological standpoint there is no need for diagnostic testing, durable medical equipment, massage therapy, physical therapy, household help or special transportation/ambulatory services.

Disability

There is currently no neurologic disability due to the accident in question. The claimant is able to function in her pre-accident capacity and carry out her day-to-day activities without restriction. She is able to work."

Dr. Sultan's report of orthopedic examination sets forth:

"PHYSICAL EXAMINATION: She is 29 years of age, standing 5'6" in height, her, her stated weight is 175 pounds and she is right-hand dominant. She has lactose intolerance and she takes a muscle relaxant of Advil as needed.

CERVICAL SPINE EXAMINATION: The head is normally centered on the shoulders, the shoulders are level. The cervical curvature is maintained. I detect no active paracervical muscle spasm. There are no trigger points on palpation over the right and left trapezius musculature. Range of motion testing of the cervical spine has been obtained with accurate visual measurements. Head and neck extension is resisted at neutral (normal 25-35°), flexion is to 40-45° (normal 40-50°), head and neck rotation to the right is to 50° and left rotation is resisted at neutral (normal 45-60°). Head and neck tilting to the right is to 25° (Normal 20-30°) and tilting to the left is again voluntarily resisted. Biceps and triceps reflexes are symmetrically dull. Sensory testing of both upper extremities is intact. Grip strength is firm on both sides, pinch mechanism is firm bilaterally. The right upper arm girth measures 11-1/4" circumference compared to 11" circumference on the left side. The right forearm measures 9-1/4" circumference compared to 9" circumference on the left side.

LEFT SHOULDER EXAMINATION: Inspection of the left shoulder reveals no localizing swelling, deformity or discoloration. There are no complaints on palpation over the long head of the biceps tendon or the acromioclavicular joint, nor are there any complaints on palpation over the shaft of the left clavicle leading to the sternoclavicular articulation. Range of motion testing of the left shoulder has been obtained with accurate visual measurements. Left shoulder abduction and forward elevation is to 175-180° (normal 170-180°), internal rotation is complete and external rotation is to 45° (normal 40-50°). Adduction is to 45° (normal 45-50°) and posterior extension is to 45° (normal 40-45°). At the end point of motion testing she complains of a pulling sensation. The left shoulder impingement test is grossly negative as is the Hawkin's test and the drop arm test.

RIGHT SHOULDER EXAMINATION: Inspection of the right shoulder reveals no localizing swelling, deformity or discoloration. There are no complaints on palpation over the right shoulder soft tissue or bony structures. She demonstrates to me how she can easily and voluntarily sublux her right shoulder anteriorly and posteriorly and in the subluxation position, right shoulder movements cannot be adequately tested. When she voluntarily relocates her shoulders in proper position, passive and active assisted range of motion with visual testing is easily carried out. Abduction and forward elevation is to 175-180° (normal 170-180°) internal rotation is complete and external rotation is to 45° (normal 40-50°). Adduction is to 45-50° (normal 45-50°) and posterior extension is to 40° (normal 40-45°). The right shoulder impingement test is grossly negative as is the Hawkin's test and the drop arm test. However, I note a mildly positive Apprehension test. There are no complaints on palpation over the shaft of the right clavicle or over the right sternoclavicular articulation.

THORACOLUMBAR EXAMINATION: In the standing position, the spinal

column is normally aligned, the pelvis is not tilted, lordotic curvature is maintained. I detect no active parathoracic or paralumbar muscle spasm. Sacroiliac joints are non-tender to palpation. Heel and toe standing is unimpaired and the Trendelenburg test is negative on both sides. Observed ambulating without external support, gait patten is steady without any clinical signs of antalgia. Range of motion testing of the thoracolumbar spine has been obtained with accurate visual measurements. Forward flexion is to 75-80° (normal 60-90°), extension is to 15° (normal 10-15°), trunk rotation to the right and left is to 60-65° (normal 45-70°), trunk tilting to the right and left is to 20° (normal 20-25°). In the supine position, the straight leg raising test is negative bilaterally. Sensory testing of both lower extremities is intact. Big toe extension is strong bilaterally. The Patrick test is negative bilaterally. Knee jerk and ankle reflexes are symmetrically present. Plantar reflexes are downgoing. Both distal thighs measure 16-1/2" circumference, both calves measure 14-1/2" circumference.

DISCUSSION: This woman claims multiple injuries as described above following the occurrence of 2/11/07. Today's comprehensive orthopedic and orthopedic neurological examination in regard to her cervical spine, thoracolumbar spine and shoulders is unremarkable except for her voluntary resistance to motion testing of her cervical spine as noted above, in addition to right shoulder voluntary subluxation as noted above. That condition is commonly known as multidirectional instability most commonly due to an underlying development variation in anatomy unrelated to the occurrence of 2/11/07. In regard to her cervical spine and thoracolumbar spine, there is no clinical correlation between today's spinal examination and the above-described MRI readings. There is no objective orthopedic impairment to the cervical spine, thoracolumbar spine and shoulders."

The respective letter reports of Dr. Coyne set forth:

"Cervical SPine MRI February 21, 2007 @ Deer Park MRI (Labeled, 'Nicole Mooers') Multiple T1 and T2 weighted axial and sagittal images demonstrate no evidence of fracture, dislocation or other trauma. Very mild diffuse degenerative disc changes are present with early elements of disc dehydration and mild annular disc bulging. There is no evidence of focal disc herniation, central spinal stenosis or spinal cord displacement at any level. The neural foramina are patent. The diameter of the spinal canal is normal. The spinal cord is normal in signal and diameter. Bone marrow signal is normal. Lordosis is normal and well preserved.

IMPRESSION

Degenerative disc changes are certainly chronic and longstanding, pre-existent and causally unrelated to the accident 2 weeks earlier on February 11, 2007. The degree of these degenerative changes is typical and expected for the age of the patient. This MRI examination demonstrates no evidence of any osseous or soft tissue abnormality or other trauma causally related to the accident of February 11, 2007."

"Lumbosacral Spine MRI February 21, 2007 @ Deer Park MRI (Labeled,

'Nicole Mooers') Multiple T1 and T2 weighted images of the lumbosacral spine in the axial and sagittal planed demonstrate no fracture, dislocation or other osseous trauma. Degenerative disc changes focally involve the L4-5 and L5-S1 levels where there is dehydration of disc material and annular disc bulging. There is a shallow superimposed central L4-5 disc protrusion which does not displace the cauda equina or compromise the spinal canal or neural foramina. There is no evidence of focal disc extrusion, central spinal stenosis or displacement of the cauda equina at any level. The congenital diameter of the spinal canal is normal. The neural foramina are patent. The visualized nerve roots are normal. The diameter and signal of the cauda equina are normal. Bone marrow signal is normal. There is a loevoconvex scoliosis which may be chronic in nature.

IMPRESSION

There are degenerative disc changes at L4-5 and L5-S1, which are certainly chronic and longstanding, preexistent and casually unrelated to the accident 2 weeks earlier on February 11, 2007. The degree of degenerative change is typical and expected for patients in this age group. Disc protrusion most frequently result from the degenerative disc process which is a very probable cause of the shallow L4-5 disc protrusion, especially given the more advanced degenerative disc changes at ths level. Clinical history and correlation are recommended to determine if there is any additional causal relationship of this protrusion to the February 11, 2007 accident."

"Left Shoulder MRI February 26, 2007 @ Deer Park MRI (Labeled, "Nicole Mooers') Multiple T1 and T2 weighted images of the left shoulder were obtained in the sagittal, coronal and axial planes. There is no evidence of fracture, dislocation or other acute bone trauma. The acromioclavicular joint and the glenohumeral joint are normal. The muscles of the rotator cuff are normal and demonstrate no evidence of tear or other abnormality. There is no fluid in the subacromial or sugdeltoid bursa. The glenoid cartilaginous labra are structurally intact. The biceps tendon is normal in position and signal. Bone marrow signal is normal. There is no joint effusion.

IMPRESSION

The left shoulder MRI is normal and demonstrates no evidence of any osseous or soft tissue abnormality or other trauma causally related to the accident of February 11, 2007"

Right Shoulder MRI March 27, 2007 @ Deer Park MRI (Labeled, 'Nicole Mooers') Multiple T1 and T2 weighted images of the right shoulder were obtained in the sagittal, coronal and axial planes. No fracture, dislocation or other acute bone trauma is identified. The acromiocavicular and the glenohumeral joints are normal. The muscles of the rotator cuff are normal and demonstrate no evidence of tear or other abnormality. The glenoid cartilaginous labra are structurally intact. There is no joint effusion or para-articular fluid collection, and there is no fluid in the sbacromial or subdeltoid bursa. The biceps tendon is normal in position and signal. Bone marrow signal is normal.

IMPRESSION

The right shoulder MRI is normal and demonstrates no evidence of any osseous or soft tissue abnormality or any trauma causally related to the accident 3 weeks earlier on February 11, 2007."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center**, 64 NY2d 851, 853; **Pagano v. Kingsbury**, supra at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see **Gaddy v. Eyler**, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec**, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando**, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the defendant's requested relief, the plaintiff, amongst other things, submit an affirmed letter report dated May 13, 2009 of Massapequa Pain Management & Rehabilitation by Jeff Silber, MD; two affirmations of Samuel Mayerfield, MD, a radiologist of a review of an MRI of the plaintiff's Cervical Spine; an MRI of the plaintiff's lumbar spine; an MRI of the plaintiff's left shoulder; certain records of Huntington Hospital; certain records of Eastern Island Medical Care PC; certain affirmed records of Samir Haddad, MD; affirmed medical records of Eugene Faillace, MD; affirmed medical records of Eric Putterman, MD; affirmed medical records of Vadana certain records of Plainview Physical Therapy and certain medical records of Massapequa Pain Management.

In pertinent part, the affirmation of Dr. Mayerfield sets forth:

- "1. MRI Of Left Shoulder
2. On February 26, 2007, I read the films of the Magnetic Resonance Images (MRIs) of the left shoulder of Nicole Mooers conducted at Stand-Up MRI of Deer Park, PC on February 26, 2007.
3. Said MRI study consisted of an examination of the left shoulder and was performed on multiple planes and multiple sequences were obtained.
4. Examination of the left shoulder of Nicole Mooers on this MRI reveals a partially visualized healed fracture of the distal clavicle.
5. Based on the foregoing, it is my opinion with a reasonable degree of medical certainty that said MRI study of the left shoulder conducted on February 26, 2007 reveals a questioned healed fracture of the distal clavicle of Nicole Mooers."

Based upon the foregoing, there is an issue of fact as to whether the plaintiff suffered a serious injury pursuant to the Insurance Law §5102 in the accident in issue. As such, the defendant's application for an Order pursuant to CPLR §3212 and §3211(a)(7), granting summary judgment dismissing the complaint of the plaintiff Nicole Mooers, on the grounds that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of §5102(d) of New York State Insurance Law, is **denied**.

In examining the issue of a rear end collision, the Court in **Leal v Wolff**, 224 AD2d 392, 638 NYS2d 110 (Second Dept., 1996) stated:

"A rear-end collision with a stopped automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred (see, *Gambino v City of New York*, 205 AD2d 583, 613 NYS2d 417; *Staarace v Inner Circle Qonexions*, 198 AD2d 493, 604 NYS2d 179; *Edney v Metropolitan Suburban Bus Auth.*, 178 AD2d 398, 577 NYS2d 102; *Benyarko v Avis Rent A Car Sys.*, 162 AD2d 572, 573, 556 NYS2d 761). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision (see, *Pfaffenbach v White Plains Express Corp.*, 17 NY2d 132, 135, 269 NYS2d 115, 216 NE2d 324) because he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an avoidable skidding on a wet pavement, or some other reasonable cause (see, *Carter v Castle Elec. Contr. Co.*, 26 AD2d 83, 85, 271 NYS2d 51). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (See, *Starace v Inner Circle Qonezions*, *supra* at 493, 604 NYS2d 179; *Young v City of New York*, 113 AD2d 833, 834, 493 NYS2d 585)."

Leal v Wolf, supra at 111-112

In describing the accident, the plaintiff stated at her January 13, 2009 deposition:

- "Q. Did there come a point in time when you stopped at that intersection?
A. Yes.
Q. Was it a red light?
A. Yes.
Q. Were there any other vehicles stopped ahead of you at this red light?
A. No.
Q. This accident involved an impact to the rear of your vehicle?
A. Yes.
Q. Was it by another vehicle that impacted your vehicle as opposed to a truck or whatever?
A. Meaning was -- like a regular car or a sports utility vehicle?
Q. Car, SUV, however you can describe what type of vehicle it was.
A. It was an SUV.
Q. Did you ever see that SUV at any time before the accident?
A. A second before I was hit.
Q. You were the first car in line at the red light?
A. Yes, I was.
Q. Was there more than one light or just one light at that intersection?
A. I think there's only one light at that intersection.
Q. Where was the light physically located with respect to where you were stopped? In other words, was it directly up above you, to the left above you, to the right, wherever?
A. It's in the front above you.
Q. Would you say it was directly above you or slightly to the left or you don't know, whatever it was?
A. I don't recall.

Q. Before the accident happened, when you felt an impact, did you start to move forward at all, or were you still at that stop light?

A. I was still at that stop light.

Q. When you say you were stopped, could you tell me for how long you were stopped at the red light altogether before you felt an impact?

A. About a minute.

Q. During that one minute or so that you were stopped, what were you generally doing in your vehicle, looking ahead, talking to your child, something else?

A. I was looking ahead.

Q. The Hyundai, did it have a radio in it?

A. Yes.

Q. Was anything playing on the radio?

A. I don't remember.

Q. Did you have a cell phone with you?

A. Yes.

Q. Were you using it at all just before the accident?

A. No.

Q. What was it your intention to do had there not been an accident, continue through the intersection, make a right, left, something else?

A. You can only go straight.

Q. While you were stopped for that one minute or so, were there any other vehicles stopped behind you at all in your lane - -

A. No.

Q. - - which was the right lane?
Were there any vehicles stopped to your left in the left lane next to you?

A. No.

Q. You mentioned you saw the other vehicle like a second before the impact. How was it that you were able to see it, the rearview mirror, side-view mirror, turned around, something else?

A. You can only go straight.

Q. While you were stopped for that one minute or so, were there any other vehicles stopped behind you at all in your lane - -

A. No.

Q. - - which was the right lane?
Were there any vehicles stopped to your left in the left lane next to you?

A. No.

Q. You mentioned you saw the other vehicle like a second before the impact. How was it that you were able to see, it the rearview mirror, side-view mirror, turned around, something else?

A. Rearview mirror.

Q. What did you see just before the impact?

A. I think I saw his dog.

Q. That was the first thing you saw, a dog as opposed to anything else?

A. Yeah.

Q. When you say you saw his dog, where was the dog located, as far as you could tell?

A. If - -if I can remember correctly, I thought the dog was in the passenger's seat. That's the best I can remember.

Q. Was that seen through your rearview mirror or side-view mirror?

A. It would be my rearview mirror.
Q. When you saw the dog, how far away would you say it was when you first saw it?
A. When I first saw the dog?
Q. Right.
A. It was a second. I saw the car and I held onto the steering wheel.
Q. Do you know how far the car was behind you at the moment you saw it for the first time?
A. No.
Q. It was moving when you saw it?
A. Yes.
Q. At any time before you felt an impact, did you hear the sound of a horn at all?
A. No.
Q. Any skidding or screeching tires?
A. No.
Q. Did you see the vehicle drive directly into your vehicle or something else or not see it?
A. Did I see him drive, no. I saw him probably a second before.
Q. What did you do when you saw him that one second? Did you brace yourself, did you try to move forward, anything at all?
A. I held onto the steering wheel.
Q. On 454 where you were stopped, were there any stop lines ahead of you or a crosswalk at all, that you recall?
A. There's no crosswalk that I could remember.
Q. Also, before the accident happened, was there any damage at all on your car, any dents or anything like that?
A. I -- I don't remember. It wasn't a brand-new car, so it might have had a ding.
Q. Then did you feel an impact to the rear of your vehicle?
A. Yes.
Q. When you were stopped there, was your foot on the brake - -
A. Yes.
Q. When you felt the impact, can you describe that as a light, medium, heavy or any other way you could describe?
A. Heavy.
Q. Were you wearing a seat belt?
A. Yes.
Q. Is a seat belt that had the lap and shoulder harness?
A. Yes.
Q. One piece?
A. Yes.
Q. As a result of that impact - - you were at a stop - - was your car caused to move forward at all?
A. Yes."

see deposition transcript of Nicole Mooers at pgs 13-19

Q. Did there come a time where your vehicle came into contact with the plaintiff's vehicle?
A. Yes.
Q. When was that? Was that after you saw her accelerating or something

else?

A. It was after she accelerated.

Q. How much time passes from when you saw her accelerating in front of you to the impact?

A. I don't know. I'm uncertain.

Q. Was it more than ten seconds, less than ten seconds?

A. It was less than ten seconds. it would have to be.

Q. Within that less than ten seconds time, did you ever see her brake lights come on?

A. No.

Q. Could you tell me the rate of her speed within that less than ten seconds?

A. I wouldn't know.

Q. Could you tell me the rate of your speed within that less than ten seconds time?

A. I couldn't tell you. I was looking forward. I couldn't tell what was on my speedometer.

Q. Would you be able to estimate for me how fast you were proceeding?

A. I couldn't estimate. Maybe a mile, two. I don't know. I mean I literally just moved.

Q. Was your foot on the accelerator at that time?

Q. At that time you -- the less than ten seconds from her accelerating to the impact happening.

A. My foot was on the gas, yes.

Q. Within that less than ten seconds time of seeing her accelerate to the impact, did you see her vehicle slow down?

A. Yes.

Q. Do you know the reason why her vehicle slowed down?

A. I'm assuming that she didn't -- maybe she was accelerating too fast and she was afraid of hitting the car in front of her.

Q. Was that the car that you said had already gone through --

A. Uh-huh.

Q. The red car that you had said already went through 347?

A. Like I said, when I stated that comment, I was more concerned about the car in front of me as opposed to what's in front of her.

Q. Okay.

When you observed her car slowing down, it was within that less than ten-second period of time?

A. Yeah. Un-huh.

Q. Prior to the impact between your vehicle and the plaintiff's vehicle, were you eating or drinking anything in the car --

A. No.

Q. Were you speaking on a cell phone at that time?

A. No.

Q. Did you have any passengers in your car?

A. No human. A dog, yes.

Q. He counts as a passenger.

A. Well.

Q. What kind of dog was it?

A. A rottweiler.

Q. What was his name?

A. Boots.
Q. Where was he - -
A. She was
Q. Or she. I'm sorry.
Where was she placed in the car at the time of this accident?
A. Passenger's seat."

see deposition transcript of Michael Piacquadio at pgs 21-24

Based upon the foregoing, the defendant has not rebutted the inference of negligence in this rear end collision accident (see, **Leal v Wolff**, supra). As such, the plaintiff's application for an Order pursuant to CPLR §3212 granting summary judgment on liability to plaintiff Nicole Mooers on grounds that defendant Piacquadio caused a rear-end collision with plaintiff's vehicle, is **granted**.

SO ORDERED.

DATED:

10/27/2009

Rys. W. W. W.
.....
J.S.C.

ENTERED

OCT 29 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE