Amended Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_______________________________________x

SONIA OTERO and ALBERTO OTERO,

Plaintiff(s),

Index No. 8312/06

-against-

Motion Seq. No.: 001
Motion Submitted: 9/5/07

JOHN DOE and MTA LONG ISLAND BUS,

Defendant(s).

_______________________________________x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits..........................X
Affirmation in Opposition...X
Reply Affirmation...X

Motion by defendants, John Doe and MTA Long Island Bus, for an Order of this Court, awarding them summary judgment and dismissing the complaint on the grounds that plaintiff, Sonia Otero, has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is determined as follows:

This action arises out of an accident that occurred on May 18, 2005 at approximately 8:30 a.m. at the intersection of Parsons Boulevard and Archer Avenue in Queens, New York. Plaintiff, Sonia Otero was a 38-year old passenger on a bus owned and operated by defendants. At the time of her accident, she was exiting the bus from

the door closest to the driver. Her right hand was on the rail and her left hand was holding her purse. As she stepped down the two exit steps, and placed her right foot outside the bus, her left ankle became trapped in the door of the N-4 bus. Sonia fell to the ground and was dragged by the bus approximately 12 to 18 feet before it stopped. As a result of the impact, Sonia was taken by ambulance to Mary Immaculate Hospital in Jamaica, Queens. She presented to the hospital with complaints of neck and back pain as well as pain on her left side. At the hospital, it was recommended that she take Ibuprofen every six hours for her pain and to follow up with a physician. Sonia was discharged the same day.

While her medical reports state otherwise, Sonia testified at her deposition and alleges in her bill of particulars that she was not employed at the time of the accident (*Otero Tr.*, pp. 8-9; *Bill of Particulars*, ¶13). She testified at deposition that as a result of this accident, she has difficulty washing her hair, is unable to vacuum, mop, do laundry, shop for groceries, iron, take out the garbage and go bike riding with her daughter (*Otero Tr.*, pp. 102-103).

Plaintiff claims that as a result of the subject accident, she sustained, *inter alia*, posterior disc herniations at C3-C4 and C4-C5 with ventral CSF impression; C3-C4 ventral cord impression and central canal stenosis; C5-C6 and C6-C7 posterior subligamentous disc bulge; bilateral cervical radiculopathy; left sided S1 inflammatory neuritis; straightening of the cervical lordosis indicative of muscle spasm; straightening of the lumbar lordosis; chest contusions/discoloration; nasal contusion; internal

derangement of the nose, left knee and left ankle, dizziness and severe headaches (*Motion*, Ex. A, ¶9).

Plaintiff contends in her verified bill of particulars that the injuries she sustained as a result of this accident fall within the following categories of serious injury:

"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;" and,

"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" (Insurance Law 5102[d]) (*Motion*, Ex. A [Bill of Particulars] ¶19).

Plaintiff does not claim that her injuries fall under any other category of Insurance Law §5102(d). Thus, any other category of serious injury other than those alleged in plaintiff's complaint or bill of particulars, will not be considered by this Court herein (*Melino v. Lauster*, 195 AD2d 653, 656 [3rd Dept. 1993] *affd* 82 NY2d 828 [1993]).

In moving for summary judgment, defendants must make a prima facie showing that plaintiff did not sustain a "serious injury" with the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to

overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez*, 4 NY3d 566 [2005]; *see also Grossman v. Wright*, 268 AD2d 79, 84 [2nd Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, defendants 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 AD2d 268 [2nd Dept. 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems, 98 NY2d 345,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d at 353 [2002]). However, the sworn MRI and CT scan tests and reports also <u>must also be</u> paired with the doctor's observations during his physical

examination of the plaintiff (*see Toure v. Avis Rent A Car Systems,* supra). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (*see Gonzalez v. Vasquez,* 301 AD2d 438 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra,* that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez,* the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez,* 4 NY3d 566).

"Permanent loss of use of a body organ, member, function or system"

A person bringing a claim for damages for personal injuries under the "permanent loss of use of a body organ, member, function or system" category, as in this case, must prove that the permanent loss of use is a total loss of use (*Oberly v. Bangs Ambulance, Inc.,* 96 NY2d 295 [2001]).

"Permanent consequential limitation of use of a body organ or member"or

"Significant limitation of use of a body function or system"

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the

physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, supra). 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 plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*). A minor, mild or slight limitation is, however, insignificant within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright*, supra at 83).

"90/180 days"

To prevail under the "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," a plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]). Plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]). Unlike a claim of serious injury under "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" category, a gap or cessation in treatment

is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (*Gomes v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup. Ct. Bronx 2005]).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand.

In support of their motion, defendants submit, *inter alia*, plaintiff's verified bill of particulars; the affirmed report of Dr. Drew A. Stein, MD, who performed an independent medical examination of the plaintiff on April 4, 2007; and, the affirmed report of Dr. Naunihal Sachdev Singh, M.D., a neurologist, who performed an independent neurological examination of the plaintiff on April 4, 2007.

In her bill of particulars, Plaintiff states that as a result of the subject accident, she was confined to bed for three weeks following the accident and to her home for approximately more than two months following the accident (*Bill of Particulars*, ¶11). Plaintiff also states in her Verified Bill of Particulars that since the date of the subject incident, she has been unable to do housecleaning, vacuuming, sweeping, mopping, laundry and taking out the garbage. She has difficulty bending, reaching and sometimes bathing her daughter (*Id.*, ¶17).

Dr. Stein's medical report states, in pertinent part, as follows:

> TREATMENT RECEIVED: The claimant was initially treated with physical therapy and chiropractic care at a frequency of 3 treatments per week. She is presently finished treating. She is currently taking no medication.
>
> * * *

PHYSICAL EXAMINATION: ***

Cervical Spine:

Cervical spine fill range of motion forward flexion 45 degrees (45 normal), extension 45 degrees (45 normal), rotation to the right 80 degrees (80 normal), rotation to the left 80 degrees (80 normal), alignment normal, negative tenderness, negative masses, skin normal, strength 5/5, normal stability, negative Spurling's sign. Bilateral upper extremities neurovascularly intact.

Thoracic Spine:

There is no tenderness to palpation from T1-T12 paraspinal musculature. The thoracic curvature is normal with no paraspinal spasms palpated. No midline tenderness was noted.

Lumbar Spine:

Active and passive ranges of motion to flexion at 90 degrees (90 normal), extension 30 degrees (30 normal), right rotation 30 degrees (30 normal), left rotation 30 degrees (30 normal). ROM was inconsistent. Bilateral Straight Leg Raising was 90 degrees (90 normal). Bilateral lower extremities neurovascularly intact, 2+ pulses, sensation intact, strength 5/5, able to stand on heels and toes, unable to squat, pelvis level, negative trunk shift, negative straight leg raise bilaterally, negative Fabere test bilaterally, negative clonus, reflexes 2+, toes

downgoing, positive paraspinal tenderness bilaterally, negative paraspinal spasm, negative leg length discrepency, trunk rotation non-painful.

Upper extremity examination revealed:

Shoulder:

Normal inspection, normal skin. No tenderness or muscle spasms were noted. No instability was noted. There was no atrophy or muscle wasting noted in the upper extremities. Active range of motion is forward elevation 180 degrees (180 normal), abduction to 180 degrees (180 normal), external rotation is 60 degrees (65 normal), and internal rotation is to lower lumbar (MT), passive range of motion is forward elevation to 180 degrees (180 normal), abduction to 180 degrees (180 normal), external rotation to 90 degrees (90 normal), and internal rotation to 50 degrees (60 normal). Impingement Test was positive bilaterally. Apprehension test, Speed's test and O'Brien's test were negative bilaterally. Muscle strength was 5/5 throughout.

* * *

DIAGNOSIS:

Based on my physical examination and history as provided by the claimant, my impression is:

- Resolved cervical sprain/strain

- Resolved thoracic sprain/strain

- Resolved lumbar sprain/strain.

DISABILITY/WORK STATUS:

There is no orthopedic disability noted upon the physical examination performed today. The claimant is capable of working fully duty at her usual occupation and is able to perform pre-accident status level of living activities with no restrictions. The prognosis is good.

(*Motion*, Ex. D)

Similarly, Dr. Singh's independent neurological review dated April 4, 2007, also concludes, in pertinent part, as follows:

CERVICAL SPINE:

The claimant was not using a cervical collar and palpation of the cervical spine revealed no vertebral tenderness. There was no paravertebral muscle tenderness or spasm over the right or left side. There was no tenderness over the right or left trapezius muscles. Foraminal compression and Valsalva maneuver were negative.

The range of neck movements using the goniometer showed flexion at 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral flexion was 45 degrees (45 degrees normal) and right and left

lateral rotation was 80 degrees (80 degrees normal). The claimant complained of pain on neck movements.

THORACIC SPINE:

There was no tenderness over the thoracic spine or thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles.

LUMBAR SPINE:

The claimant was not using a lumbosacral support and palpation of the lumbar spine revealed no vertebral tenderness. There was no paraspinal muscle tenderness or spasm on the right and left side. There was no tenderness over the sciatic notch. Valsalva maneuver was negative.

The range of motion of the lumbar spine using the goniometer showed flexion at 90 degrees (90 degrees normal), extension was 30 degrees (30 degrees normal), right and left lateral flexion was 30 degrees (30 degrees normal), and right and left lateral rotation was 30 degrees (30 degrees normal). Supine straight leg-raising test was possible up to 90 degrees on both sides (90 degrees normal). Sitting straight leg-raising test was possible up to 90 degrees on both sides (90 degrees normal).

SHOULDER JOINTS:

There was no tenderness over the shoulder joints and the range of motion was full bilaterally. Flexion was 180 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 180 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal).

* * *

IMPRESSION AND DIAGNOSIS:

- Cervical spine sprain- resolved.

- Lumbar spine sprain - resolved.

The claimant has a normal neurological examination. She complained of diffuse pain in her neck and shoulders, however, she has no objective neurological findings.

DISABILITY:

There is no neurological disability based on my examination today and the claimant is not disabled from working or from activities of daily living.

(*Motion*, Ex. E).

Based on the foregoing, and based on defendants' remaining proof, including

plaintiff's verified bill of particulars, this Court finds that defendants have submitted ample proof in admissible form that the plaintiff, Sonia Otero, did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposition to defendants' motion, plaintiff submits, *inter alia*, the Mary Immaculate Hospital records; the sworn affidavit of Dr. Steven Rosenzweig, D.C., a chiropractor; the sworn affidavit of Dr. Robert Diamond, MD, a radiologist who supervised the taking of an MRI film of the cervical spine of Sonia Otero, on June 30, 2005; and plaintiff's own affidavit.

Insofar as Dr. Diamond's sworn MRI report of plaintiff's cervical spine is not accompanied by any of his observations during a physical examination of the plaintiff, said report does not constitute competent evidence. Accordingly, the aforesaid MRI report will not be considered by this Court on the instant motion (*Toure v. Avis Rent A Car Systems*, supra).

It is noted however that the findings of chiropractor Steven Rosenzweig contained in his *affidavit* does constitute admissible evidence in opposition to defendants' motion (CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441 [2nd Dept. 1999]; *Feintuch v. Grella*, 209 AD2d 377 [2nd Dept. 1994]). In his affidavit, Dr. Rosenzweig, states, in pertinent part, as follows:

3. On 6/2/05 [plaintiff] came under care in this office and received chiropractic treatment continuously until 6/27/06 at which time she was released having reached MMI. During her time under care, she was

worked up diagnostically and received treatment to the cervical, thoracic and lumbar spines.

* * *

10. On 7/13/07, I performed an examination of this patient, which demonstrates the following: Orthopedic and Neurological Examination: In the standing position there were limitations in the range of motion of the cervical lumbar spines. There was palpable paravertebral tenderness of the musculature in the cervical and lumbar spinal regions.

11. On the initial evaluation of 6/2/05 the cervical spine ranges of motion measured flexion to 50 degrees (normal at 60), extension to 60 degrees (normal at 60), right rotation to 70 degrees (normal at 80) and left rotation to 70 degrees (normal at 80), right lateral flexion to 35 degrees (normal at 40) and left lateral flexion to 25 degrees (normal at 40).

12. In today's examination [7/13/07], cervical spine ranges of motion measured flexion to 40 degrees (normal at 60), extension to 30 degrees (normal at 60), right rotation to 50 degrees (normal at 80) and left rotation to 50 degrees (normal at 80), right lateral flexion to 20 degrees (normal at 40) and left lateral flexion to 20 degrees (normal at 40).

13. On the initial evaluation of 6/2/05, the lumbar spine ranges of motion measured flexion to 60 degrees (normal at 90) extension to 20 degrees (normal at 30), right lateral flexion to 25 degrees (normal at 30) and left lateral flexion to 25 degrees (normal at 30).

14. In today's examination [7/13/07], lumbar ranges of motion measured flexion to 50 degrees (normal at 90), extension to 10 degrees (normal at 30), right lateral flexion to 20 degrees (normal at 30) and left lateral flexion to 20 degrees (normal at 30).

15. *Diagnosis: S/p MVA with cervical disc herniations, C3/4 and C4/5; chronic derangement of the cervical spine; chronic derangement of the lumbar spine; chronic derangement of the thoracic spine.*

16. In my opinion, as a specialist licensed in chiropractic, licensed in the State of New York, the above diagnoses are causally related to the accident of the above date.

17. The patient has sustained permanent injuries to the cervical, thoracic and lumbar spines. In my opinion, while additional therapy is required for palliation, in the long term additional therapy would not be helpful in a

curative manner as the patient's injuries are permanent.

18. Mrs. Otero has sustained permanent injuries to her neck, upper back and lower back and has permanent limitations in the use of these areas. These limitations are a natural and expectant consequence of the injuries in the accident on the above date.

(*Aff in Opp.*, Ex. E [Emphasis Supplied]).

In reaching his opinions, chiropractor Steven Rosenzweig reviewed x-rays of plaintiff's cervical and lumbar spines as well as of her left ankle dated June 11, 2005. Rosenzweig also reviewed plaintiff's MRI dated June 30, 2005 (*Aff in Opp.*, Ex. E, ¶5). Based on a review of these records and his examination of the plaintiff on July 13, 2007, Rosenzweig concluded that Sonia Otero has sustained "cervical disc herniations, C3/4 and C4/5; chronic derangement of the cervical spine; chronic derangement of the lumbar spine; chronic derangement of the thoracic spine" (*Rosenzweig Aff.*, ¶15).

It is well settled that the mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*Kearse v. New York City Tr. Auth.*, supra; *Diaz v. Turner*, supra; *Monette v. Keller*, 281 AD2d 523 [2nd Dept. 2001]). However, in this case, the Rosenzweig affidavit constitutes *objective* evidence of the extent of plaintiff's alleged physical limitations resulting from the disc

injury (*Kearse v. New York City Tr. Auth.*, supra). The chiropractor substantiates plaintiff's claim of a serious injury by ascribing a percentage to the degree of limitation and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Toure v. Avis*, supra; *see also Dufel v. Green*, 84 NY2d 795, 798 [1995]). Accordingly, this Court finds that plaintiff has raised a triable issue of fact with regards to the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."

Plaintiff failed to come forward with evidence that she sustained a total loss of use of a body organ, member, function or system. Thus, defendants' motion for summary judgment dismissal of plaintiff's complaint for failure to satisfy the serious injury threshold of that category of Insurance Law §5102(d) must be granted (*Oberly v. Bangs Ambulance, Inc.*, supra).

Similarly, plaintiff's evidence in opposing defendants' prima facie showing that she did not sustain a "serious injury" within the 90/180 day category of Insurance Law §5102(d) is also insufficient to establish a serious injury within the meaning of the statute. In opposition, plaintiff submits, *inter alia*, her own affidavit wherein she states that the injuries resultant from this accident "[c]ause [her] persistent intermittent pain and discomfort especially when performing activities such as washing [her] hair, showering or anything were [sic] [she has] to lean forward" and that as a result of her injuries, she can "[n]o longer vacuum, wash the bathroom, iron, take out the garbage,

mop, sweep and go for bicycle rides with [her] daughter" (*Otero Aff.*, ¶¶10-11). However, in the absence of any documentation in evidentiary form to prove that such curtailment of activities was at the direction of a doctor and thus medically determined (*cf. Nelson v. Distant*, 308 AD2d 338 [1st Dept. 2003]), plaintiff's self-serving affidavit is insufficient to establish a serious injury within the meaning of Insurance Law §5102(d) (*Glielmi v. Banner*, 254 AD2d 255 [2nd Dept. 1998]; *Rum v. Pam Transport, Inc.*, 250 AD2d 751 [2nd Dept. 1998]).

Plaintiff's own recitation of treatment has no evidentiary value. Subjective evidence or complaints of limitations unsupported by credible medical evidence or documentation is not enough to establish the threshold issue of serious injury (*Ackerson v. Mincy*, 162 AD2d 934 [3rd Dept. 1990]). Furthermore, there is no proof of continuous confinement, total loss of mobility or substantive disability which prevented the plaintiff from engaging in all customary and usual daily activities (*Hezekian v. Williams*, 81 AD2d 261 [2nd Dept. 1981]). Thus, the 90/180 day "serious injury" claim as to Sonia Otero must also be dismissed.

In sum, this Court finds that plaintiff's proof is insufficient to defeat defendants' motion for summary judgment dismissal of plaintiffs' claim of serious injury under the "permanent loss of use of a body organ, member, function or system" and "90/180 days" categories.

Nevertheless defendants' motion for summary judgment dismissal of plaintiff's complaint is herewith denied insofar as plaintiff has demonstrated the existence of a

triable issue of fact that a "serious injury" was sustained within the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." Accordingly, this matter will proceed to trial on this limited issue.

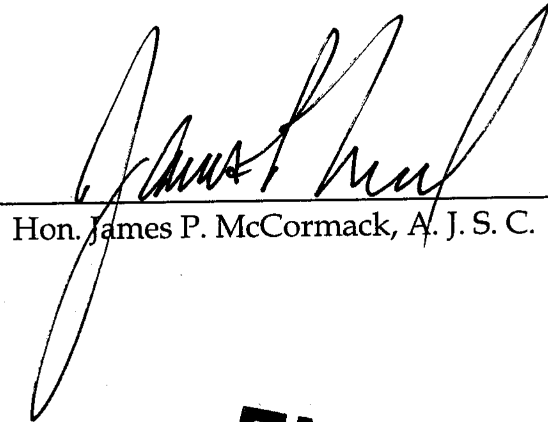
It is noted that if, at trial, a jury finds that the plaintiff sustained an injury within the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories of Insurance Law §5102(d), the no-fault threshold will be satisfied and the plaintiff will be permitted to recovery for *all* injuries incurred as a result of the subject accident (*O'Neill v. O'Neill*, 261 AD2d 459 [2nd Dept. 1999]; *Prieston v. Massaro*, 107 AD2d 742 [2nd Dept. 1985]; *Matula v. Clement*, 132 AD2d 739, 740 [3rd Dept. 1987] *lv denied* 70 NY2d 610 [1987]). It is for the trier of fact to determine, in the first place, whether a serious injury has been sustained under the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories of "serious injury" law. "[A] jury's finding that the plaintiff sustained an injury within *any* of the categories set forth in Insurance Law §5102(d) satisfies the no-fault threshold, thereby *eliminating that issue* from the case and permitting the plaintiff to recovery any damages proximately caused by the accident" (*Preston v. Young*, 239 AD2d 729 [3rd Dept. 1997] *citing Kelley v. Balasco*, 226 AD2d 880 [3rd Dept. 1996]; *Matula v. Clement*, supra).

At this juncture however, defendants' motion for summary judgment dismissal of plaintiff's complaint on the grounds that plaintiff has not satisfied the "serious

injury" threshold requirement of Insurance Law §5102(d) is denied.

This shall constitute the decision and order of this Court.

Dated: November 20, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

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