

**Cascio v Golden**

2007 NY Slip Op 32346(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0026734/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 4-3-07  
ADJ. DATE 6-14-07  
Mot. Seq. # 002 - MotD  
003 - XMD

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TIFFANY CASCIO and JEFFREY CASCIO,	:	DAY & ASSOCIATES, P.C.
	:	Attorneys for Plaintiffs
Plaintiffs,	:	11 Grace Avenue, Suite 408
	:	Great Neck, New York 11021
- against -	:	
	:	JAMES P. NUNEMAKER, JR. & ASSOCS.
RAYMOND O. GOLDEN, JR. and DEBORAH L.	:	Attorneys for Defendants
GOLDEN,	:	P.O. Box 9040
	:	Jericho, New York 11753-9040
Defendants.	:	
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Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 29; Answering Affidavits and supporting papers 30 - 33; Replying Affidavits and supporting papers 34 - 37; Other    ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that defendants' motion (002) for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted solely to the extent indicated below, otherwise denied; and it is further ordered

**ORDERED** that plaintiffs' cross motion (003) for an order granting plaintiffs' summary judgment on "serious injury" grounds, and for an order imposing costs and sanctions against defendants pursuant to Uniform Rules of Trials Courts (22 NYCRR) § 130-1.1, is denied as set forth below.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Tiffany Cascio as a result of a motor vehicle accident that occurred on Grand Boulevard at or near its intersection with Brandywine Drive, Town of Babylon, New York on February 7, 2002. The accident allegedly happened when the vehicle owned by defendant Raymond Golden and operated by defendant Deborah Golden impacted the vehicle operated by Mrs. Cascio. The Court's computerized records indicate that the note of issue in this action was filed on November 3, 2006. Defendants now move for summary judgment dismissing the complaint on the ground that Mrs. Cascio did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiffs cross move for summary judgment on the issue of serious injury, and for an order awarding them costs and sanctions pursuant to Uniform Rules of Trials Courts (22 NYCRR) § 130-1.1. Defendants oppose plaintiffs' cross motion, and each side has filed a reply.

CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). Plaintiffs made their cross motion on April 30, 2007, as indicated in their affidavit of service of the cross motion, which is nearly two months after March 3, 2007, the 120-day deadline following the filing of the note of issue thereby rendering the cross motion untimely (*see*, CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, plaintiffs did not seek leave to file a late motion for summary judgment in their notice of cross motion (*see e.g.*, ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for plaintiffs has provided no explanation or “good cause” for serving the cross motion nearly two months late, and thus, the Court has no discretion to entertain it on the merits (*see*, ***Brill v City of New York***, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Contrary to counsel’s characterization, a delay of nearly two months is not minimal (*compare*, ***Miranda v Devlin***, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see*, ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]). The Court notes, however, that this cross motion falls under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1<sup>st</sup> Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see*, CPLR 3212 [b]).

Turning to defendants’ motion, Insurance Law § 5102 (d) defines “serious injury” as “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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendants submit, inter alia, the pleadings; plaintiffs’ verified bill of particulars; Mrs. Cascio’s prenatal records from St. Catherine of Sienna Hospital; Mrs. Cascio’s Good Samaritan Hospital emergency department records, including x-ray reports of her wrists; Mrs. Cascio’s Huntington Hospital emergency room records including x-ray, pelvic, fetal and transvaginal sonograms; the unsworn report of Mrs. Cascio’s treating obstetrician, Dimitrios S. Mastrogiannis, M.D.; the unsworn report of Mrs. Cascio’s treating physician, Ralph Parisi, M.D.; the unaffirmed/unsworn report of defendants’ examining physician, Victor R. Klein, M.D.; the affirmed report of defendants’ examining neurologist, Richard A. Pearl, M.D.; and the affirmed report of defendants’ examining orthopedist, Jay Nathan, M.D. Initially, the Court notes that the report of Dr. Klein, which is neither affirmed nor sworn, is not in admissible form and has not been considered in this determination (*see, Pagano v Kingsbury, supra; DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454 [1<sup>st</sup> Dept 1991]).

Plaintiffs allege in their bill of particulars that Mrs. Cascio sustained, among other things, a torn and ruptured placenta requiring hospitalization for eight days; placental separation and pre-term labor; a surgical “C-section” performed with induced labor; severe scarring/disfigurement due to the surgical “C-section”; and bilateral wrist injuries. Plaintiffs also claim that Mrs. Cascio was confined to her bed for three months and to her house for six months. Additionally, plaintiffs claim that Mrs. Cascio sustained a “serious injury” in the categories of a significant disfigurement, a permanent consequential limitation, a significant limitation, and a non-permanent injury. Moreover, plaintiffs claims that Mrs. Cascio sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (d).

Mrs. Cascio’s St. Catherine of Sienna Hospital prenatal records dated January 10, 2002 show that she was diagnosed with uterine contractions and gestational diabetes approximately one month prior to the accident. The obstetrician who examined Mrs. Cascio at the hospital also reported that she had symptoms of tachycardia after eating, Braxton Hicks’ contractions<sup>1</sup> and an L5-S1 herniated disc. On February 5, 2002, Mrs. Cascio was prescribed Zithromax, an antibiotic, for a urinary tract infection. Mrs. Cascio’s Good Samaritan Hospital Medical Center emergency department records for the date of the accident indicate that she was approximately 33 weeks pregnant on that date. These records also show that Mrs. Cascio was complaining of left wrist and shoulder pain, but that she did not make any complaints of neck, back or abdominal pain. The attending physician placed a splint on Mrs. Cascio’s left

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<sup>1</sup> Braxton Hicks’ contractions are defined as rhythmic myometrial activity occurring during the course of a pregnancy that usually causes no pain for the patient (Stedman’s Medical Dictionary 404 [27<sup>th</sup> ed 2000]). The myometrium is defined as the muscular wall of the uterus (Stedman’s Medical Dictionary 1175 [27<sup>th</sup> ed 2000]).

thumb and sent her for x-rays of her wrists, after noting that there was tenderness over her left wrist and left thumb. The attending radiologist who interpreted her x-rays, reported that there were negative test results and noted "satisfactory bony alignment without visible evidence of fracture or destructive bone lesion." Based upon his clinical findings and the negative x-ray results, the emergency department physician diagnosed Mrs. Cascio with a left wrist sprain. One day later, Mrs. Cascio was admitted to St. Catherine of Sienna Hospital due to her complaints of contractions every two to three minutes, even though she denied that her abdomen was hit or that she had sustained a rupture of the membranes/vaginal bleeding as a result of the accident. On February 8, 2002, Dr. Mastrogiannis performed fetal, pelvic and transvaginal sonograms of Mrs. Cascio in the hospital, and his findings include a closed cervix with no previa of the posterior placenta<sup>2</sup>. He also reported that these studies showed normal fetal anatomy and normal biophysical activity. Dr. Mastrogiannis performed additional fetal and transvaginal pelvic sonograms of Mrs. Cascio in the hospital on February 11, 2002, and his findings include a small retrochorionic<sup>3</sup> collection. On February 13, 2002, a third set of sonograms were performed by Dr. Mastrogiannis, and his findings include a small retrochorionic collection at the inferior edge of the placenta, which was unchanged from the prior evaluation, and "recurrent" premature labor.

In his report dated February 20, 2002, Dr. Mastrogiannis states that Mrs. Cascio was treated at his office on that date for an evaluation and initial consultation. He noted that he had previously treated her in the hospital in connection with the motor vehicle accident. Dr. Mastrogiannis also opined that Mrs. Cascio's pregnancy was complicated by gestational diabetes and pregnancy-induced hypertension. Additionally, he concluded that Mrs. Cascio's previously observed retrochorionic collection appeared to be resolved and that her premature labor and gestational diabetes was in good control.

In his report dated April 25, 2002, Dr. Parisi states that he performed an orthopedic examination of Mrs. Cascio on that date and his findings include a "good" range of motion of both wrists and a positive Phalen's test in both wrists. At that time, he placed bilateral splints on both of Mrs. Cascio's wrists and advised her to start physical therapy.

In his report dated June 13, 2006, Dr. Pearl states that he performed an independent neurological examination of Mrs. Cascio on June 12, 2006, and his findings include a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+"/symmetrical; and an intact sensory exam. While he observed positive Tinel's and Phalen's signs at the wrists bilaterally, he also noted that there were no fasciculations or atrophy. Dr. Pearl opined that his examination showed a mild carpal tunnel syndrome bilaterally based upon Mrs. Cascio's complaints of pain upon testing, but that there were no objective findings to indicate a neurological injury or disability.

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<sup>2</sup> The placenta is defined as an organ of metabolic interchange between the fetus and the mother (Stedman's Medical Dictionary 1389 [27<sup>th</sup> ed 2000]). Placental previa is defined as the condition in which the placenta is implanted in the lower segment of the uterus, extending to the margin of the internal os of the cervix or partially or completely obstructing the os (Stedman's Medical Dictionary 1389 [27<sup>th</sup> ed 2000]). Os is synonymous with bone (Stedman's Medical Dictionary 1278 [27<sup>th</sup> ed 2000]).

<sup>3</sup> The chorion is defined as the multilayered, outermost fetal membrane consisting of extraembryonic somatic mesoderm, trophoblast, and, on the maternal surface, villi bathed by maternal blood; as pregnancy progresses, part of the c. becomes the definitive fetal placenta (Stedman's Medical Dictionary 343 [27<sup>th</sup> ed 2000]).

In his report dated July 17, 2006, Dr. Nathan states that he performed an independent orthopedic examination of Mrs. Cascio on that date, and his findings include bilateral forearm girth of 25 c.m; motor strength that was "5/5" bilaterally in all muscle groups with no atrophy; intact sensation; and upper body reflexes that were "2+" and equal bilaterally. He also noted that Mrs. Cascio had a full range of flexion, pronation and supination bilaterally with no tenderness, heat, swelling, erythema or effusion bilaterally. Dr. Nathan opined that Mrs. Cascio had sustained bilateral wrist sprains, but that she was capable of performing the activities of her daily living without restrictions and not disabled.

Mrs. Cascio testified to the effect that she was taken by ambulance to a hospital emergency room after the accident, however, she neither lost consciousness nor was she bleeding from any part of her body. Mrs. Cascio missed seven weeks of work as she was resting in bed due to her prenatal condition. She was also out of work and on paid maternity leave for an additional six weeks following the birth of plaintiffs' child on March 27, 2002. Plaintiff further testified that she had returned to a volunteer position with the Bay Shore Ambulance approximately six months after the accident.

By their submissions, defendants made a prima facie showing that Mrs. Cascio did not sustain a serious injury (*see, Aponte v Tusa*, 28 AD2d 407, 811 NYS2d 569 [2d Dept 2006]; *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Mrs. Cascio's pre-natal hospital records show that she was diagnosed with gestational diabetes, tachycardia and Braxton Hicks' contractions approximately one month prior to the accident. Mrs. Cascio's hospital emergency room records for the day of the accident show that she denied that her membranes were ruptured or that she had vaginal bleeding as a consequence of the accident. Additionally, four days after Mrs. Cascio's discharge from the hospital, her treating obstetrician opined that her small retrochorionic collection appeared to have been resolved and that her premature labor was in good control. Further, defendants' examining neurologist opined, upon a recent examination, that Mrs. Cascio sustained a mild carpal tunnel syndrome bilaterally based upon her complaints of pain, but that there were no objective findings to indicate a neurological injury or disability. Similarly, defendants' examining orthopedist opined that Mrs. Cascio had sustained bilateral wrist sprains, but also concluded that she was capable of performing the activities of her daily living without restriction. Defendants' remaining evidence, including Mrs. Cascio's deposition testimony, also supports a finding that she did not sustain a significant disfigurement or any other type of a serious injury. As defendants have met their burden as to all categories of serious injury alleged, the Court turns to plaintiffs' proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to the motion and in support of their cross motion, plaintiffs submit, among other things, the unaffirmed Good Samaritan Hospital Medical Center Discharge Summary for Mrs. Cascio for the period from February 8 through to February 16, 2002; the affirmed letter and personal affirmation of Mrs. Cascio's treating osteopath, Anthony F. Sampino, D.O.; and Mrs. Cascio's personal affidavit. At the outset, the Court has considered the unaffirmed Discharge Summary of Good Samaritan Hospital Medical Center as it was submitted by, discussed and relied upon by defendants in support of the motion (*see, Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2d Dept 2006]; *Kearse v NY City Transit Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Mrs. Cascio's Good Samaritan Hospital Medical Center Discharge Summary dated April 25, 2002 shows that she was examined by Dr. Sampino and observed to have pre-term contractions due to the motor vehicle accident, as well as gestational diabetes. She was initially diagnosed with a "possible" obscured retroperitoneal bleed or abruption. After diagnostic testing, Mrs. Cascio was subsequently diagnosed with a retrochorionic collection at the inferior edge of the placenta and bacterial vaginosis. Repeat evaluations showed that there was a small, stable, non-enlarging abruption with no contraction of the uterus. In connection with her symptoms, she was taken off magnesium sulfate tocolysis and placed on Procardia. These records further show that on February 16, 2002 Mrs. Cascio was discharged in stable condition "without contraction or irritability," and advised to follow-up with her own physician while continuing Procardia.

In his letter dated March 19, 2002, Dr. Sampino avers that Mrs. Cascio, a pregnant patient under his care, was suffering from a placental separation and pre-term labor subsequent to her accident on February 7, 2002. During that visit, he advised Mrs. Cascio to remain on strict bed rest from the date of the accident until her delivery, which was anticipated on March 27, 2002. In his recent affirmation, Dr. Sampino avers that Mrs. Cascio was in his care prior to and after the accident in connection with her pregnancy. Dr. Sampino also avers that Mrs. Cascio had a normal pregnancy with gestational diabetes prior to February 7, 2002, but that her placental injury required the administration of medication, extended bed rest and extensive fetal monitoring to prevent pre-term labor. He opined, within a reasonable degree of medical certainty, that Mrs. Cascio sustained a separated placenta as a result of the accident and that it was prevented from functioning without restriction for the duration of her pregnancy. Dr. Sampino further concluded that, without medical intervention and bed rest, Mrs. Cascio would have continued to suffer from pre-term labor that would have compromised the survival of the fetus.

Mrs. Cascio avers that she was transported to Good Samaritan Hospital Medical Center after the accident and that she remained there for about eight days. She also avers that she remained on strict bed rest for the remainder of her pregnancy. Mrs. Cascio further avers that, as a result of her bilateral wrist pain, she wore prescribed wrist splints and underwent a regiment of physical therapy.

By their submissions, plaintiffs raised a triable issue of fact that Mrs. Cascio sustained a "serious injury" in the categories of a permanent consequential limitation or a significant limitation of her placenta after the accident and prior to her childbirth on March 27, 2002 (*see generally, Leahey v Fitzgerald*, 1 AD3d 924, 768 NYS2d 55 [4<sup>th</sup> Dept 2003]; *Parkill v Cleary*, 305 AD2d 1088, 759 NYS2d 262 [4<sup>th</sup> Dept 2003]; *c.f. Winslow v Callaghan*, 306 AD2d 853, 761 NYS2d 891 [4<sup>th</sup> Dept 2003]). Mrs. Cascio's emergency room records show that she sustained a placental abruption as a result of the accident, even though she was in stable condition upon her discharge nine days later. Additionally, Dr. Sampino opined that Mrs. Cascio's sustained a separated placenta as a result of the accident and that it could not function normally thereafter for the remainder of the pregnancy. Dr. Sampino also demonstrated that Mrs. Cascio's separated placenta was a significant injury as the survival of the fetus would have been compromised if she had not received immediate medication and extended bed rest for the duration of her pregnancy. While Dr. Sampino did not assign a qualitative percentage to the loss of use of Mrs. Cascio's placenta, he adequately described the qualitative nature of its affect on Mrs. Cascio's health and pregnancy based upon its normal function, purpose and use (*see, Toure v Avis Rent A Car Systems, Inc., supra; Vitez v Shelton*, 6 AD3d 1180, 776 NYS2d 422 [4<sup>th</sup> Dept 2004]). Thus, plaintiffs have raised an issue of fact that Mrs. Cascio sustained a permanent consequential injury to her placenta for the life of

that organ, as well as a significant limitation of use of her placenta arising from her accident.

The Court reaches a different conclusion, however, with respect to the other categories of serious injury claimed by plaintiffs as well as the other alleged injuries. In this regard, plaintiffs failed to demonstrate that Mrs. Cascio sustained a “serious injury” in the category of a permanent loss of use as they have not demonstrated that she sustained a total loss of use of her placenta during childbirth (*see generally, Crespo v Kramer*, 295 AD2d 467, 744 NYS2d 187 [2d Dept 2002]). Plaintiffs also failed to demonstrate that Mrs. Cascio’s alleged bilateral carpal tunnel syndrome constitutes a “serious injury” as they have not proffered any objective medical evidence that was contemporaneous with the accident showing any initial range of motion restrictions of Mrs. Cascio’s wrists (*see, Berktas v McMillan*, 40 AD3d 563, 835 NYS2d 388 [2d Dept 2007]; *Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]), or proof by way of a recent medical examination showing any physical limitations resulting from her alleged wrist injuries (*see, Chinnici v Brown*, 295 AD2d 465, 744 NYS2d 186 [2d Dept 2002]). In any event, plaintiffs have not proffered any objective explanation for the cessation of Mrs. Cascio’s medical treatment approximately five-years ago (*see, Teodoru v Conway Transp. Serv., supra; Vallejo v Builders for the Family Youth, Diocese of Brooklyn, Inc.*, 18 AD3d 741, 795 NYS2d 712 [2d Dept 2005])

Additionally, plaintiffs failed to demonstrate that Mrs. Cascio’s need for a surgical “C-section,” was causally related to the accident as their submissions do not address this issue, and, as such, they also failed to raise a triable issue whether the claimed complications and resulting scars were causally related to the accident (*see, Kilmer v Streck*, 35 AD3d 1282, 827 NYS2d 808 [4<sup>th</sup> Dept 2006]; *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]). Furthermore, plaintiffs’ failure to proffer any expert testimony or photographs specifically addressing the issue of the alleged complications and scarring constitutes an abandonment of these claims (*see generally, Harris v Carella*, 2007 NY Slip Op 5867 [4<sup>th</sup> Dept, July 6, 2007]; *Edwards v DeHaven*, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]).

Moreover, plaintiffs failed to raise a triable issue of fact that Mrs. Cascio was prevented from performing substantially all the material acts constituting her usual and customary activities for at least 90 days during the 180 day period immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Drexler v Melanson*, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]). Specifically, Dr. Sampino’s affirmation relates only to the period prior to Mrs. Cascio’s delivery and is insufficient to demonstrate a non-permanent injury. Secondly, Mrs. Cascio admitted during her examination before trial that her paid maternity leave was voluntary and unrelated to the accident (*see, Sougstad v Meyer*, 40 AD3d 839, 835 NYS2d 722 [2d Dept 2007]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). Further, since there is no evidence in the record demonstrating that Mrs. Cascio’s alleged economic loss exceeded the statutory amount of basic economic loss, plaintiffs’ claim in this regard must be dismissed (*see, CPLR 3212 [b]; see, Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). In light of the above determination, the branch of plaintiffs’ cross motion which is for an order granting them summary judgment on the issue of serious injury is denied as academic.

Lastly, the branch of plaintiffs’ cross motion for an order imposing costs and sanctions against defendants is denied. The Court finds that defendants’ motion which is based, in part, upon legal theory, and which has been granted in part, clearly did not rise to the level of “frivolous conduct” as

Cascio v Golden  
Index No. 04-26734  
Page No. 8

contemplated by court rules (*see*, Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; CPLR 8303-a; *Agostini v Sobol*, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; *Juron & Minzner, P.C. v State Farm Ins. Co.*, 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]; *In re Christopher*, 280 AD2d 546, 720 NYS2d 391 [2d Dept 2001]).

Accordingly, defendants' motion and plaintiffs' cross motion are determined as indicated above.

Dated:           JUL 24 2007          

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION