SCAN

`SHORT FORM ORDER ,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

FATIMA ILYAS,

Plaintiff(s),

-against-

MOTION DATE: 3/21/08
INDEX No.:1197/06
MOTION SEQUENCE NO:1
CALENDAR:2007H2804

EMPIRE AUTO PARTS SUPPLY, INC. And
MAURY R. ROSARIO-TINEO,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-8
Answering Affidavits.....	9-15
Replying Affidavits.....	16-18
Briefs.....	19,19a

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint on the grounds that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102(d) and as required by Insurance Law § 5104(a) is denied.

This is an action to recover money damages for personal injuries allegedly sustained as the result of an occurrence on November 8, 2005 at approximately 12:05 p.m. on the westbound Long Island Expressway (LIE) at or near Underhill Avenue in Queens, New York. Plaintiff, 33-years old at the time of the accident, was the driver of a car that she alleges was rear ended by a car owned and operated by the defendants. Both cars were in motion at the time of impact.

Plaintiff was on her way to work at the New York Hospital in Queens where she was employed as an ultrasound technician. She was due to start work that day at 1:00 p.m. She was driving her car in the middle lane of the LIE at approximately 50 miles per hour when, as a result of sudden traffic, she decreased her speed to 35 mph. Plaintiff testified that defendant "didn't know that traffic became slow, so he was at the same speed, so he just hit me before I do anything." Plaintiff testified that her brake lights were functioning on the day of the accident. As a result of the impact, plaintiff testified that her body moved forward, and that there was contact between her chest and the steering wheel. She stated that

her neck also moved forward. She became dizzy and felt immediate pain in her neck. Her neck and head did not hit anything as a result of this accident.

Plaintiff testified that when the police arrived, her car was still in the middle lane of the expressway and that when the police asked her to move her vehicle to the side of the road, she was able to do so.

As a result of the impact, plaintiff was taken by ambulance to New York Hospital in Queens (her place of employment). At the hospital, x-rays were taken, she was placed in a cervical collar, her spine was checked, and she was given Advil. Plaintiff testified that while being treated at the emergency room, she made complaints only referable to her neck and that she felt dizzy. Plaintiff was discharged the same day.

While her medical reports state otherwise, plaintiff's hospital records reveal that she denied any back pain or loss of consciousness at the time of her accident. plaintiff testified at her deposition and alleges in her bill of particulars that as a result of this accident, she missed six months of work.

Plaintiff claims that as a result of the subject accident, she sustained, *inter alia*, posterior disc herniations at L3-L4, L4-L5 and at L5-S1 impinging on the anterior aspect of the spinal canal, the neural foramina bilaterally at L3-L4 and at L5-S1 and nerve roots bilaterally at L4-L5; spinal stenosis at L3-L4 and L4-L5; subligamentous posterior disc herniation at C4-C5 impinging on the anterior aspect of the spinal canal; neck sprain, restricted range of motion and restricted range of movement of the cervical spine; post head trauma with a post concussion headache syndrome; cervical radiculopathy/myleopathy; lumbosacral radiculopathy; cervical, lumbar, paralumbar spasms; reversal of the normal cervical lordosis; loss of lumbar lordosis; and restricted range of motion and restricted range of movement of the lumbar spine.

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; *see also Grossman v. Wright*, 268 AD2d 79, 84).

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; *Covington v. Cinnirella*, 146 AD2d 565, 566).

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). 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). 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). However, the sworn MRI and CT scan tests and reports also must also be 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).

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). 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). 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).

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; plaintiff's deposition transcript; the medical records of New York Hospital of Queens relative to her admission on the date of loss; the unaffirmed, unsworn report of plaintiff's physician Dr. James M. Liguori, D.O., who saw the plaintiff on November 14, 2005 for a neurologic consultation; the unsworn, unaffirmed MRI reports of Dr. Richard J. Rizzuti, MD, DABR; the sworn and affirmed report Dr. John Kelemen, MD, a neurologist, who performed an independent neurological examination of the plaintiff on July 12, 2007; the sworn and affirmed report of Dr. Issac Cohen, MD, FAAOS, an orthopedic surgeon, who performed an independent orthopedic evaulation on September 12, 2007; and the sworn and affirmed report of Dr. Alan B. Greenfield, MD, DABR, a board certified radiologist who, on December 2, 2005, interpreted and/or read plaintiff's MRI films from that day.

In her bill of particulars, plaintiff states that as a result of the subject accident, she was confined to bed for three months following the accident and to her home for approximately six months following the accident. Plaintiff also states that since the date of the subject accident, she has been unable to sit, stand, walk, bend, climb stairs, lift or carry heavy objects, perform strenuous

activities and find a comfortable position sleeping.

To the extent that Dr. Greenfield's sworn MRI report of plaintiff's cervical spine, lumbar spine and brain 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 reports cannot be considered by this Court on the instant motion (*Toure v. Avis Rent A Car Systems*, supra).

In addition, while the unsworn MRI reports of Dr. Richard J. Rizzuti are also relied upon by the plaintiff in making her prima facie case and thus, at first blush, appear to qualify as admissible evidence in support of defendant's motion (*Gonzalez v. Vasquez*, 301 AD2d 438; *Passaretti v. Yung*, 39 AD3d 517), in light of the fact that said MRI report and readings are not made in conjunction with the doctor's observations during his physical examination of the plaintiff, said reports also do not constitute competent evidence on this motion for summary judgment (*Aguilar v. NYC Waterworks, Inc.*, 298 AD2d 245; *Puma v. Player*, 233 AD2d 308).

Plaintiff's physician, Dr. James Liguori, in his November 14, 2005 (six days after the date of accident) neurological report, states in pertinent part, as follows:

> Motor Exam: 5/5 throughout, 4+/5 weakness of the deltoid on the right. Deep tendon reflexes are 2+ symmetric except right ankle jerk is trace. Downgoing plantar. Positive Hoffmann's sign bilaterally. No clonus.
>
> Sensory Exam: Cervical and lumbar muscle spasm. No clear cut sensory level is noted. Straight leg raising on the right to 30-40°.
>
> Coordination and Gait: Non-dysmetric, negative Romberg. The patient is able to tandem walk.
>
> Impression:
> 1. Status post head trauma with a post concussion headache syndrome.
> 2. Cervical radiculopathy/myelopathy.
> 3. Rule out right brachial plexopathy.
> 4. Lumbosacral radiculopathy.

Additionally, Dr. Kelemen's July 12, 2007 medical report states, in pertinent part, as follows:

> PHYSICAL EXAMINATION: On examination, the claimant was an alert, cooperative woman in no obvious distress...There was no palpable paracervical or paralumbar muscle spasm or reported

tenderness. Straight leg raise testing was negative bilaterally. There was no sciatic notch tenderness.
* * *
IMPRESSION:
Status post cervical and lumbar strain.

I find no evidence of a neurological abnormality or disability from a neurological perspective.

Similarly, Dr. Cohen's independent orthopedic review based on an examination of the plaintiff on September 12, 2007, also concludes, in pertinent part, as follows:

CERVICAL SPINE:

On inspection, there is maintenance of the normal cervical curvature noted. Range of motion is satisfactory and normal, performed in an active fashion with flexion and extension of 45 degrees (normal up to 45 degrees), lateral bending in the 45-degree range to the right and left (normal up to 45), and rotational motion to the right and left in the 80-degree range (normal up to 80 degrees). Compression test and Spurling's test was negative. Claimant described some tenderness in the right trapezius muscle area while turning her head toward the right side. No evidence of muscle spasms or trigger points were noted upon palpation this area. Muscles were supple.
* * *
THORACOLUMBAR SPINE:

On inspection, there was maintenance of the normal lordotic curvature noted. Range of motion demonstrates forward flexion to 90 degrees (normal up to 90), hyperextension to 30 degrees (normal up to 30), right and left lateral bending to 30 degrees (normal up to 30) and right and left rotational motion to 30 degrees (normal up to 30). Straight leg raising was negative to 90 degrees bilaterally in the sitting position. There was no tenderness, no muscle spasms or trigger points noted on palpation of the paravertebral muscles.

DIAGNOSIS:

1. Status post motor vehicle accident
2. Resolved cervical sprain associated with subligamentous disc herniation, C4-5.
3. Resolved low back syndrome associated with degenerative disc disease.

DISCUSSION:

At the time of this evaluation, the claimant states she still has complaints related to the previously described accident

> and specifically on examination, her main complaint was pain into the trapezius muscle on the right side of the cervical spine. The objective examination performed in my office today was essentially unremarkable, without any objective findings present in the entire physical examination. No trigger points are areas of muscle spasms were noted. The claimant has a normal functional capacity of the cervical and thoracolumbar spine, without any objective evidence of disability present. The work up performed was essentially unremarkable. MRI examination of the cervical spine area, as documented demonstrated subligamentous disc herniation without evidence of nerve involvement, as it is not compromising the nerve root and/or the cervical cord. The MRI of the lumbosacral spine area demonstrates some degenerative changes with some disc disease, associated with a completely normal electromyographic study.
>
> It is my opinion therefore, at the time of this evaluation, that the claimant has recovered satisfactorily well from the previously described accident. She is performing her normal activities in an unrestricted fashion without any limitation. No evidence of sequella or permanency related to this accident is present (*Motion*, Ex. J).

Defendants, having submitted admissible proof that the plaintiff has a full range of motion, and that she suffers from no disabilities causally related to the motor vehicle accident, have established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d).

In opposition to defendants' motion, plaintiff submits, *inter alia*, the affidavit of Andrea LoRusso-Pesiri, a chiropractor; the sworn affirmation of Dr. James Liguori, a neurologist; the affirmation of Dr. Richard J. Rizzuti, MD, DABR, a radiologist who supervised the taking of an MRI film of the cervical spine of plaintiff Ilyas, on December 2, 2005; and plaintiff's own affidavit.

As stated above, insofar as Dr. Rizzuti'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 can 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 Andrea Lo-Russo Pesiri contained in her *affidavit* do constitute admissible evidence in opposition to defendants' motion (CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441; *Feintuch v. Grella*, 209 AD2d 377). In her affidavit, Ms. Lo-Russo Pesiri states, in pertinent part, as follows:

4. I performed range of motion testing of the patient's cervical spine, at the initial visit [November 11, 2005], which revealed positive findings:

	NORMAL	FINDINGS
Flexion	45 degrees	10 degrees
Extension	45 degrees	15 degrees
Left Rotation	80 degrees	50 degrees
Right Rotation	80 degrees	50 degrees
Left Lateral Flexion	45 degrees	30 degrees
Right Lateral Flexion	45 degrees	30 degrees

5. I additionally performed range of motion testing of the patient's lumbar spine, on said date, which revealed:

	NORMAL	FINDINGS
Flexion	90 degrees	70 degrees
Extension	30 degrees	10 degrees
Left Rotation	30 degrees	20 degrees
Right Rotation	30 degrees	20 degrees
Left Lateral Flexion	30 degrees	10 degrees
Right Lateral Flexion	30 degrees	20 degrees

* * *

8. My initial diagnosis, based on the history taken, in-office examination and results of MRIs and EMG/NCV testing was: acute post-traumatic cervical intersegmental motion dysfunction with myositis and muscle spasm accompanied by a right sided cervicobrachial syndrome complicated by a disc herniation at the C4-C5 spinal level; acute post-traumatic lumbosacral intersegmental motion dysfunction with myositis and muscle spasm accompanied by a bilateral sciatic radiculopathy complicated by disc herniations at the L3-L4, L4-L5 and L5-S1 spinal levels.

9. It was my expert chiropractic opinion that the injuries, as diagnosed, were causally related to the motor vehicle accident of November 8, 2005. It was further my expert chiropractic opinion that the disc pathologies were causally related to the motor vehicle accident of November 8, 2005. It was my expert chiropractic opinion that the injuries as diagnosed were permanent in nature and had rendered the patient permanently disabled, with regard to the functioning of her cervical and lumbar spine. It was my expert chiropractic opinion that the injuries, as diagnosed, would inhibit her ability to carry out her normal activities of daily living, which involved prolonged sitting, standing, bending, walking, lifting or extreme physical exertion.

10. Thereafter, I placed the patient on a course of treatment, consisting of physiotherapy, including ice and stretching exercises, hydrocollator therapy, electrical muscle stimulation to relax muscle spasms, pulsed ultrasound to combat inflammation, soft tissue massage to encourage blood to the area for healing and traction to relieve numbness and tingling into the right upper extremity with spinal manipulation to correct subluxation complexes and increase ranges of motion. The patient treated with me, from November 11, 2005 to July 27, 2006, and then from May 24, 2007 to September 14, 2007. She was unable to continue her course of treatment with me, as her no fault benefits were eventually denied.

11. It was my expert chiropractic opinion that she will require household help, in order to assist her with the everyday needs of the household, because she cannot perform any of her usual and customary duties at home.
* * *

13. The patient presented to me, on November 20, 2007, for further evaluation of her injuries, relative to the accident. She expressed complaints, at that time, of continued pain in her neck, lower back, right arm and right hand. I performed a physical examination of the patient with objective findings: muscle spasm noted in the right trapezius musculature, right deltoid musculature and paraspinally from L1 through S1 bilaterally; muscle spasm noted in the bilateral gluteal musculature and right hamstring and right gastrocnemius musculature; inflammation noted in the right shoulder, right trapezius region and right deltoid region; numbness and tingling shooting into the right upper extremity to the right hand and right fingers.

14. I performed range of motion testing of the patient's cervical spine, on said date, which revealed:

	NORMAL	FINDINGS
Flexion	45 degrees	25 degrees
Extension	45 degrees	20 degrees
Left Rotation	80 degrees	60 degrees
Right Rotation	80 degrees	40 degrees
Left Lateral Flexion	45 degrees	40 degrees
Right Lateral Flexion	45 degrees	40 degrees

15. I performed range of motion testing of the patient's lumbar spine, on said date, which revealed:

	NORMAL	FINDINGS
Flexion	90 degrees	80 degrees

Extension	45 degrees	30 degrees
Left Rotation	80 degrees	70 degrees
Right Rotation	80 degrees	70 degrees
Left Lateral Flexion	45 degrees	40 degrees
Right Lateral Flexion	45 degrees	40 degrees

16. My current diagnosis, based on the history taken, in-office examinations, and results of MRIs and EMG/NCV testing, is: acute post-traumatic cervical intersegmental motion dysfunction with myositis and muscle spasm accompanied by a right sided cervicobrachial syndrome complicated by a disc herniation at the C4-C5 spinal level; acute post-traumatic lumbosacral intersegmental motion dysfunction with myositis and muscle spasm accompanied by a bilateral sciatic radiculopathy complicated by disc herniations at the L3-L4, L4-L5 and L5-S1 spinal levels.

17. It is my expert chiropractic opinion that the injuries sustained by the patient are causally related to the motor vehicle accident of November 8, 2005. It is further my expert chiropractic opinion that the disc pathologies, as diagnosed via MRIs, are consistent with my clinical findings and that those injuries are permanent in nature. It is my expert chiropractic opinion that the injuries, as diagnosed, have rendered the patient permanently disabled with regard to the function of her cervical and lumbar spine. It is further my expert chiropractic opinion that the injuries, as diagnosed including the limitations of motion in the lumbar and cervical spine, and the disc pathologies, are permanent and will inhibit the patient's ability to carry out her normal activities of daily living.

18. It is my expert chiropractic opinion that the injuries, as diagnosed, are significant in nature and will inhibit her ability to carry out his normal activities of daily living, which would involve prolonged sitting, standing, bending, walking, lifting or extreme physical exertion.

These findings are also confirmed by the expert neurological opinions of plaintiff's physician, Dr. James Liguori, who based on range of motion testings, various sensory and motor examinations including reflexes, Hoffman's testing and straight leg raising testing and a review of plaintiff's December 2, 2005 MRI reports also concluded in his sworn affirmation that on November 14, 2005 "cervical and lumbar muscle spasms were noted" and his "initial diagnosis, based on the history taken, in-office examinations, and results of MRIs and EMG/NCV testing, was: cervical disc herniation at C4/5, and lumbosacral herniations at L3/4, L4/5, and L5/S1 with impingements and spinal stenosis as documented; status post head

trauma with a post concussion headache syndrome, cervical radiculopathy/ myelopathy, and lumbosacral radiculopathy."

Dr. Liguori states in his affirmation that he examined the plaintiff on November 14, 2005, December 8, 2005, January 5, 2006, March 6, 2006, January 26, 2007, March 2, 2007 and November 21, 2007. He further states, as follows:

> 15. My current diagnosis, based on the in-office examinations, MRIs, and EMG/NCV results, is as follows: cervical disc herniation at C4/5, and lumbosacral herniations at L3/4, L4/5 and L5/S1 with impingements and spinal stenosis; cervical radiculopathy, secondary to disc herniation C4/5 confirmed on EMG/NCV testing of the upper extremities; lumbosacral radiculopathy secondary to disc herniations L3/4, L4/5, L5/S1 again with impingements and spinal stenosis; and status post head trauma with a post concussion headache syndrome.
>
> 16. The patient's prognosis is guarded. She will be left with a permanent partial disability. It is with a high degree of medical certainty that the patient's injuries are directly and causally related to the subject motor vehicle accident of November 8, 2005. It is further my expert medical opinion that the disc pathology, as diagnosed via MRI, is consistent with my clinical findings and that these injuries are permanent in nature. It is my expert medical opinion that the injuries as diagnosed have rendered the patient permanently disabled with regard to the functioning of her cervical and lumbar spine. It is further my expert medical opinion that the injuries as diagnosed, including the limitations of motion in the lumbar and cervical spine, and the disc pathology are permanent and will inhibit the patient's ability to carry out her normal activities of daily living [...17...] which would involve prolonged sitting, standing, bending, walking, lifting or extreme physical exertion.

Within the context of back injuries, including cervical and lumbar sprains, strains, herniation bulges, etc, the projection of permanent limitations has no probative value in the absence of a recent examination (*Evans v. Mohammad*, 243 AD2d 604; *Mohammed v. Dhanasar*, 273 AD2d 451). In this case, however, plaintiff has presented consistent and recent ample medical proof in admissible form that there exists a triable issue of fact with regard to "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." The LoRusso-Pesiri 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). Additionally, plaintiff's neurologist, based upon objective testing and other evidence, confirms the findings reached by the chiropractor. 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."

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) also sufficiently establishes a serious injury within the meaning of the statute. In opposition, plaintiff submits, *inter alia*, her own affidavit wherein she states that "[a]pproximately 5-6 months after the accident, [she has] been unable to do anything with my right arm, i.e., lifting pots and pan for cooking, picking up [her] children, vacuuming, and lifting heavy laundry, because of the pain and numbness there. Because of my injuries to my neck, back, and legs, [she has] been unable to do household activities, such as cooking, cleaning, laundry and mopping, as they would aggravate the aforesaid pains." As plaintiff has furnished additional admissible evidence, including the sworn affirmation of her neurologist, Dr. Liguori, to prove that such curtailment of activities was at the direction of a doctor and thus medically determined (*Nelson v. Distant*, 308 AD2d 338), plaintiff's averments sufficiently establish a serious injury within the meaning of Insurance Law §5102(d) (*cf. Glielmi v. Banner*, 254 AD2d 255; *Rum v. Pam Transport, Inc.*, 250 AD2d 751).

However, plaintiff has 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).

In sum, this court finds that while 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" category, 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" and "90/180 days"

categories. Accordingly, this matter will proceed to trial on the above issues.

Dated: JUN 05 2008

J.S.C.