

**Capozzola v Ford Credit Titling Trust**

2009 NY Slip Op 30434(U)

January 14, 2009

Supreme Court, Suffolk County

Docket Number: 05-12158

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 3-27-08  
ADJ. DATE 8-20-08  
MNEMONIC: # 003 - MD  
# 004 - XMD

-----X			
NANCY CAPOZZOLA and GREGORY	:	CARTIER, BERNSTEIN, AUERBACH, et al.	
CAPOZZOLA,	:	Attorneys for Plaintiffs	
	:	77 Medford Avenue	
	:	Patchogue, New York 11772	
Plaintiffs,	:		
	:	PHILLIPS LYTTLE, LLP	
- against -	:	Attorneys for Defendants Ford Credit Titling	
	:	Trust & Ford Motor Credit Company	
FORD CREDIT TITLING TRUST, FORD	:	3400 HSBC Center	
MOTOR CREDIT COMPANY, CATHY J.	:	Buffalo, New York 14203-2887	
LOMBARDO, JOSEPH LOMBARDO and	:		
DANIEL SHAPIRO,	:	SCHONDEBARE & KORCZ	
	:	Attorneys for Defendants Lombardo &	
	:	Shapiro	
Defendants.	:	3555 Veterans Memorial Highway, Suite P	
-----X		Ronkonkoma, New York 11779	

Upon the following papers numbered 1 to 59 read on this motion and cross motion for summary judgment, Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 31 ; Notice of Cross-Motion and supporting papers (004) 32 - 35 ; Answering Affidavits and supporting papers 36-55 ; Replying Affidavits and supporting papers 56 - 58 ; Other 59 Ford Mem/Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (003) by the defendants Ford Credit Titling Trust and Ford Motor Credit Company (hereinafter Ford) pursuant to CPLR §3212 and Insurance Law §5102 (d) for an order granting summary judgment on the basis that plaintiffs Nancy Capozzola and Gregory Capozzola have failed to meet the serious injury threshold limits, is denied; and it is further

**ORDERED** that this cross-motion (004) by the defendants Cathy J. Lombardo and Daniel Shapiro pursuant to CPLR §3212 and Insurance Law §5102 asserting that plaintiffs' alleged injuries fail to meet the serious injury threshold limits, is denied.

The complaint of this action asserts that, on September 28, 2003, on Hewitt Road at its intersection with Twin Pine Road, Center Moriches, County of Suffolk, New York, the plaintiffs, Nancy Capozzola and Gregory Capozzola, sustained serious injuries within the meaning of

Insurance Law §5102 when their vehicle which was allegedly stopped at a stop sign was struck in the rear by the vehicle operated by Joseph Lombardo, owned by Ford, and registered to Cathy J. Lombardo. Nancy Capozzola was a passenger in the vehicle operated by Gregory Capozzola.

In her bill of particulars, Nancy Capozzola has claimed the following injuries from this accident: congestive heart failure; multiple fractures of the left ribs with bilateral bronchopneumonia requiring hospitalization on October 21, 2003; anterior instability of the right shoulder requiring arthroscopic anterior capsular shift of the right shoulder; hypertrophic changes in the acromioclavicular joint of the right shoulder; lateral down sloping of the acromion extending to abut the supraspinatus of the right shoulder; weakness of the right upper extremity; scarring of the right shoulder; frozen shoulder syndrome; supraspinatus tendinosis/tendinopathy of the right shoulder; tear of the anterosuperior glenoid labrum of the right shoulder; positive anterior apprehension and relocation tests of the right shoulder; prominent epidural vein extending into the left neural canal at the C4-5 disc level; post traumatic cervical brachial syndrome; spasm in the right sided levator scapulae muscles and paraspinal muscles; headaches; bruised right breast; and multiple strains, sprains, bruises and contusions, inter alia.

In his bill of particulars, Gregory Capozzola has claimed the following injuries from this accident: central disc herniation at C2-3, C3-4; broad based central disc herniation at C4-5; right sided spasm of the cervical spine; paresthesias in the right arm with axial loading; limited tip to the left and turn toward the right; synovial fluid in the left knee with anterior soft tissue swelling; posteromedial distal femoral chondromalacia of the left knee; anteromedial proximal tibial subcortical bruise of the left knee; patellar tendinosis/tendinopathy of the left knee; tenderness of the medial joint line with positive medial McMurray of the left knee; partial tear of the medial collateral ligament of the left knee; tear of the anterior horn of the medial meniscus of the left knee; grade II signal in the lateral meniscus of the left knee; hypertrophic changes in the acromioclavicular joint extending to abut the supraspinatus of the right shoulder; rotator cuff tear of the right shoulder; positive anterior apprehension and relocation tests of the right shoulder; supraspinatus and subscapularis tendinosis/tendinopathy of the right shoulder; limited range of motion of the lumbosacral spine; post traumatic right occipital headaches; positive Tinel's sign of the right wrist; right wrist tenderness extending into the hand and right middle finger; concussion, post concussion syndrome; tinnitus; patchy sensory loss with a right greater than left C5-6 dermatome and right median sensory distribution; sluggish right brachioradialis reflex; palpation of the suboccipital triangle producing increased sensitivity of the greater and lesser occipital nerves; bilateral carpal tunnel syndrome; multiple sprains, strains, swelling and bruises, inter alia; and the plaintiff requires surgery on his right shoulder and possibly his left knee.

The defendants now seek summary judgment on the basis that plaintiffs' claimed injuries fail to meet the threshold imposed by Insurance Law §5102.

Motion (003) is supported with, inter alia, an attorney's affirmation; copies of the pleadings inclusive of the supplemental summons and amended complaint and answers

served in response; the plaintiffs' bill of particulars; chest and right shoulder x-ray reports, dated October 24, 2003 and September 29, 2003, and discharge summary, dated March 19, 2003, for Nancy Capozzola; copies of the transcripts of the examinations before trial of the plaintiffs; unsworn affidavit of Gary P. Cohen, D.C., notarized by a New Jersey notary; independent orthopedic report of Harvey Fishman, M.D., dated October 12, 2004; neurology report of Edward M. Weiland, M.D., dated June 20, 2006; orthopedic report of Noah Finkle, M.D. dated July 10, 2006 for Gregory Capozzola; and the neurological consultation report of Norman Pflaster, M.D., dated September 28, 2003; initial manual therapy report of Ralph Mangels, D.C, dated September 28, 2003; report of Fred M. Carter, M.D., dated May 24, 2004; surgery report of October 4, 2004; orthopedic reports of Stephen Zolan, MD, DOS, dated June 4, 2004 and September 13, 2004; neurological report of Edward M. Weiland, M.D. dated June 20, 2006, and the orthopedic report of Noah Finkle, M.D., dated July 10, 2006, for Nancy Capozzola.

Motion (004) is supported by a copy of the amended complaint and amended answer served by the defendants Cathy Lombardo and Daniel Shapiro and an attorney's affirmation from their counsel which affirmation adopts the facts, expert opinions, exhibits and legal arguments stated in the affirmation of Donna M. Lanham, Esq., counsel for Ford. This Court determines that this motion (004) is procedurally defective as the pleadings, exhibits and arguments submitted with another party's motion or cross-motion cannot be incorporated by reference (*see*, CPLR §3212[b]). Nevertheless, this Court has searched the record pursuant to CPLR §3212(b) and considers the totality of the evidence submitted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law §5102(d), “ ‘[s]erious 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 medical 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 term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Camarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

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 “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* (supra)).

The Court must determine in the first instance whether a prima facie showing of “serious injury” has been established (see, *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 the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]).

## NANCY CAPOZZOLA

The discharge summary for Nancy Capozzola (hereinafter plaintiff) from Central Suffolk Hospital submitted by the defendants indicated she was a fifty year old female who presented to the emergency room with shortness of breath which had worsened after an automobile accident on September 28, 2003. She was diagnosed with pneumonia secondary to a chest contusion and was treated accordingly for her complaints as well as for renal failure and sinus bradycardia. The chest x-ray of October 16, 2003 revealed bilateral bronchopneumonia. A further chest x-ray of October 18, 2003 revealed interval progression of bibasilar pneumonia and/or atelectasis; the patient was post trauma and progression of pulmonary contusions could not be excluded.

The report of Norman Pflaster, M.D. (hereinafter Pflaster), dated November 25, 2003, submitted by the defendants, stated that the plaintiff was a restrained driver when her vehicle was twice hit in the rear and she immediately had right shoulder pain and neck pain that radiated down into her fingers. There were some fractures of the left ribs and about one month later she was hospitalized for pneumonia complicated by congestive heart failure and renal failure.

Pflaster's report, dated February 19, 2004, submitted by the defendants, correctly stated the patient (plaintiff) was not driving but was a passenger and that her right shoulder pain persisted and still radiated into the fingers but had improved with manual therapy. Pflaster noted that the MRI of the cervical spine was performed and revealed an epidural vein in the area of the C4-5 interspace that was thought not to represent a disc. Further studies were recommended and the plaintiff was treated for chronic pain.

The report of Ralph Mangels, D.C and Norman L. Chernick, M.D. of Manual Therapy, dated December 3, 2003, revealed complaints of neck pain radiating into the right shoulder and upper arm with paresthesias extending into the whole hand, right suboccipital headaches, right shoulder pain extending into the anterior and posterior scapular region with transient crepitus, and right upper extremity pain with constant numbness/paresthesias within a distal forearm/hand (palmar and dorsal aspect) associated with mild to moderate weakness of the right upper extremity. The report stated the plaintiff was recently hospitalized for left lobe pneumonia secondary to rib fractures and developed congestive heart failure and subsequent renal failure while hospitalized. The plaintiff was diagnosed with post traumatic cervical brachial syndrome (rule/out cervical herniated disc), and right shoulder internal derangement/myofascial pain syndrome.

The report of Fred Carter, M.D. (hereinafter Carter), dated May 24, 2004 indicated the plaintiff had therapy for her neck and evaluation of her neck but still had persistent right-sided neck and right shoulder pain for which Carter started her on therapy for her right shoulder, and recommended an MRI.

The operative report, dated October 4, 2004, noted the arthroscopic anterior capsular shift of the right shoulder noted a rotator cuff tear was appreciated.

Stephen Zolan M.D., D.O.S. (hereinafter Zolan), examined the plaintiff on June 4, 2004 in orthopedic consultation and stated he had no medical records available for his review. He noted, upon examination, that there was mild flattening of the cervical lordotic curve; mild restriction and mild tenderness and spasm; no deficit of motor, sensory or reflex function found in the upper extremities; elevation and forward flexion of the shoulder were 0-180 degrees on the left; right shoulder elevation was 0-90 degrees with marked restriction of rotation and anterior/posterior shoulder tenderness especially over the labrum and rotator cuff. Zolan stated that the injuries sustained in the accident and the accident were causally related. Zolan's diagnosis was that of cervical sprain and impingement syndrome of the right shoulder. Treatment was for follow up for the right shoulder and neck monthly for two months, and for physiotherapy for the shoulder three times a week for eight weeks and an MRI of the shoulder. Zolan stated the plaintiff was not orthopedically disabled.

Zolan also examined the plaintiff on September 13, 2004 and noted a mildly flattened cervical lordotic curve with mild restriction and tenderness with mild spasm; elevation and forward flexion of the shoulder were 0-180 degrees on the left; right shoulder elevation was now 0-130 degrees, impingement at 90 degrees, moderate restriction of rotation internally and externally was noted. The diagnosis was cervical sprain, active and impingement syndrome of the right shoulder, active, with the injuries causally related to the accident.

Edward M. Weiland, M.D. (hereinafter Weiland), performed a neurological examination on the plaintiff on June 20, 2006. Weiland stated that she continued to have neck pain radiating to the suprascapular areas, more prevalently on the right and the symptoms appeared to be provoked with activities of daily living as well as minimal weight bearing maneuvers. Weiland also stated that there was full range of motion of the neck, lumbar spine and shoulders and compared his findings to those normal values listed in his report. Weiland's diagnosis was that of cervical sprain/strain; contusion of the right shoulder and status post-right shoulder arthroscopy, right chest wall contusion resolved, and Weiland opined that there was a normal neurological examination.

Noah Finkle, M.D. (hereinafter Finkle), examined the plaintiff on July 10, 2006. Finkle's report stated that examination of the cervical spine revealed slight limitation of rotation to the right (60 degrees) with the norm being approximately 70/70 degrees; extension and flexion were stated to be normal but the findings were not listed and were not compared to any normal ranges of motion. Finkle found a slightly positive impingement sign at the full arc of abduction and external rotation, but indicated no range of motion findings. Lower extremity evaluation was said to be within normal limits, but no specific findings were presented or compared to normal values. Examination of the lumbosacral spine revealed normal range of motion but no findings were presented and the findings were not compared to normal ranges of motion. Finkle further noted that the Central Suffolk Hospital short-stay form, dated October 4, 2004, indicated arthroscopic anterior capsular shift of the right shoulder with a fraying of the anterior superior edge of the labrum; the MRI report of the right shoulder, dated August 4, 2004, indicated hypertrophic AC changes, laterally downsloping acromion, supraspinatus tendinosis/tendinopathy, and tear of the anterior superior glenoid labrum; the MRI report of the cervical spine, dated January 5, 2004, indicated a C4-5 disc level with prominence of the

epidural vein and underlying tiny left foraminal disc herniation could be excluded. Finkle noted in his "Impression" that the patient had sustained a cervical sprain and strain to the right shoulder with no evidence of clinical instability in the right shoulder although Carter's initial examination indicated some laxity. The MRI revealed a superior labral tear which Finkle stated he did not believe was causally related to the vehicular accident of September 28, 2003. Finkle further stated that Carter repaired the superior labrum; however, his pathological findings on the operative note indicated only fraying of the labrum and no specific labral tear, therefore, one must question the need for a labral repair in the first place. Finkle further stated it was also known that individuals with chronic renal failure could develop pseudofractures of their ribs and he suspected that the clinical findings were more related to either osteoporosis or pseudofracture secondary to her renal disease and not traumatically induced rib fractures from the motor vehicle accident.

Based upon the foregoing, the submissions proffered by the defendants have raised factual issues which preclude summary judgment and the Court finds that the defendants have not demonstrated prima facie entitlement to summary judgment. Finkle has shown normal findings in a conclusory manner and has not demonstrated actual findings compared to normal findings with the full ranges of motion of the plaintiff's neck, shoulder, and lower extremities, leaving this Court to speculate about that. Finkle had identified a herniated disc at C4-5 but had failed to comment on the same. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]) and Weiland, the defendants examining physician, has not opined as to the disc herniation. Finkle does not give a basis for his opinion that there could have been pseudofractures of the ribs nor does he opine that the plaintiff sustained rib fractures as a result of the accident. Additionally, Zolan finds a causal relationship between the claimed injuries and the accident. Thus defendants' own submissions raise multiple factual issues which preclude summary judgment.

#### GREGORY CAPOZZOLA

The affidavit of Gary P. Cohen, D.C. relative to his examination of Gregory Capozzola is not in admissible form as it does not swear the truth of its contents and is therefore not considered in support of the defendants' applications.

Harvey Fishman, M.D. (hereinafter Fishman), performed an orthopedic examination upon Gregory Capozzola (hereinafter Capozzola) on behalf of the defendants on October 12, 2004 and stated he saw the MRI results of the cervical spine and right shoulder, that they were unremarkable, and that the findings were preexisting and chronic in nature. However, Fishman did not state the basis for his conclusion that the findings listed in the MRI studies of Capozzola's cervical spine and right shoulder were unremarkable and that the findings were preexisting and chronic in nature. Examination of the cervical spine, upper extremities, lower extremities and thoraco-lumbar spine, he stated, revealed that there was no evidence of restricted range of motion. However, Fishman did not state what his actual findings were nor did he compare those ranges of motion to normal ranges of motion. Accordingly, Fishman's report leaves it to the Court to speculate as to what his findings were and what the normal

ranges of motion were, which is insufficient to demonstrate prima facie entitlement to summary judgment on the issue that the plaintiff did not sustain a serious injury. Conclusory allegations without more are insufficient as a matter of law to establish a prima facie case of serious injury (see, *Weingrad v New York Univ. Med. Center*, supra).

Weiland performed a neurological examination on behalf of the defendants on June 20, 2006 upon Capozzola and stated that examination of the cervical spine, lumbar spine, and shoulders revealed no limitation in range of motion and compared his findings to the normal ranges of motion. However, although Weiland mentioned that he reviewed the MRI reports of the plaintiffs cervical spine, dated January 30, 2004, the EMG/NCV evaluation of February 28, 2004, the ophthalmological evaluation, the MRI report of the "lumbar knee", dated August 11, 2004 and the MRI of the right shoulder, dated August 11, 2004, he did not list the findings of those reports and did not comment on any findings, leaving it to the Court to speculate as to what those findings were and any basis for his opinion.

Finkle examined Capozzola on July 10, 2006 and stated his findings relative to his examination of the cervical spine and compared those findings to the normal ranges of motion. Although Finkle examined Capozzola's shoulders, mid-back, and lower extremities, he did not quantify his findings nor compare those findings to the normal ranges of motion. Upon examination of the lumbosacral spine, Finkle quantified his findings and compared them to the normal ranges of motion. However, Finkle stated that the normal range of motion for flexion was 80 degrees and for lateral bending was 35 degrees, whereas Weiland states the normal ranges of motion for flexion and lateral bending were 45 degrees and 40 degrees respectively, thus raising another factual issue. Finkle noted small C2-C5 disc herniations without evidence of spinal cord impingement; however, he did not opine as to whether or not these findings of multiple disc herniations were causally related to the accident of September 28, 2003.

Based upon the foregoing, the defendants have not demonstrated prima facie that Capozzola did not sustain a serious injury within the meaning of Insurance Law §5102 as the reports of the defendants' examining physicians fail to demonstrate the ranges of motions as indicated above, or raise factual issues concerning their findings. They only present conclusory opinions.


Here, the defendants have failed to satisfy their burden of establishing, prima facie, that the plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (see, *Agathe v Tun Chen Wang*, 3 AD3d 737, 822 NYS2d 766 [2nd Dept 2006]; see also, *Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) as defendants' examining physicians either fail to provide specific range of motion measurements for the plaintiff or fail to compare those findings with normal ranges of motion (see, *Hypolite v International Logistics Management, Inc.*, 43 AD3d 461, 842 NYS2d 453 [2<sup>nd</sup> Dept 2007]; *Somers v Macpherson*, 40 AD3d 742, 836 NYS2d 620 [2<sup>nd</sup> Dept 2007]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2<sup>nd</sup> Dept 2006]), or set forth different values for the normal ranges of motion. By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of

defendants' examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (see, **Rodriguez v Schickler**, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). In that the reports of defendants' examining physicians do not exclude the possibility that the plaintiffs, Nancy Capozzola and Gregory Capozzola, each suffered a serious injury in the accident, the defendants are not entitled to summary judgment (see, **Peschanker v Loporto**, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Accordingly, that part of defendants' applications which seek summary judgment dismissing the complaint on the basis that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102 is denied.

Since the defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiffs' papers in opposition to defendants' motions were sufficient to raise a triable issue of fact (see, **Agathe v Tun Chen Wang**, *supra*; **Walters v Papanastassiou**, *supra*).

Dated: January 14, 2009

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