SHORT FORM ORDER

COPY

INDEX No. 09-26770
CAL No. 11-00381MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 4-29-11 (#001 & #002)
MOTION DATE 5-27-11 (#003)
ADJ. DATE 6-24-11
Mot. Seq. # 001 - MD # 003 - MG
002 - MD

DANELLE PACHECO and TAMIKA SCOTT, Plaintiffs, - against - SHAYNA N. COCHRAN and NOREEN A. O'BRIEN, Defendants.	PALERMO, PALERMO & TUOHY, P.C. Attorney for Plaintiffs 1300 Veterans Memorial Highway Hauppauge, New York 11788 ARMIENTI, DeBELLIS, GUGLIELMO & RHODEN, LLP Attorney for Defendant Cochran 39 Broadway, Suite 520 New York, New York 10006-3034 RUSSO APOZNANSKI & TAMBASCO Attorney for Defendant O'Brien 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 36 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10 (untabbed) ; Notice of Cross Motion and supporting papers (002) 11-19; (003) 20-32 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 33-34; 35-36 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendant Noreen O'Brien pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Tamika Scott, has not sustained a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (002) by the defendant Shayna Cochran pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Tamika Scott, has not sustained a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (003) by the plaintiffs Danelle Pacheco and Tamika Scott pursuant to CPLR 3212 for summary judgment on the issue of liability against defendants Noreen O'Brien and Shayna Cochran, is granted, and for further order granting summary judgment to Danelle Pacheco on the basis that she sustained a serious injury as defined by Insurance Law §5102 (d) is granted.

RST

In this negligence action, the plaintiffs, Danelle Pacheco and Tamika Scott, seek damages for personal injuries which they allege were sustained on March 15, 2009, when the vehicle in which they were passengers was struck by the vehicle operated by defendant Noreen O'Brien, on westbound Route 27, approximately 200 feet west of Exit 51, Town of Brookhaven, Suffolk County, New York. Danelle Pacheco and Tamika Scott were both passengers in the vehicle operated by Shayna Cochran. The first cause of action for damages premised upon negligence is asserted by Danelle Pacheco against Shayna Cochran. The second cause of action for damages premised upon negligence is asserted by Danelle Pacheco against Noreen O'Brien. The third cause of action for damages premised upon negligence is asserted by Tamika Scott against Shayna Cochran. The fourth cause of action for damages premised upon negligence is asserted by Tamika Scott against Noreen O'Brien.

In motions (001) and (002), the defendants Shayna Cochran and Noreen O'Brien seek summary judgment dismissing the complaint on the basis that the plaintiffs did not sustain a serious injury in that their claimed injuries fail to meet the threshold imposed by Insurance Law §5102(d).

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 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 [2d Dept 1981]).

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 [1982]).

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" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st 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 (***DeAngelo v Fidel Corp. Services,***

Inc., 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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*).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*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 [1st 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]).

MOTION (001)

In support of motion (001), Noreen O'Brien has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answer served by O'Brien with a cross claim asserted against defendant Cochran, and plaintiffs' verified bill of particulars; a copy of the unsigned and uncertified transcript of the examination before trial of Tamika Scott dated April 1, 2010; and the affirmed reports of Joseph C. Elfenbein, M.D., dated April 26, 2010 concerning his independent orthopedic examinations of Tamika Scott and Danelle Pacheco. The moving defendant has not submitted copies of the records and test reports upon which the expert has based his opinions. The records and materials relied upon by the experts are to be provided in admissible form in support of the motion for summary judgment (see, ***Friends of Animals v Associated Fur Mfrs.,*** *supra*; *see also,* ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tompkins County 2002]). Additionally, defendant O'Brien has failed to provide a copy of the answer served by co-defendant Shayna Cochran as required pursuant to CPLR 3212. The unsigned and uncertified transcript of the examination before trial of Tamika Scott is not in admissible form pursuant to CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]).

It is determined, however, that even if those records and materials relied upon by the experts were submitted with the moving papers, and the plaintiff's deposition transcript were in admissible form, and all the pleadings were provided to this court, pursuant to CPLR 3212, that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint.

By way of her verified bill of particulars, Tamika Scott has alleged, that as a result of this accident, she sustained the following injuries: severe cerebral concussion from blunt force trauma to her head with post concussion syndrome, loss of consciousness, severe headaches and neck aches, dizziness and restriction of

motion; cervical spine strain/sprain with cervicalgia, restriction of motion; lumbar spine sprain/strain with lumbago, restriction of motion; right shoulder sprain/strain requiring subacromial space steroid injection and drainage of fluid with chronic pain and limitation of motion; right knee sprain/strain with bruising and lacerations; right ankle and right foot sprain/strain, requiring an air cast ankle stirrup brace and supportive footwear, chronic pain and limitation of motion, requiring the use of crutches for one month; and the need for extensive physical therapy.

Tamika Scott testified at her examination before trial that she attended physical therapy for three months for her neck, shoulder, back and ankle, and thereafter was prescribed home exercises to strengthen her shoulder, ankle, and back. She also received cortisone injections into her shoulder. She was treated by a neurologist for severe headaches after the accident, and took Darvon for the headaches for about a two month period after the accident. She had no prior injuries to those parts of her body which she claims were injured in this accident, and has sustained no subsequent injuries to those part of her body either. She testified that she can no longer participate in sports, such as volleyball and baseball, since the accident. Because her job requires lifting, bending, and pulling while providing physical care for elderly patients, she must ask other staff members to help her perform these activities. She states that she cannot work as many hours since the accident. She also testified that she has a scar on her right leg.

The report of Joseph C. Elfenbein, M.D. was submitted concerning his independent orthopedic evaluation of Tamika Scott. Dr. Elfenbein has set forth the x-rays, CT scan's and medical records which he reviewed, but has not provided a copy of the same, nor does he comment on the results of the diagnostic testing and contents of the medical records, leaving this court to speculate as to the basis for his opinion that the plaintiff has no disability as a result of the accident. He does not rule out that the plaintiff's claimed injuries were not caused by the accident. Although the plaintiff claims to have required cortisone injections into her shoulder, Dr. Elfenbein does not comment on the injury requiring said treatment. Thus, the report of defendant's orthopedic examining physician raises factual issues which preclude summary judgment.

Although the plaintiff has claimed that she has a scar on her right leg, no scar review has been submitted describing the scar, and the moving defendant has not ruled out whether or not there is a scar. Dr. Elfenbein does not comment on the same. Although the plaintiff has been treated by a neurologist for headaches and for seeing spots and flickering, claimed to be caused by the accident, and is also claiming cervalgia and lumbago, the moving defendant has not submitted a report pertaining to an independent neurology examination addressing these claims (*see*, ***Browdame v Candura et al***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]. Thus, factual issues exist as to these claimed injuries.

Based upon the foregoing, the defendant has failed to establish prima facie that Tamika Scott did not sustain a serious injury pursuant to the first category of injuries defined by Insurance Law §5102(d).

The defendant's examining physician, Dr. Elfenbein, did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion relative thereto. Thus, the defendant has not established prima facie entitlement to summary judgment on this category of injury.

Accordingly, motion (001) by defendant Noreen O'Brien for summary judgment dismissing the complaint on the basis that Tamika Scott has not sustained a serious injury as defined by Insurance Law § 5102 (d) is denied.

MOTION (002)

In support of motion (002), for summary judgment dismissing that part of the complaint asserted by Tamika Scott, Shayna Cochran has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, the moving defendant's answer with a cross claim asserted against Noreen A. O'Brien, plaintiffs' verified bill of particulars; and an unsigned copy of the transcript of the examination before trial of Tamika Scott; a copy of the sworn report of Jerrold Gorski, M.D. dated May 21, 2010 concerning his independent orthopedic examination of the plaintiff; a copy of the sworn report of Edward M. Weiland, M.D. dated July 15, 2010 concerning his independent neurological examination of the plaintiff. The moving defendant has not submitted copies of the records and test reports upon which the expert has based his opinions. The records and materials relied upon by the experts are to be provided in admissible form in support of the motion for summary judgment (see, ***Friends of Animals v Associated Fur Mfrs.,*** *supra*; *see also,* ***Hornbrook v Peak Resorts, Inc.,*** *supra*). Additionally, defendant Cochran has failed to provide a copy of the answer served by co-defendant Noreen O'Brien as required pursuant to CPLR 3212. The unsigned and uncertified transcript of the examination before trial of Tamika Scott is not in admissible form pursuant to CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2dDept 2006]).

It is determined, however, that even if those records and materials relied upon by the experts were submitted with the moving papers, and the plaintiff's deposition transcript were in admissible form, and all the pleadings were provided to this court, pursuant to CPLR 3212, that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint.

The report of Jerrold Gorski, M.D. was submitted concerning his independent orthopedic evaluation of Tamika Scott. It is noted that defendant O'Brien's expert, Dr. Elfenbein, and defendant Cochran's expert, Dr. Gorski, have set forth different normal cervical range of motion values, leaving it to this court to speculate which normal range of motion values is correct. This raises factual issues which preclude summary judgment. Dr. Gorski has set forth the x-rays, and medical records which he reviewed, but has not provided a copy of the same, leaving this court to speculate as to the basis for his opinion that the plaintiff has no disability as a result of the accident. He does not rule out that the plaintiff's claimed injuries were not caused by the accident. Dr. Gorski states in a conclusory manner that neurovascular examination of the upper extremity and lower extremity were negative, but he does not indicate whether he is referring to the right or left extremity, what his examination consisted of, or the basis for his conclusion. He states that the back examination was negative visually, but does not indicate what his examination consisted of and the basis for such opinion. By conducting a "visual" examination, Dr. Gorski failed to utilize an objective method to obtain range of motion measurements for the plaintiff's lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to this court to speculate as to his conclusory opinion that the examination of the plaintiff's back was negative. Thus, defendant's orthopedic examining physician's report raises factual issues which preclude summary judgment.

Dr. Weiland has set forth in his report concerning his independent neurological examination of Tamika Scott that his impression/diagnosis is that of a history of a closed head trauma with subjective headache

disorder; cervical spinal stenosis, resolved; thoracic sprain/strain, resolved; lumbosacral sprain/strain, resolved; contusions to the shoulder, right foot and right ankle with no finding of neurological permanency. Although he sets forth the medical records and reports he reviewed, including a neurological report by Dr. Sauter, such records have not been provided to this court. Although he mentions that the plaintiff had MRI testing and several nerve study tests, he has not reviewed the same, nor does he comment upon the findings relative thereto. Dr. Weiland has set forth the range of motion values he obtained with regard to examination of the plaintiff's cervical spine, shoulders and lumbar spine. However, he does not compare his findings to the normal range of motion values or set forth the objective method by which he obtained such measurements (*see*, ***Martin v Pietrzak***, *supra*; ***Vomero v Gronrous***, *supra)*, thus further raising factual issues which preclude summary judgment.

Based upon the foregoing, defendant Cochran has not established prima facie that Tamika Scott did not sustain a serious injury under the first category of injuries set forth by Insurance Law §5102(d).

The defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion relative thereto. Accordingly, defendant Cochran has not established prima facie entitlement to summary judgment on this category of injury.

In view thereof, motion (002) by defendant Shayna N. Cochran for summary judgment dismissing the complaint as asserted by Tamika Scott on the basis that she did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Inasmuch as the defendants in motion (001) and (002) have failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted to the plaintiff.

MOTION (003)

In motion (003), the plaintiffs seek summary judgment with respect to liability on the basis that they were not negligent in causing the accident.

In motion (003), the plaintiffs, Tamika Scott and Danelle Pacheco, have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claims, and their verified bills of particulars; unsigned copies of their transcripts of their respective examinations before trial; the affidavit of Tamika Scott; and copies of the sworn reports of Dr. Elfenbein and Dr. Gorski concerning their respective independent orthopedic evaluations. While the plaintiffs' deposition transcripts are unsigned, they are considered by this court to have been adopted as accurate (*see*, ***Ashif v Won Ok Lee,*** 2008 NY Slip Op 9936, 868 NYS2d 906 [2d Dept 2008]).

Tamika Scott testified to the extent that on the date of the accident she and Danelle Pacheco were both passengers in the vehicle being operated by Shayna Cochran. Danelle was seated in the rear passenger seat behind the driver. Scott was sitting in the front passenger seat. They left Tamika Scott's home to go to a restaurant and traveled westbound on Sunrise Highway, described as having three travel lanes in the westbound direction. They were in the left travel lane for approximately five minutes prior to the accident. Traffic was described as moving well, the weather as sunny, and the roadway as dry. Ms. Scott first saw the defendant's vehicle, a dark colored Durango, about three minutes prior to the accident, in the middle travel lane of Sunrise Highway, as the two vehicles were traveling side by side. The Durango was traveling in the middle lane at about the same speed as the vehicle in which she was traveling. About thirty seconds prior to the accident, the front of the Durango was about "25%" or a little in front of their vehicle, still in the middle lane. The Durango then suddenly began to switch lanes, hitting the Cochran vehicle, causing it to spin from the left side of the highway to the right side and to strike the guard rails on the right side of the highway. At no time did Ms. Scott see the Durango with its blinker light on indicating it was going to move over. Scott continued that Cochran tried to avoid the Durango when it started moving into the left lane by hitting her brakes, beeping her horn, and swerving to the left. The passenger side front fender and front passenger door of the vehicle she was in, and the front driver side of the Durango, made contact. She did not know the speeds the two vehicles were traveling. She went unconscious after she was thrown into the back seat, having landing on her cousin Danelle.

Danelle Pacheco testified to the effect that she was a passenger seated in the rear behind the driver's seat in Shayna Cochran's vehicle at the time of the accident. They were traveling on Sunrise Highway in the left travel lane. She remembered seeing a black SUV in the middle lane traveling next to them, moving into their lane of travel. She could not see the back, only the side, of the other vehicle, and could not tell if the vehicle had its turn signal light on. She heard Cochran blow her horn, and felt the vehicle slow down. She heard Cochran say, "Oh my God" as Cochran was bracing herself. She closed her eyes and held on because she knew what was going to happen. She stated that was it, and she blacked out.

The defendants have not opposed this motion and have not raised any triable issues of fact to preclude summary judgment as a matter of law on the issue of whether the plaintiffs bear any liability in the occurrence of this accident.

Here, the plaintiff passengers, Tamika Scott and Danelle Pacheco, by the admissible evidence, have established prima facie that there is nothing they did or did not do which caused the accident between the two defendant vehicles. The testimonies by the plaintiffs establish that the vehicle being operated in the middle westbound lane of Sunrise Highway by defendant O'Brien entered into the left lane of traffic, striking the vehicle being operated by defendant Cochran in which the plaintiffs were passengers. It is determined as a matter of law that the plaintiffs were innocent passengers in the Cochran vehicle. As innocent passengers, summary judgment may be awarded to them without precluding an apportionment of fault between the drivers of the two vehicles involved in the accident (*see,* ***Conigliar v Premier Poultry Inc.***, 67 AD3d 954, 888 NYS2d 779 [2d Dept 2009]; *see also* ***Garcia v Tri-County Ambulette Service, Inc.***, 282 AD2d 206, 723 NYS2d 163 [1st Dept 2001]).

Accordingly, that part of motion (003) for summary judgment in favor of the plaintiffs, Tamika Scott and Danelle Pacheco, on the issue of liability as asserted against the defendants, Shayna Cochran and Noreen O'Brien, is granted.

In motion (003), Danelle Pacheco also seeks summary judgment on the issue that she sustained a serious injury within the meaning of Insurance Law §5102 (d). In support of this application, she has submitted the

sworn report of the defendants' examining physician, Jerrold Gorski, M.D. dated May 21, 2010 wherein he affirms that he reviewed a series of office notes from Dr. Kleeman beginning on March 19, 2006 in which it was set forth that Danelle Pacheco was diagnosed with a fracture of the humerus with minimal angulation. Dr. Gorksi further reviewed follow up x-rays from March 23, 2009 and March 31, 2009 which showed the fracture to be in good alignment. He further reviewed additional follow up x-rays of April 14, May 5, June 15, and a final x-ray report of August 17, 2009, showing the healing of the fracture, callous formation at the site, and alignment of the bone. Dr. Gorski concludes that upon examination that Ms. Pacheco sustained a fracture of the left humerus. In her verified bill of particulars, Danelle Pacheco has claimed a midshaft comminuted metadiaphyseal fracture of the left humerus with displacement. Based upon the foregoing, it is determined that Danelle Pacheco has sustained a fracture as defined as a serious injury by Insurance Law §5102(d). The defendants have failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, that branch of the motion (003) by Danelle Pacheco for an order granting summary judgment on the basis that she sustained a serious injury as defined by Insurance Law §5102(d) is granted.

Dated: 9/1/2011

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION