SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

TERLIE VINCENT,

Plaintiff,

Index No.: 8137/10
Motion Seq. No.: 01
Motion Date: 08/22/11

- against -

METROPOLITAN SUBURBAN BUS AUTHORITY,
MTA LONG ISLAND BUS AUTHORITY and
SURESH HOSEIN,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR §§ 3211 and 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the ground that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiff as a result of an automobile accident with defendants which occurred on June 5, 2008, at approximately 7:20 a.m., at or near the intersection of Jamaica Avenue and 213th Street, County of Queens, State of New York. The accident involved two vehicles, a Nissan Sentra operated by

plaintiff and owned by an individual named John Chery, and a bus owned by defendants Metropolitan Suburban Bus Authority and MTA Long Island Bus Authority and operated by defendant Suresh Hosein ("Hosein")

At the time of the accident, plaintiff alleges that her vehicle was making a left turn onto Jamaica Avenue from 213th Street, when defendants' bus struck her vehicle twice. Plaintiff claims that defendants' bus hit the rear passenger side of her vehicle, caused her vehicle to hit the cement median and then land on the sidewalk. Plaintiff asserts that it was a very hard impact. Plaintiff contends that her chest and right knee struck the steering wheel, while her body was pushed over to the door.

As a result of the collision, plaintiff claims that she sustained the following injuries:

Sprain of the lateral collateral ligament, right knee;

Right knee derangement;

Cervical radiculopathy;

Cervical myofascitis;

Decreased range of motion, cervical spine;

Lumbar myofascitis;

Decreased range of motion, lumbar spine;

Thoracic myofascitis;

Headaches;

Disc herniation at L1-L2;

Posterior bulging disc at L2-L3;

Posterior bulging disc at L5-S1;

Ligamentious laxity at C2-C3;

Ligamentious laxity at C3-C4;

Multilevel slight hypertrophy of the uncinate processes;

Posterior bulging disc at C2-C3;

Posterior bulging disc at C3-C4;

Hypertrophy. *See* Defendants' Affirmation in Support Exhibit B.

Plaintiff commenced this action by service of a Summons and Verified Complaint on or about June 12, 2009. Issue was joined on or about July 6, 2009. *See* Defendants' Affirmation in Support Exhibit A.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427

N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be

supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that, as a consequence of the above described automobile accident with defendants, she has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) significant disfigurement; (Category 3)

2) a fracture; (Category 4)

3) permanent loss of a body organ, member, function or system; (Category 6)

4) a permanent consequential limitation of use of a body organ or member; (Category 7)

5) a significant limitation of use of a body function or system; (Category 8)

6) 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.(Category 9).

See Defendants' Affirmation in Support Exhibit B.

To meet the threshold regarding significant disfigurement, the law is well settled that the test for determining when an injury is a significant disfigurement is whether or reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive,

objectionable or as the object of pity or scorn. *See Spevak v. Spevak*, 213 A.D.2d 622, 624 N.Y.S.2d 232 (2d Dept. 1995); *Maldonado v. Piccirilli*, 70 A.D.3d 785, 894 N.Y.S.2d 119 (2d Dept. 2010); *Lynch v. Iqbal*, 56 A.D.3d 621, 868 N.Y.S.2d 676 (2d Dept. 2008); *Sirmans v. Mannah*, 300 A.D.2d 465, 752 N.Y.S.2d 359 (2d Dept. 2002). Small, well-healed scars do not constitute significant disfigurement within the meaning of the no-fault statute. *See Santos v. Taveras*, 55 A.D.3d 405, 866 N.Y.S.2d 43 (1st Dept. 2008).

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot, supra*. A claim 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 can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems, supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, 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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.,* 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants' motion. In support of their motion, defendants submit the pleadings, plaintiff's Verified Bill of Particulars and Supplemental Verified Bill of Particulars, the transcript of plaintiff's Public Authorities Hearing testimony, the transcript of plaintiff's Examination Before Trial ("EBT") testimony, the transcript of defendant Hosein's EBT testimony, the affirmed report of Marianna Golden, M.D., who performed an independent neurological examination of plaintiff on April 13, 2011 and the affirmed report of Thomas P. Nipper, M.D., who performed an independent orthopedic examination of plaintiff on April 13, 2011.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d

Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Defendants assert that, according to plaintiff's testimony at the Public Authorities Hearing, as well as at her EBT, at the time of the accident, plaintiff declined the police's offer to call her an ambulance and went to work from the scene. However, later that day, plaintiff went to Jamaica Hospital, as she was suffering from chest pain, neck pain and her right knee was visibly swollen. At the hospital, she was given a prescription for pain medication. Approximately one week after the accident, plaintiff went to Avenue Medical Pain Relief Center and was treated there for six weeks. In July or August 2008, plaintiff switched to Grand Central Physical Medicine and Rehab. She went there for therapy five days per week and stopped going there in either April or May 2009. Plaintiff testified that the pain in her chest went away after approximately two weeks, the pain in her neck and lower back comes and goes and her right knee hurts when she goes up and down stairs.

Dr. Marianna Golden, M.D., board certified in neurology and psychiatry, conducted an examination of plaintiff on April 13, 2011. *See* Defendants' Affirmation in Support Exhibit F. Plaintiff told Dr. Golden that she had radiating low back pain and pain in her right knee. Dr. Golden examined plaintiff and performed range of motion tests on plaintiff's cervical spine and thoarcolumbar spine. Range of motion testing, conducted by way of a goniometer, indicated no deviations from normal. Dr. Golden's diagnosis was "[c]ervical and thoracolumbar spine strains, resolved. Normal neurologic examination. Based on my examination, there is no indication of a neurologic disability."

Thomas P. Nipper, M.D., performed an independent orthopedic examination of plaintiff on April 13, 2011. *See* Defendant's Affirmation in Support Exhibit G. Dr. Nipper examined plaintiff and performed quantified and comparative range of motion tests on plaintiff's cervical spine, lumbar spine and right knee. Range of motion testing, conducted by way of a goniometer,

indicated "slight" deviations from normal. With respect to the right knee "McMurray Test, Lachman, anterior drawer, pivot shift and posterior drawer tests are all negative." Dr. Nipper stated, "[t]he above ranges of motion were performed with suboptimal effort due to complaint of pain." Dr. Nipper's diagnosis was "[c]ervical and lumbar sprain, resolved. There is no evidence of an orthopedic disability."

With respect to plaintiff's 90/180 claim, defendants rely on plaintiff's testimony at the Public Authorities Hearing, as well as at her EBT, which indicated that, as a result of the subject accident, she missed two days of work and one week of school. Plaintiff testified that the only aspect of her job that changed is that she is now unable to sit at the computer for eight hours per day and needs to take a break after an hour and a half due to her lower back hurting and her fingers becoming numb. Additionally, before the accident, plaintiff went to the gym almost everyday or twice a week and did cardio exercise for thirty minutes. Now she goes "once in a while" and will do cardio exercise for about ten minutes. She also used to use the rowing machine for approximately twenty minutes, but now she can barely do five minutes.

Based upon this evidence, the Court finds that defendants have established a *prima facie* case that plaintiff did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden now shifts to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

To support her burden, plaintiff submits her certified medical records from Avenue Medical Pain Relief Center, her certified medical records from Grand Central Physical Medicine and Rehab, her own Affidavit, the affirmed report of Dorina Drukman, D.O., CPM&R and the reports of Sasan Azar, M.D., of Radiological Diagnostic Center Medical Association, P.C. who performed MRIs of plaintiff's lumbar spine and cervical spine on April 24, 2009.

At the outset, plaintiff argues that defendants' own doctors give plaintiff restricted range of motion in her cervical spine, lumbar spine and right knee almost three years after the subject accident.

Plaintiff submits that her EBT testimony indicated that she was treated for her knees and lower back at Avenue Medical Pain Relief Center where she underwent a rigorous course of physical therapy for her pain including stretching, hot and cold packs, therapy and acupuncture. Plaintiff went to Avenue Medical Pain Relief Center almost every day for approximately six weeks. Thereafter, plaintiff continued her treatment at Grand Central Physical Medicine and Rehab. She treated there for almost one year. Plaintiff testified that she stopped going for therapy because insurance was no longer covering it.

Plaintiff presented to Avenue Medical Pain Relief Center on June 10, 2008, five days after the subject accident. *See* Plaintiff's Affirmation in Support Exhibit B. Upon initial physical examination of plaintiff by Dr. Nitin Narkhede, the following neurological/orthopedic tests were positive: Jackson's and Spurling's Signs, Soto Hall, Kemp's, Straight Leg Raise, Reverse Phalen's, Tinel's Sign and McMurray's Sign. Quantified and comparative range of motion tests performed on plaintiff's cervical spine, lumbar spine and right knee on that date indicated deviations from normal. Dr. Narkhede's diagnosis of plaintiff on that date was, "[c]ervical Radiculitis. Cervical, Thoracic and Lumbar Myofascitis. Rule out Cervical and Lumbar Disc Displacement without Myelopathy. Knee Derangement. Rule out Traumatic Carpal Tunnel Syndrome. Headaches. Costochondritis. Paresthesias." Dr. Narkhede stated, "[w]ithin a reasonable degree of medical certainty, if the history given by Terlie Vincent is correct, then there is a direct causal relationship between the motor vehicle accident of 6/05/08 and the patient's injuries and complaints."

The affirmed report of Dr. Dorina Drukman, of Grand Central Physical Medicine and Rehab, indicates that plaintiff first presented to her office on July 22, 2008. *See* Plaintiff's Affirmation in Support Exhibit E. Quantified and comparative range of motion tests, conducted

by way of a inclinometer and performed on plaintiff's neck, lumbar spine and right knee on that date, indicated deviations from normal. The following neurological/orthopedic tests were positive: Foraminal Compression, Foraminal Distraction, Spurling, Soto Hall, Lasegue/Straight Leg Raise, Kemp, Adduction Stress, Apley's Compression and Valgus. Dr. Drukman's diagnostic impression of plaintiff was, "[c]ervical radiculitis. Cervical myofascitis. Tension headache. Lumbar radiculitis. Contusion of knees. Effusion knee. Pain in the knee. Patellar tendonitis. Numbness." *See id.*

Plaintiff was re-evaluated by Dr. Drukman on October 17, 2008. Quantified and comparative range of motion tests, conducted by way of a inclinometer and performed on plaintiff's cervical spine, lumbar spine and right knee on that date, indicated deviations from normal. Dr. Drukman's diagnostic impression of plaintiff on October 17, 2008 was, "[c]ervical radiculopathy. Rule out lumbar disc herniations. Lumbar radiculitis. Right knee contusion. Effusion in the right knee. Right lateral collateral ligament sprain. Pain in the right knee. Right knee patellar tendonitis." Plaintiff was again re-evaluated by Dr. Drukman on February 13, 2009. Quantified and comparative range of motion tests, conducted by way of a inclinometer and performed on plaintiff's neck, lumbar/lower trunk and right knee on that date, indicated deviations from normal. Dr. Drukman's diagnostic impression of plaintiff on February 13, 2009 was, "[c]ervical radiculopathy. Rule out cervical disc herniations. Cervical muscle spasm. Rule out lumbar disc displacement. Low back syndrome. Lumbar radiculitis. Effusion in the right knee. Right lateral collateral ligament sprain. Patellar tendonitis." *See id.*

Finally, plaintiff was once again re-evaluated by Dr. Drukman on August 10, 2011. At that time, plaintiff reported persistence in her symptoms in the upper and lower trunk and both knees with worsening of the symptoms in her knees. Quantified and comparative range of motion tests, conducted by way of a inclinometer and performed on plaintiff's cervical spine, lumbar spine and right knee on that date, indicated deviations from normal. Dr. Drukman's diagnostic impression of plaintiff on August 10, 2011 was, "[l]umbar radiculitis. B/l patellar tendonitis.

Cervical muscle spasm. Cervical radiculopathy." *See id.*

Dr. Drukman's Conclusion/Prognosis was, "Ms. Vincent is a 28-year-old female who was involved in a motor vehicle collision as a restrained driver on 06-05-2008. She sustained injuries to her upper back, lower back and both knees. In spite of significant time since the accident, she continues to experience pain, limitations and range of motions, weakness in the injured areas. In accordance with the history presented, patient complaints, results of the objective tests performed and findings on the physical examination, it is my professional opinion that Ms. Vincent's impairments and current symptoms are directly causally related to the motor vehicle collision on 06-05-2008. Her impairments are permanent in nature and she may continue to experience limitations in her daily activities in the future. She would benefit from repeated courses of physical therapy for the exacerbations of her symptoms. At present she is mildly partially disabled with limitations in prolonged standing, sitting, frequent stair climbing, lifting more than 10 lbs. The prognosis for her full recovery is poor." *See id.*

Plaintiff also submits the reports of Dr. Sasan Azar, of Radiological Diagnostic Center Medical Association, P.C., under whose auspices administered and supervised the administration and examination of the MRIs of plaintiff's lumbar spine and cervical spine performed on April 24, 2009. *See* Plaintiff's Affirmation in Opposition Exhibit F. With respect to the MRI of the cervical spine, the impression was, "[q]uestion of focal left paracentral disc herniation at L1-L2 disc level only best appreciated on the sagittal T2-weighted sequence. Small posterior bulges at L2-L3 and L5-S1 levels. Question of abnormal morphology of the mid and lower pole of the right kidney and left lower pole of the left kidney on the axial T1 and T2-weighted sequence. Correlation with renal ultrasound examination in recommended." With respect to the MRI of the cervical spine, the impression was, "[s]light ligamentous laxity at C2-C3 and C3-C4 level as detailed above. Multilevel slight hypertrophy of the uncinate processes as detailed above. Small posterior bulges. Hypertrophy of tissue of nasopharynx. Partial opacification of bilateral maxillary sinuses." *See id.*

Plaintiff further submits her own Affidavit in which she states, "[d]espite the fact that I do still experience pain and discomfort in my low back and right knee, I am no longer going to physical therapy. Due to the fact that no-fault terminated my benefits, I could not afford to continue my physical therapy. That, combined with the fact that the treatment was not really helping and my doctor advising me that I had reached maximum medical improvement, I no longer attend physical therapy sessions."

Plaintiff additionally argues that "there are discrepancies between plaintiff's doctor, Dorina Drukman, D.O., and defendants' doctors, Dr. Nipper and Dr. Golden, concerning what constitutes normal range of motion of the cervical and lumbar spine. Thus, Dr. Golden's findings that plaintiff's cervical and lumbar range of motion was 'normal' was in fact not normal according to Dr. Drukman. These discrepancies between plaintiff's doctor and defendants' doctors concerning normal cervical and lumbar range of motion raise triable issues of fact whether plaintiff sustained significant limitations in range of motion of his (*sic*) cervical and lumbar spine."

The Court notes that, in her opposition, plaintiff states, "[a]s will be demonstrated below, plaintiffs (*sic*) Terlie Vincent has suffered a serious injury in that she suffered: a permanent, consequential limitation of use of her cervical spine, lumbar spine and right knee; a significant limitation of use of her cervical spine, lumbar spine and right knee; and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of at least ninety days during the one hundred and eighty days immediately following the accident." Plaintiff failed to address or provide any evidentiary support of her claims that she suffered "serious injury" under the following categories: significant disfigurement (Category 3), a fracture (Category 4) and permanent loss of a body organ, member, function or system (Category 6). Accordingly, plaintiff's claims under those three categories are hereby **DISMISSED.**

However, with respect to plaintiff's claims of "serious injury" under the categories of a permanent consequential limitation of use of a body organ or member (Category 7), a significant limitation of use of a body function or system (Category 8) and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Category 9), the Court concludes that the evidentiary documentation presented by plaintiff clearly raise genuine issues of fact as to injuries causally related to the June 5, 2008 accident. Consequently, with respect to those three "serious injury" categories, defendants' motion for an order pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York granting them summary judgment and dismissing plaintiffs' Verified Complaint is hereby **DENIED**.

The parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 8, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 6, 2011