SHORT FORM ORDER

INDEX No. 13-61135
CAL No. 14-00864MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 4-18-14 (#001)
MOTION DATE 6-18-14 (#002)
MOTION DATE 8-20-14 (#003)
ADJ. DATE 9-24-14
Mot. Seq.# 001 - MG
002 - MD
003 - MG

KATHLEEN E. CASSIDY,

Plaintiff,

- against -

RIVERHEAD CENTRAL SCHOOL DISTRICT and SEAN C. TERRY,

Defendant.

KUJAWSKI & KUJAWSKI, ESQS.
Attorney for Plaintiff
1637 Deer Park Avenue
Deer Park, New York 11729-0661

AHMUTY, DEMERS & MCMANUS, ESQS.
Attorney for Defendant
200 I.U. Willets Road
Albertson, New York 11507

Upon the following papers numbered 1 to 46 read on these motions for summary judgment and to file a late notice of claim; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-8; (003) 24-28; Notice of Cross Motion and supporting papers 9-14; Answering Affidavits and supporting papers 29-32; 33-34; 35-38; Replying Affidavits and supporting papers 39-41; 42-43; 44-46; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by plaintiff Kathleen E. Cassidy pursuant to CPLR 3212 for summary judgment in her favor on the issue of liability is granted; and it is further

ORDERED that motion (002) by defendants Riverhead Central School District and Sean C. Terry pursuant to CPLR 3212 for summary judgment dismissing the complaint on the bases that the notice of claim was not timely served pursuant to General Municipal Law § 50-i, is denied; or in the alternative, that the plaintiff failed to sustain a serious injury as defined by Insurance Law § 5102 (d), is denied ; and it is further

ORDERED that motion (003) by plaintiff Kathleen E. Cassidy pursuant to General Municipal Law 50-e for an order permitting plaintiff to file a late notice of claim is granted and the notice of claim dated February 4, 2013 previously served by plaintiff is deemed served nunc pro tunc; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon the defendants and the clerk of the calendar department, Supreme Court, Riverhead, within 30 days of entry of this order with the clerk of Suffolk County, and the clerk of the calendar department is directed to schedule this matter for a hearing on damages forthwith.

In this negligence action, Kathleen E. Cassidy seeks damages for personal injuries which she alleges she sustained on September 20, 2012, on State Road 24 (Flanders Road) in the vicinity of Cypress Avenue and Wood Road Trail, in Southampton Town, in Suffolk County, New York, when her stopped vehicle was struck in the rear by a pickup truck which was struck in the rear by a bus operated by defendant Sean C. Terry and owned by Riverhead Central School District, in this chain collision accident.

In cross motion (002), defendants seek, in part, dismissal of the complaint on the basis that the plaintiff failed to timely serve a notice of claim. In cross motion (003), plaintiff seeks leave to serve a late notice of claim.

Pursuant to General Municipal Law § 50-i (1), service of a notice of claim upon a school district is a condition precedent to the commencement of an action for personal injury against a school district, and must be served within ninety days after the claim arises (*see* Education Law § 3813[2]; General Municipal Law § 50-i[1]; ***Felice v Eastport/South Manor Cent. School Dist.***, 50 AD3d 138; 851 NYS2d 218 [2d Dept 2008]; ***Padovano v Massapequa Union Free School Dist.***, 31 AD3d 563, 818 NYS2d 274 [2d Dept 2006]). The purpose of the notice of claim requirement is to give public corporations such as school districts an opportunity for timely and efficient investigation of tort claims, as well as to protect them against stale claims (*see* ***Felice v Eastport/South Manor Cent. School Dist.***, *supra*; ***Casias v City of New York***, 39 AD3d 681, 833 NYS2d 662 [2d Dept 2007]; *see* ***Brown v City of New York***, 95 NY2d 389, 718 NYS2d 389 [2000]).

An application to extend the time within which to serve a notice of claim may be made before or after commencement of an action but not more than one year and ninety days after the cause of action accrued, unless the statute has been tolled (*see* General Municipal Law § 50-e[5]; ***Robinson v Board of Education of City School District of City of New York***, 104 AD3d 666, 962 NYS2d 279 [2d Dept 2013]; ***Johnson v Town of Hempstead***, 18 AD3d 712, 794 NYS2d 924 [2d Dept 2005]; ***Matter of Schmidt v Board of Cooperative Educational Services of Nassau County***, 253 AD2d, 676 NYS2d 623 [2d Dept 1998]). In determining whether or not to grant leave to serve a late notice of claim, a court must consider: (1) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter; (2) whether the petitioner was an infant or mentally or physically incapacitated; (3) whether the petitioner had a reasonable excuse for the failure to serve a timely notice of claim; and (4) whether the delay would substantially prejudice the public corporation in maintaining its defense (*see* General Municipal Law § 50-e[5]; Education Law § 3813[2-a]; ***Hampson v Connetquot Central School District***, 114 AD3d 790, 980 NYS2d 132 [2d Dept 2014]; ***Placido v County of Orange***, 112 AD3d 722, 977 NYS2d 64 [2d Dept 2013]; ***Vicari v Grand Ave. Middle School***, 52 AD3d 838, 860 NYS2d 629 [2d Dept 2008]; ***Melissa G. v North Babylon Union Free School Dist.***, 50 AD3d 901, 855 NYS2d 276 [2d Dept 2008]). A court has the discretion to consider all relevant factors and the presence or absence of any one factor is not necessarily determinative (*see* ***Nurena v Westchester County***, 120 AD3d 781, 2014 NY Slip Op 05965; ***Vicari v Grand Ave. Middle School***, *supra*; ***Jordan v***

City of New York, 41 AD3d 658, 659, 860 NYS2d 629 [2d Dept 2008]; ***Narcisse v Incorporated Vil. of Cent. Islip***, 36 AD3d 920, 921; 838 NYS2d 624 [2d Dept 2007]).

In that this action accrued on September 20, 2012, plaintiff had until December 20, 2013 to serve an application to file a late notice of claim. The notice of claim relating to this accident is dated February 4, 2013, thus it was served within one year and ninety days of the accrual of the accident, although beyond the ninety days following the occurrence giving rise to the claim. Defendants seek dismissal of the complaint on the basis that the notice of claim was received by the Riverhead Central School District on February 15, 2013, and therefore, said notice was not timely served. Defendants conducted a hearing of plaintiff pursuant to General Municipal Law § 50-h on April 10, 2013. It is noted that defendants' answer dated June 28, 2013, raised the affirmative defense that the verified complaint failed to comply with the requirements of Education Law section 3813 and General Municipal Law section 50-i, but does not set forth the basis for the defense. Thereafter, plaintiff served a verified bill of particulars dated July 15, 2013.

It is determined that the respondent School District would not be prejudiced if plaintiff were permitted to serve a late notice of claim. Defendants were aware of the occurrence of the accident within days of the 90 days following the subject accident. An MV 104 Police Report was prepared following the accident, and listed all the parties involved, as well as the multiple infant passengers who were passengers on the defendants' school bus when the accident occurred. Sean Terry, the bus driver and employee of the school district, testified that immediately following the accident, he radioed the bus garage to notify of the accident. He was told to make a list of the children on the bus and spoke with the children to ascertain that they were okay. Thereafter, a few mechanics and the superintendent from the Phillips Avenue School of the defendant school district arrived at the scene. Thus, plaintiff met her initial burden of establishing a lack of substantial prejudice to the defendants (***Kellman v Hauppauge Union Free School District***, 120 AD3d 634, 991 NYS2d 128 [2d Dept 2014]). While the plaintiff offers no explanation for the delay in timely serving the notice of claim, the absence of a reasonable excuse for the delay does not bar the court from granting leave to serve a late notice of claim as there is actual notice and an absence of prejudice to the defendants (***Kellman v Hauppauge Union Free School District***, *supra*; ***Joy v County of Suffolk***, 89 AD3d 1025, 933 NYS2d 369 [2d Dept 2011]; ***Matter of Rivera-Guallpa v County of Nassau***, 40 AD3d 1001, 836 NYS2d 288 [2d Dept 2007]).

Accordingly, that part of motion (002) by defendants for dismissal of the complaint based upon plaintiff's failure to timely serve the notice of claim is denied, and motion (003) by plaintiff for leave to serve a late notice of claim is granted, and the notice of claim dated February 4, 2013 previously served by plaintiff is deemed served nunc pro tunc.

In motion (001), plaintiff seeks summary judgment in her favor on the issue of liability. Kathleen Cassidy testified to the extent that she was involved in a motor vehicle accident on February 20, 2013. The day was sunny, and the roads were dry. She was traveling in a westerly direction on Flanders Road, which she described as having one travel lane in each direction, with a center turn lane. She was traveling on a straight portion of the road with a slight decline, about one-quarter mile from the intersection with Route 105, which is controlled by a traffic signal light. She brought her vehicle to a slow stop behind an SUV, which was stopped ahead of her. The traffic light ahead was not visible from where she stopped. While her vehicle remained in a stopped position, it was struck in the rear by the truck behind her vehicle, which had been struck by a full-sized yellow school bus. She had noticed the yellow school bus behind her vehicle

before that, then noticed that the truck was behind her while she was stopped. She heard an impact, a crash, the sound of breaking glass, and then felt an impact to the rear of her vehicle from the truck. She looked in her rear-view mirror and saw the truck and the school bus. Upon impact, her vehicle moved forward, but did not strike the vehicle in front of her.

Sean Terry testified to the extent that he was hired in the summer of 2011 by the Riverhead School District as a bus driver. He had a commercial driver's license for driving the bus on the date of the accident. The Riverhead School District, via another employee bus driver, provided ten weeks of training and instructions to Terry for driving the school bus. When he finished his training, he went into the Army and did not return to Riverhead School District until the following school year in about May 2012, and did not drive the bus until September 2012. He was given retraining before so doing.

Terry continued that on the date of the accident, he did not have a set bus route, and was on a new route. He had just finished picking up the last of 30 elementary school children and was the only adult on the bus. He was driving on Flanders Road in a westerly direction, but did not know how far he traveled on that road before the accident occurred. He described traffic as heavy and stop and go. He stated that there was a pickup truck in front of him with which the front of his bus came into contact. Just prior to the impact with the pickup truck, it was "slightly moving." He stated the brake lights had come on so he could tell it was slowing down from about five or ten miles per hour, and was moving slightly slower than his bus, which was moving at about five to ten miles per hour. He noticed a long line of vehicles ahead which were stopping or stopped due to traffic.

Terry testified that he hit the pickup truck because it stopped short in front of him. The front of his bus was about 20 feet behind the pickup truck, the last time the pickup's brake lights illuminated. Terry was driving about 20 miles per hour at that point. He was not sure if the pickup truck was traveling slower or faster than his vehicle. He applied his brakes softly at first, then hard. He characterized the impact between the front of the bus and the rear of the pickup truck as medium, which caused the pickup truck to move forward and strike the vehicle in front of it, which he described as a small car. He could not remember if the superintendent who came to the scene from the school district asked him what happened. He filled out a report for the school. The front grill of the bus was dented, and the bed of the pickup truck had a big dent.

It is well settled that the violation of a statute which establishes a specific standard of care may result in either absolute liability or a finding of negligence per se (***Ciatto v Lieberman***, 266 AD2d 494, 698 NYS2d 54 [2d Dept 1999]; ***Zupnick v Certified Lumber Corp.***, 17 Misc3d 1122A, 851 NYS2d 75 [Sup. Ct., Kings County 2007]). As a rule, violation of a state statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability (***Elliott v City of New York***, 95 NY2d 730, 724 NYS2d 397 [2001]). Violation of a statute constituting negligence per se places a duty on a party to provide a reasonable excuse for its failure to comply with the statutorily imposed standard of care (***Dalas v City of New*** York, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]; ***Cordero v City of New York***, 112 AD2d 914, 492 NYS2d 914 [1985]). The standard to be applied in deciding a motion for judgment as a matter of law is whether the trial court could find that by no rational process could the trier of fact base a finding in favor of the party opposing the motion (***Burns v Mastroianni***, 173 AD2d 754, 570 NYS2d 629 [2d Dept 1991]). Based upon the adduced testimonies, defendants' school bus struck the pickup truck in the rear as it was coming to a stop, causing the pickup truck to strike the rear of plaintiff's vehicle, which was stopped in

traffic. It is determined that by no rational process could a trier of fact base a finding against plaintiff or in favor of defendants.

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2000]). A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson***, 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). In the instant action, doubt is eliminated by the record submitted by the parties and there is no factual issue to be determined with respect to the defendants' liability for the occurrence of the accident (***Ugarriza v Schmieder***, 46 NY2d 471, 414 NYS2d 304 [1979]; ***Sillman v 20th Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). Terry was aware that traffic was heavy, stop and go, and that the pickup truck in front of him applied its brakes prior to the accident on more than one occasion, however, he failed to exercise reasonable care under the circumstances to avoid the accident.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [1999]; *see also* Vehicle and Traffic Law § 1129[a]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that the defendant rebut the inference of negligence by providing a nonnegligent explanation for the accident (***Grimm v Bailey***, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]). Under the circumstances of this case, such explanation by the defendant is insufficient to rebut the inference of negligence caused by the rear-end collision, as a claim of a sudden stop by the leading vehicle, standing alone, is insufficient to rebut the presumption of negligence (*see* ***Byrne v Smith***, 96 AD3d 704, 945 NYS2d 737 [2d Dept 2012]; ***Franco v Bauguste***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]).

Vehicle & Traffic Law § 1129 (a) provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. The defendant was under a duty to maintain a safe distance between his bus and the vehicle in front of the bus, and his failure to do so, in the absence of a nonnegligent explanation, constitutes negligence as a matter of law (***Mendiolaza v Novinski***, 268 AD2d 452, 703 NYS2d 49 [2d Dept 2000]). As set forth above, the defendant failed to come forward with a nonnegligent explanation for striking the pickup truck in the rear, and causing the pickup truck to strike the plaintiff's stopped vehicle in the rear. The defendant has further failed to rebut the inference that he did not maintain a safe distance between the bus and the pickup truck, thus proximately causing the subject accident.

In opposition, the defendant has failed to raise a factual issue or to come forward with a non-negligent explanation for the occurrence of the accident and his failure to timely stop prior to striking the pickup truck in the rear, causing the impact to the plaintiff's vehicle. Here, the defendant testified that he saw the heavy stop-and-go traffic on Flanders Road, and vehicles ahead which were stopped or stopping, and that the driver of the pickup truck had applied his brakes prior to the contact between the bus and pickup truck, causing plaintiffs' vehicle to be struck in the rear by the front of the pickup truck. It is noted that counsel for the defendant argues in the reply that the operator of the pickup truck could have liability in this

action, however, this is a conclusory, speculative argument, unsupported by evidentiary proof to support such claim, and fails to raise a factual issue to preclude summary judgment in favor of plaintiff. The defendants have not come forward with a nonnegligent explanation with regard to his operation of his vehicle. Consequently, the defendants failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat the summary judgment motion.

Accordingly, motion (001) by plaintiff for summary judgment in her favor on the issue of liability is granted.

In motion (002), defendants further seek summary dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). In support of said application, defendants submitted, inter alia, plaintiff's verified bill of particulars; plaintiff's and defendant Terry's transcripts of their examinations before trial and plaintiff's testimony pursuant to the hearing conducted pursuant to General Municipal Law 50-h; and the sworn reports of Edward Weiland, M.D. dated February 20, 2014 concerning his independent neurologic examination of the plaintiff, Jerrold Gorski, M.D. dated February 14, 2014 concerning his independent "medical" evaluation of plaintiff, and David Fischer dated May 1, 2014 concerning his radiology review of plaintiff's MRIs of her cervical and lumbar spine both dated December 10, 2012, and right shoulder of June 13, 2013.

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 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."

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*).

By way of plaintiff's verified bill of particulars, she alleges that she sustained the following injuries in the subject accident: neck sprain and strain; muscle spasm; mild C5-6 spinal stenosis with multilevel neural foramina stenosis; lumbar back sprain; mild L2-L3, L3-L4, L4-L5 spinal stenosis with multilevel neural foramina stenosis; multiple vertebral body hemangiomas, atypical in appearance at L1; lumbar radiculopathy; left cluneal nerve neuroma; lipoma superior to the distal right clavicle; partial thickness tear of the distal supraspinatus tendon of the right shoulder; lipoma superior to the distal right clavicle; small glenohumeral joint effusion of the right shoulder; and sprains of the acromioclavicular and coracracromial ligament of the right shoulder.

While Dr. Weiland and Dr. Gorski indicated the medical records and reports they each reviewed concerning plaintiff's care and treatment and diagnostic testing, none of those records or reports, including plaintiff's cervical, lumbar, and right shoulder MRIs, have been provided to this court with the moving papers, precluding summary judgment. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and the expert testimony is limited to facts in evidence (*see* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

Dr. Weiland performed an independent neurologic evaluation of the plaintiff and indicated that plaintiff complains of periodic lower back pain radiating to the left paraspinous region, and stated that she denies any radicular symptoms involving her lower extremities. He does not address the cause of her back pain or the pain radiating to the left paraspinous region, or the left cluneal nerve neuroma, or set forth the radicular symptoms which he stated the plaintiff denied having. While Dr. Weiland reviewed a report concerning the lumbar epidural steroid injections plaintiff was administered by Dr. Adipietro, he did not review plaintiff's MRI study of her lumbar spine, comment on the findings of the MRI, correlate any findings with his examination, or comment upon the epidural injections and plaintiff's surgical consultation.

Dr. Weiland obtained range of motion measurements of plaintiff's cervical, thoracic, and lumbar spine, hips and shoulders, however, he did not set forth the method he employed to determine such values that he reported, 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 this court to speculate as to how he determined such ranges of motions when examining the plaintiff. He did not compare his findings to the normal range of motion values, precluding summary judgment.

Dr. Gorski performed an orthopedic examination of the plaintiff and set forth that he reviewed the records from Stony Brook Neurosurgery Department by Dr. Davis, addressed to Dr. Carter, and that Dr. Davis reported that the cervical MRI scan revealed modest discogenic disease and that the radiologist overstated the significance of the stenosis. Dr. Gorski does not address the nature of the discogenic disease or stenosis or causation. Therefore, factual issues are raised as to the discrepancies in the MRI study interpretations by the radiologist and Dr. Davis, and claimed injuries which Dr. Gorski does not address.

Dr. Gorski stated that he reviewed the plaintiff's shoulder MRI and indicated that, inter alia, degenerative arthritis of the AC joint was revealed. However, he does not address duration or causation of the same and whether it is trauma related (*see* ***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). Dr. Gorski does not rule out or address the glenohumeral joint effusion of the right shoulder; or the partial thickness tear of the distal supraspinatus tendon of the right shoulder which was noted in plaintiff's bill of particulars, as not being causally related to the subject accident. While Dr. Gorski performed cervical range of motion values, he did not report any range of motion values with regard to plaintiff's lumbar spine or right shoulder. These factual issues also preclude summary judgment.

Although an independent radiology review was submitted concerning Dr. Fisher's review of plaintiff's cervical, lumbar, and right shoulder MRI studies, copies of the reports which set forth the findings of plaintiff's radiologist have not been provided, leaving this court to speculate as to the contents of those reports and whether there are any differences in interpretation set forth in those reports, in light of Dr. Davis' disagreement with the reported findings. Dr. Fisher did not submit a copy of his curriculum vitae to quality as an expert in this matter. Dr. Fisher has reported discogenic degenerative changes in plaintiff's cervical spine and lumbar spine, however, he does not opine with regard to causation or duration of these findings, precluding summary judgment.

It is further noted that the defendants' examining physicians did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering the defendants' physicians' affidavits/reports 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 the 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 with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

The plaintiff testified to the extent that she immediately felt a pull in her lower back and pain at the base and left side of her neck upon the occurrence of the accident. She was treated in the emergency room at Peconic Bay Medical Center following the accident, then received follow-up care and treatment at North Fork Orthopedic, where she was prescribed medication and physical therapy. She attended physical therapy at Hampton Bays Physical Therapy, twice a week, and she was still treating at the time of her hearing on April 10, 2013. She had MRIs of her neck, back, and right shoulder. She then followed with a neurologist, and Dr. Adipietro, for pain management. At her later deposition, the plaintiff testified that she underwent physical therapy for six months. She saw a back specialist who recommended epidural injections, so she

had two injections in 2013 into her lower back. She was advised not to continue physical therapy with the epidural injections. At the time of her deposition, she had another epidural scheduled.

The plaintiff testified that prior to the accident, she was working at Starbucks as a shift supervisor, 30 and 34 hours a week. Since the accident, her hours were cut back to 12 to 16 a week. Since the accident, she cannot do things as fast, and has difficulty bending. She testified that her back was presently "killing" her from sitting. She also works at Stop & Shop as the lead bakery clerk, and does ordering, scheduling, baking, packing out, deliveries, and cleaning. She has difficulty putting the truck away (unloading it) and bending. She can no longer hula hoop, ride a unicycle, roller skate, jump rope, vacuum her car, run, bend low to pick things off the floor, step up curbs, or stairs, or sit. She has difficulty getting up from a sitting position. She cannot shovel the driveway. Stop and go traffic causes her to have back pain. She stated she is in pain every day. The plaintiff testified that ten years prior to the accident, she injured her back at work while moving a metal plate while working in Massachusetts as a baker at Stop & Shop, but has had no re-injuries since the subject accident.

Based upon the foregoing, the defendants failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law, 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.

Accordingly, that part of motion (002) by defendants for summary dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as to either category of injury defined in Insurance Law § 5102 (d) is denied.

Dated: 10/23/14

HON. JERRY GARGUILO J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION