

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**CHARLES PHILIPPOU and IRINA KAPLUN,**

**Plaintiff,**

**Index No.: 931/03**

**Motion Date: 1 /26/05**

**-against-**

**Motion Cal. No.: 33**

**NIKOLA DOSLOV and "JOHN DOE", said name  
being fictitious/unknown,**

**Defendants.**

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The following papers numbered 1 to 8 read on this motion by defendant for an order granting summary judgment in defendant's favor and dismissing the complaint on the grounds that plaintiffs have not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

**PAPERS  
NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-8

Upon the foregoing papers it is ordered that the motion by defendant for an order granting summary judgment in defendant's favor and dismissing the complaint on the grounds that plaintiffs have not sustained a serious injury within the meaning of Section 5102 of the Insurance Law is denied, for the following reasons:

This action arose out of a motor vehicle accident that occurred on January 16, 2000, on the Grand Central Service road and 69<sup>th</sup> Road, Queens County, New York. Plaintiffs commenced this action and alleged in their complaints that she suffered serious injuries from this accident.

Initially, it is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See, Licari v Elliot*, 57 NY2d 230,237 (1982); *Armstrong v Wolfe*, 133 AD2d 957,958 (3<sup>rd</sup> Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with *Licari v Elliott*, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant

within the meaning of the statute" ( Licari v Elliott, supra, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" ( Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of this motion, defendant has submitted, *inter alia*, plaintiffs' bill of particulars, affirmed reports of Dr. Entin, a neurologist, who examined plaintiffs on January 14, 2004 and affirmed reports of Dr. Tuvia, a radiologist, who reviewed MRI images of plaintiffs' cervical and lumbosacral spine.

Plaintiff Philippou indicated in his bill of particulars that he suffered disc herniations at C3-7, L1-3 and L4-5 as a result of this accident. Plaintiff Kaplun indicated in her bill of particulars that she suffered disc herniations at L4-5, C5-6 and disc bulges at L5-S1 and C3-5. Doctor Entin reviewed plaintiffs' medical records and performed examinations, at defendant's request, and concluded that plaintiffs had a normal neurological exam with no evidence of neurological dysfunction or disability as a result of the subject accident. He did note that plaintiff Kaplun had evidence of bilateral carpal tunnel syndrome that was not related to the subject accident. Doctor Tuvia reviewed plaintiff Philippou's cervical spine MRI of January 30, 2000 and lumbosacral spine MRI of February 16, 2000 and observed various disc herniations, however, he concluded that they were caused by degenerative changes and not a traumatic episode. Doctor Tuvia reviewed plaintiff Kaplun's cervical spine MRI of January 30, 2000 and lumbosacral spine MRI of February 16, 2000 and observed various disc herniations and bulges, however, he concluded that they were caused by degenerative changes and not a traumatic episode.

The Court finds that defendant has submitted proof in admissible form which establishes that plaintiffs have not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiffs to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See*, Gaddy v Eyler, 79 N.Y.2d 955 [1992] ; Greggs v Kurlan, 290 AD2d 533 (2d Dept 2002.) Consequently, the

plaintiffs must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see, Powell v Hurdle*, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see, Grossman v. Wright*, 268 A.D.2d 79 (2d Dept 2000.)) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiffs.

In opposition, plaintiffs have submitted, *inter alia*, an attorney's affirmation, an affirmation and reports of Dr. Gilas, an affirmation and reports of Dr. Ginde, a radiologist, and affirmed reports of Dr. St. Hill.

Doctor Ginde prepared reports concerning the MRI images taken of plaintiffs during January and February 2000 and observed the various herniations and bulges that are mentioned above. Doctor Gilas first treated plaintiffs during January 2000 and thereafter, on May 30, 2000 and June 12, 2000 the doctor performed FCE range of motion tests on plaintiffs and found there were specific reductions of such. These reductions were due to herniated discs or bulges he found after his own testing and viewing the MRI images and these would cause permanent pain and discomfort. The doctor identified these disabilities as being caused by the subject car accident. Dr. St. Hill examined plaintiffs on July 13, 2004 and found the disabilities found by Dr. Gilas to still exist.

This evidence is sufficient to raise a triable issue of fact that plaintiffs sustained serious injuries within the meaning of the Insurance Law. *See Fabiano v Kirkorian*, 306 AD2d 373 (2d Dept 2003.) (Plaintiff who had a herniated disc, submitted an affirmation of an orthopedist which specified the decreased range of motion and explained that his injuries are permanent and causally related to the motor vehicle accident was sufficient to raise a triable issue of fact.) *See also, Cenatus v Rosen*, 3 AD3rd 546 (2d Dept 2004.) (Plaintiff's opposition of an affirmation from a physician who performed a recent examination of the plaintiff and quantified the results with percentages of the loss of range of motion of the cervical and lumbosacral established an issue of fact.) As such, plaintiffs have met their burden and raised a triable issue of fact as to whether each of them suffered a "serious injury"

and defendant's motion for summary judgment is denied.

**Dated: January 30, 2005**

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**ORIN R. KITZES, J.S.C.**