

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D15519
X/gts

_____AD3d_____

Submitted - May 14, 2007

DAVID S. RITTER, J.P.
GLORIA GOLDSTEIN
STEVEN W. FISHER
RUTH C. BALKIN, JJ.

2005-02073

DECISION & ORDER

Ernesto Zelaya, respondent, v New York
New York Auto Body, Inc., et al., appellants.

(Index No. 23549/98)

Steven Zalewski & Associates, P.C., Kew Gardens, N.Y. (Denise N. Johnson of counsel), for appellants.

Sivin & Miller, LLP, New York, N.Y. (Edward Sivin of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Queens County (Sherman, J.H.O.), entered January 5, 2005, which, after a nonjury trial, is in favor of the plaintiff and against them in the principal sum of \$297,356.27.

ORDERED that the judgment is affirmed, with costs.

The defendants contend that the Supreme Court erred in considering the causation testimony proffered by the plaintiff's medical expert. This contention, however, is unpreserved for appellate review (*see* CPLR 4017; 5501[a][3]). In light of the defendants' failure to raise a *Frye* objection (*see Frye v United States*, 293 F 1013; *see also Parker v Mobil Oil Corp.*, 7 NY3d 434) until after the close of the plaintiff's case, the expert's testimony is presumed to have been unobjectionable and any alleged error in its admission was waived (*see Horton v Smith*, 51 NY2d 798; *Seay v Greenidge*, 292 AD2d 173; *Cocca v Conway*, 283 AD2d 787, 788; *Koplick v Lieberman*, 270 AD2d 460). Thus, the trier of fact was free to consider such evidence in reaching its verdict.

June 12, 2007

Page 1.

ZELAYA v NEW YORK NEW YORK AUTO BODY, INC.

The defendants' remaining contentions are without merit.

RITTER, J.P., GOLDSTEIN, FISHER and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court