

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

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Submitted - September 5, 2007

STEPHEN G. CRANE, J.P.
DAVID S. RITTER
STEVEN W. FISHER
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2006-10495

DECISION & ORDER

Carilio Sanon, et al., respondents, v Eva Moskowitz,
appellant.

(Index No. 3779/05)

Rivkin Radler, LLP, Uniondale, N.Y. (Evan H. Krinick, Cheryl E. Korman, and
Melissa M. Murphy of counsel), for appellant.

Law Office of Kenneth M. Mollins, P.C., Melville, N.Y. (Richard D. Saul of
counsel), for respondents.

In an action to recover damages for personal injuries, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Winslow, J.), dated October 16, 2006, as denied her motion for summary judgment dismissing the complaint on the ground that neither of the plaintiffs sustained a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The Supreme Court properly determined that the defendant failed to establish her prima facie entitlement to judgment as a matter of law (*see Ayotte v Gervasio*, 81 NY2d 1062). One of the plaintiffs' treating physicians, Jeffrey Schwartz, opined, inter alia, after an orthopedic examination and diagnostic imaging, that both of the plaintiffs suffered measurable losses in lumbar and cervical ranges of motion as a result of the subject accident. The defendant's expert orthopedist, S. Farkas, after examining both plaintiffs and reviewing Dr. Schwartz's prior reports, opined that the

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plaintiffs' cervical and lumbar sprains had resolved. However, there is no evidence that Dr. Farkas measured the plaintiffs' lumbar extension or cervical lateral flexion (left and right)—areas in which Dr. Schwartz previously had noted decreased ranges of motion. Moreover, whereas Dr. Schwartz had considered 60 degrees to be the normal range of cervical flexion and extension, Dr. Farkas considered anything above 30 degrees to be normal. Because Dr. Farkas's reports failed to resolve all triable issues of fact as to whether either plaintiff sustained a serious injury, summary judgment was properly denied (*see Ayotte v Gervasio*, 81 NY2d 1062).

CRANE, J.P., RITTER, FISHER, COVELLO and DICKERSON, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court