

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

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_____AD3d_____

Argued - December 17, 2007

ROBERT A. SPOLZINO, J.P.
PETER B. SKELOS
ANITA R. FLORIO
DANIEL D. ANGIOLILLO, JJ.

2006-09637

DECISION & ORDER

Dannielle Cavender, appellant,
v Wyeth Pharmaceuticals, et al., respondents.

(Index No. 12536/03)

Melvin B. Berfond, New York, N.Y. (Michael Konopka of counsel), for appellant.

Costello, Shea & Gaffney LLP, New York, N.Y. (Steven E. Garry and Sooyung T.A. Lee of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Hurkin-Torres, J.), dated August 18, 2006, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that the defendant did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

The defendants failed to establish, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The report of Dr. Monsanto, the defendants' examining hand specialist, noted the surgeries to the plaintiff's left wrist and thumb as well as the "two well healed scars" on her wrist and thumb, which he diagnosed as "post excision of a mass of wrist and mass of thumb." His conclusory assertion that these injuries were not secondary to the accident was insufficient as a matter of law to establish that the plaintiff did not sustain a serious injury as a result of the subject accident. Since the defendants failed to satisfy their burden

February 5, 2008

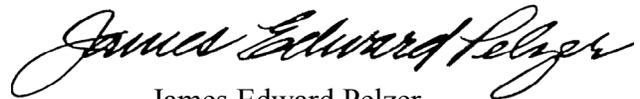
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of establishing a prima facie case, it is unnecessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see Jenkins v Miled Hacking Corp.*, 43 AD3d 393, and cases cited therein).

SPOLZINO, J.P., SKELOS, FLORIO and ANGIOLILLO, 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