

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

D18265
X/kmg

_____AD3d_____

Argued - January 29, 2008

DAVID S. RITTER, J.P.
ANITA R. FLORIO
EDWARD D. CARNI
JOHN M. LEVENTHAL, JJ.

2006-11096
2007-01707

DECISION & ORDER

Anna Marie DeSimone, respondent,
v Royal GM, Inc., et al., appellants.

(Index No. 11745/04)

Cheven Kelly & Hatzis, New York, N.Y. (Thomas Torto and Jason Levine of counsel), for appellants.

Chelli & Bush, Staten Island, N.Y. (Laurel A. Wedinger of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from (1) a judgment of the Supreme Court, Richmond County (Gigante, J.), dated October 26, 2006, which, inter alia, upon a jury verdict finding that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) and awarding the plaintiff damages in the principal sums of \$100,000 for past pain and suffering and \$250,000 for future pain and suffering, and upon the denial of their oral application pursuant to CPLR 4404(a) to set aside the verdict as against the weight of the evidence and to set aside the damages awards as excessive, is in favor of the plaintiff and against them in the total sum of \$353,799.99, and (2) an order of the same court dated December 29, 2006, which denied their motion pursuant to CPLR 4404(a) to set aside the damages awards as excessive.

ORDERED that the judgment and the order are affirmed, with one bill of costs.

By failing to move for a directed verdict pursuant to CPLR 4401 on the issue of whether the plaintiff sustained a “serious injury” under Insurance Law § 5102(d), the defendants implicitly conceded that the issue was for the trier of fact (*see Miller v Miller*, 68 NY2d 871, 873;

March 4, 2008

Page 1.

DeSIMONE v ROYAL GM, INC.

Hurley v Cavitolo, 239 AD2d 559). Furthermore, the jury verdict finding, inter alia, that the plaintiff sustained a “significant limitation of use of a body function or system” should not be set aside as against the weight of the evidence, as it could have been reached on a fair interpretation of the evidence (see *Bendersky v M & O Enters. Corp.*, 299 AD2d 434, 435). Lastly, the jury award of damages for the plaintiff’s rotator cuff injury and herniated cervical disc did not deviate from what would be reasonable compensation (see CPLR 5501; *Severin v Benenati*, 251 AD2d 316, 317).

RITTER, J.P., FLORIO, CARNI and LEVENTHAL, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court