

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

D21420  
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Submitted - November 12, 2008

ROBERT A. SPOLZINO, J.P.  
FRED T. SANTUCCI  
HOWARD MILLER  
THOMAS A. DICKERSON  
RANDALL T. ENG, JJ.

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2007-09033

DECISION & ORDER

Mohammad S. Akhtar, et al., appellants, v  
Virginia A. Santos, respondent.

(Index No. 16097/04)

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Tierney & Tierney, Port Jefferson Station, N.Y. (Stephen A. Ruland of counsel), for appellants.

Faust Goetz Schenker & Blee, LLP, New York, N.Y. (Dominic Boone of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Brandveen, J.), dated August 24, 2007, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that the plaintiff Mohammad S. Akhtar 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 defendant's motion for summary judgment dismissing the complaint is denied.

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Gaddy v Eyster*, 79 NY2d 955, 956-957; *Matthews v Cupie Transp., Corp.*, 302 AD2d 566, 567). In this case, the orthopedist who examined the injured plaintiff on behalf of the defendant found restrictions in the range of motion of the plaintiff's cervical and lumbar

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spines and left shoulder five years after the accident. Accordingly, the defendant failed to meet her initial burden of establishing a prima facie case that the plaintiff had not sustained a serious injury. Under these circumstances, “it is not necessary to consider whether the plaintiff’s papers in opposition to the defendant’s motion were sufficient to raise a triable issue of fact” (*Coscia v 938 Trading Corp.*, 283 AD2d 538; *see Swaby v Maldonado*, 52 AD3d 692, 692-693).

SPOLZINO, J.P., SANTUCCI, MILLER, DICKERSON and ENG, JJ., concur.

ENTER:

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

James Edward Pelzer  
Clerk of the Court