

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

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Submitted - January 7, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
ANITA R. FLORIO
EDWARD D. CARNI
RANDALL T. ENG, JJ.

2008-05505

DECISION & ORDER

Lisa Smith, respondent, v Andrew Matinale,
et al., appellants.

(Index No. 1030/07)

Picciano & Scahill, P.C., Westbury, N.Y. (Gilbert J. Hardy and Francis J. Scahill of counsel), for appellants.

John P. Gianfortune, P.C. (Michelle S. Russo, P.C., Port Washington, N.Y., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Nassau County (Galasso, J.), entered May 22, 2008, which denied their motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with costs.

The defendants satisfied their initial burden of establishing, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident through the submission of the plaintiff's deposition testimony and the affirmed reports of their examining physicians (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyley*, 79 NY2d 955). However, the medical evidence submitted by the plaintiff in opposition, in

particular the affirmations of her treating orthopedist and neurologist, as well as the affirmation of her radiologist, was sufficient to raise a triable issue of fact. Moreover, both the plaintiff's orthopedist and the plaintiff, in her own affidavit, adequately explained any gaps in her medical treatment.

MASTRO, J.P., FISHER, FLORIO, CARNI and ENG, 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