

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

D23207
T/kmg

_____AD3d_____

Submitted - March 18, 2009

ROBERT A. SPOLZINO, J.P.
FRED T. SANTUCCI
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL, JJ.

2008-10563

DECISION & ORDER

Alla Nirenberg, et al., respondents, v Public
Administrator of Westchester County,
appellant.

(Index No. 21853/06)

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains, N.Y. (Erin Cola of
counsel), for appellant.

Lucchese & D'Ammora, LLP (Pollack, Pollack, Isaac & De Cicco, New York, N.Y.
[Brian J. Isaac and Jillian Rosen], of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from
an order of the Supreme Court, Westchester County (Loehr, J.), dated October 28, 2008, which
denied its motion for summary judgment dismissing the complaint on the ground that the plaintiff Alla
Nirenberg did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with costs.

While we affirm the order appealed from, we do so on a ground other than that relied
upon by the Supreme Court. The defendant failed to meet its prima facie burden of showing that the
plaintiff Alla Nirenberg (hereinafter the injured plaintiff) did not sustain a serious injury within the
meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car
Sys.*, 98 NY2d 345; *Gaddy v Eycler*, 79 NY2d 955, 956-957). In support of its motion, the defendant
relied, inter alia, on the affirmed medical report of Dr. Elliot R. Gross. While Dr. Gross, the
defendant's only medical expert, opined in his medical report that the injured plaintiff had "full" range
of motion in her cervical and lumbar spines, he failed to set forth the objective medical tests he

May 19, 2009

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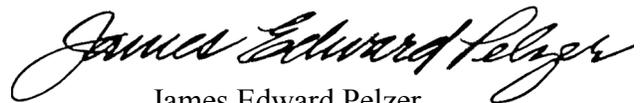
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performed in reaching those conclusions (*see Giammalva v Winters*, 59 AD3d 595; *Stern v Oceanside School Dist.*, 55 AD3d 596; *Spahn v Wohlmacher*, 52 AD3d 815; *Perez v Fugon*, 52 AD3d 668). Dr. Gross also diagnosed the injured plaintiff with post-traumatic stress disorder, an injury she claimed in her bill of particulars.

Since the defendant failed to meet its prima facie burden, it is unnecessary to consider whether the papers submitted by the injured plaintiff in opposition to the defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see Giammalva v Winters*, 59 AD3d 595; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

SPOLZINO, J.P., SANTUCCI, ANGIOLILLO and LEVENTHAL, 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