

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

D25318
W/cb

_____AD3d_____

Submitted - October 28, 2009

MARK C. DILLON, J.P.
HOWARD MILLER
RANDALL T. ENG
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2008-08022

DECISION & ORDER

Lorraine Wallace, respondent, et al., plaintiffs, v
Adam Rental Transportation, Inc., et al., defendants,
Horton Transportation, Inc., et al., appellants.

(Index No. 34418/05)

Harvey Gladstein & Partners, LLC, New York, N.Y. (Richard M. Sands and Jan B. Rothman of counsel), for appellants.

Joseph M. Settipane, New York, N.Y., for respondent.

In a consolidated action to recover damages for personal injuries, the defendants Horton Transportation, Inc., Horton Transportation II, Inc., and Arif Gardashov appeal from an order of the Supreme Court, Kings County (Vaughan, J.), entered June 4, 2008, which denied their motion for summary judgment dismissing the complaint insofar as asserted by the plaintiff Lorraine Wallace against them on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with costs.

The appellants failed to meet their prima facie burden of showing that the plaintiff Lorraine Wallace 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 Eyler*, 79 NY2d 955, 956-957). In support of their motion, the appellants relied on, inter alia, the affirmed

December 8, 2009

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medical report of Dr. Wayne Kerness, their examining orthopedic surgeon. In that report, Kerness noted significant limitations in the range of motion of Wallace's left shoulder (*see Alvarez v Dematas*, 65 AD3d 598; *Landman v Sarcona*, 63 AD3d 690; *Bagot v Singh*, 59 AD3d 368; *Hurtte v Budget Roadside Care*, 54 AD3d 362). While Kerness broadly opined that the all of his findings regarding Wallace were normal because Wallace suffered from pre-existing degenerative changes of, inter alia, the left shoulder, he failed to set forth any foundation for that conclusion (*see Franchini v Palmieri*, 1 NY3d 536).

Since the appellants failed to meet their prima facie burden, it is unnecessary to consider the sufficiency of the evidence submitted in opposition to the motion (*see Alvarez v Dematas*, 65 AD3d 598; *Landman v Sarcona*, 63 AD3d 690).

DILLON, J.P., MILLER, ENG, HALL and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court