

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

D29381  
O/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 9, 2010

ANITA R. FLORIO, J.P.  
THOMAS A. DICKERSON  
ARIEL E. BELEN  
LEONARD B. AUSTIN, JJ.

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2008-03846

DECISION & ORDER

Morris Dana, et al., respondents-appellants, v Allstate  
New Jersey Insurance Company, appellant-respondent.

(Index No. 25986/05)

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Leahey & Johnson, P.C., New York, N.Y. (Peter James Johnson, Jr., of counsel), for  
appellant-respondent.

Lester B. Herzog, Brooklyn, N.Y., for respondents-appellants.

In an action, inter alia, to recover damages pursuant to the supplementary underinsured motorist provision of an insurance policy, the defendant appeals from a judgment of the Supreme Court, Kings County (Partnow, J.), entered April 16, 2008, which, upon a special jury verdict finding that the plaintiff Morris Dana sustained damages in the principal sums of \$25,000 for past pain and suffering and \$20,000 for future pain and suffering, and that the plaintiff Susan Dana sustained damages in the principal sum of \$5,000 for loss of services, is in favor of the plaintiff Morris Dana and against it in the principal sum of \$45,000 and in favor of the plaintiff Susan Dana and against it in the principal sum of \$5,000, and the plaintiffs cross-appeal from the same judgment on the ground of inadequacy.

ORDERED that the appeal and cross appeal are dismissed as academic, without costs or disbursements, as the judgment was vacated by an order of the same court dated May 13, 2009 (*see Dana v Allstate New Jersey Insurance Company*, \_\_\_\_\_AD3d\_\_\_\_\_ [decided herewith]).

The appeal and the cross appeal from the judgment entered April 16, 2008, must be dismissed as academic since the judgment was vacated by an order of the same court dated May 13,

December 14, 2010

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2009, which, among other things, granted the defendant's motion to set aside the judgment (*see generally Kerrigan v Kerrigan*, 71 AD3d 737; *Kessler v Kessler*, 47 AD3d 892).

FLORIO, J.P., DICKERSON, BELEN and AUSTIN, JJ., concur.

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2008-03846

DECISION & ORDER ON MOTION

Morris Dana, et al., respondents-appellants, v Allstate  
New Jersey Insurance Company, appellant-respondent.

(Index No. 25986/05)

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Motion by the appellant-respondent, among other things, to withdraw an appeal from a judgment of the Supreme Court, Kings County, entered April 16, 2008. By decision and order on motion of this Court dated February 11, 2010, that branch of the motion was referred to the panel of Justices hearing the appeal for determination upon the argument or submission of the appeal.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied in light of the dismissal of the appeal from the judgment entered April 16, 2008 (*see Dana v Allstate New Jersey Insurance Company*, \_\_\_\_\_ AD3d \_\_\_\_\_ [decided herewith]).

FLORIO, J.P., DICKERSON, BELEN and AUSTIN, JJ., concur.

ENTER:



Matthew G. Kiernan  
Clerk of the Court