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

D32602
W/prt

_____AD3d_____ Submitted - October 5, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-10670 DECISION & ORDER

John P. Walter, etc., respondent, v
Robert Walch, et al., appellants.

(Index No. 6169/08)

Baxter Smith & Shapiro, P.C., Hicksville, N.Y. (Anne Marie Garcia and Harold A. Campbell of counsel), for appellants.

Shulman Kessler, LLP, Melville, N.Y. (Steven Shulman of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Rebolini, J.), dated September 20, 2010, as denied their cross motion for summary judgment dismissing the complaint on the ground that the infant, Paige Gildard, did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The defendants, on their cross motion for summary judgment, failed to meet their prima facie burden of showing that the plaintiff's infant stepdaughter, Paige Gildard (hereinafter the infant), 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). The plaintiff alleged, inter alia, that the infant sustained certain injuries to the cervical region of her spine as a result of the subject accident. Although the defendants asserted that those alleged injuries did not constitute serious injuries within the meaning of Insurance Law §

5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 352; *Gaddy v Eyler*, 79 NY2d at 955-956), the defendants' examining orthopedic surgeon recounted, in his affirmed report submitted in support of the cross motion, that the range-of-motion testing he performed during his examination revealed the existence of a significant limitation of motion in the region (*see Cues v Tavarone*, 85 AD3d 846).

Since the defendants failed to meet their prima facie burden on their cross motion for summary judgment, their cross motion was properly denied without considering whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (*id.* at 846).

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court