

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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CA 09-01823

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND GREEN, JJ.

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RICHARD D. SEMONIAN AND MARY ANN SEMONIAN,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JANICE O. SEIDENBERG AND THE BUFFALO NEWS, INC.,  
DEFENDANTS-APPELLANTS.

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGAN WILLIG, LOCKPORT (NORTON T. LOWE OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered June 1, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Richard D. Semonian (plaintiff) when the vehicle that he was driving was struck by a vehicle operated by defendant Janice O. Seidenberg and owned by defendant The Buffalo News, Inc. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. We conclude that defendants met their initial burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) in the instant accident but instead suffers from a "diffuse degenerative disease of his cervical spine which is causing cervical stenosis." Plaintiffs failed to raise an issue of fact to defeat the motion, particularly in view of their failure to offer a reasonable explanation for the 16-month gap in plaintiff's treatment (see *Pommells v Perez*, 4 NY3d 566, 572; *McConnell v Freeman*, 52 AD3d 1190; *McCarthy v Bellamy*, 39 AD3d 1166). We also note that plaintiff admitted that, during the 16-month period in question, he continued to work on a full-time basis, moonlighted as a security guard, and exercised regularly by lifting weights and jogging. We thus conclude

under the circumstances of this case that the court erred in denying defendants' motion.

Entered: March 26, 2010

Patricia L. Morgan  
Clerk of the Court