

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

D59458  
M/htr

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Submitted - February 7, 2019

REINALDO E. RIVERA, J.P.  
LEONARD B. AUSTIN  
JEFFREY A. COHEN  
ANGELA G. IANNACCI, JJ.

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2017-10641

DECISION & ORDER

Denise C. Flood, et al., respondents, v Elias Fillas,  
appellant.

(Index No. 701817/15)

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Brand, Glick & Brand, P.C., Garden City, NY (Robert S. Mazzuchin of counsel), for  
appellant.

Dell & Dean, PLLC (Mischel & Horn, P.C., New York, NY [Scott T. Horn and  
Lauren E. Bryant], of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from  
an order of the Supreme Court, Queens County (Denis J. Butler, J.), entered September 11, 2017.  
The order denied the defendant's motion for summary judgment dismissing the complaint on the  
ground that the plaintiff Denise C. Flood did not sustain a serious injury within the meaning of  
Insurance Law § 5102(d) as a result of the subject accident.

ORDERED that the order is affirmed, with costs.

The plaintiffs commenced this action, inter alia, to recover damages for personal  
injuries allegedly sustained by the plaintiff Denise C. Flood (hereinafter the injured plaintiff) in a  
motor vehicle accident on June 26, 2014. The defendant moved for summary judgment dismissing  
the complaint on the ground that the injured plaintiff did not sustain a serious injury within the  
meaning of Insurance Law § 5102(d) as a result of the accident. The Supreme Court denied the  
motion, and the defendant appeals.

The defendant failed to meet his prima facie burden of showing that the injured  
plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result

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of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyer*, 79 NY2d 955, 956-957). The defendant failed to submit competent medical evidence establishing, prima facie, that the injured plaintiff did not sustain a serious injury to the lumbar region of her spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), as the defendant's expert found significant deficits in the range of motion of the lumbar region of the injured plaintiff's spine (*see Mercado v Mendoza*, 133 AD3d 833, 834; *Miller v Bratsilova*, 118 AD3d 761). Further, the opinion of the defendant's expert as to the cause of the alleged injury to the lumbar region of the injured plaintiff's spine was speculative (*see Pupko v Hassan*, 149 AD3d 988, 989; *see also Chang v Cardone*, 113 AD3d 582, 583; *Jean v New York City Tr. Auth.*, 85 AD3d 972, 974). Since the defendant failed to meet his prima facie burden, it is unnecessary to determine whether the opposing papers were sufficient to raise a triable issue of fact (*see Che Hong Kim v Kossoff*, 90 AD3d 969, 969).

Accordingly, we agree with the Supreme Court's determination to deny the defendant's motion for summary judgment dismissing the complaint.

RIVERA, J.P., AUSTIN, COHEN and IANNACCI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court