

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

740

CA 16-02180

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

ALEXIS M. MAIETTA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DEAN A. SNYDER AND SUSAN C. SNYDER,
DEFENDANTS-RESPONDENTS.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (WILLIAM SWIFT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 27, 2016. The order, inter alia, denied the cross motion of plaintiff for summary judgment on the issue of serious injury.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action to recover damages for injuries allegedly sustained by plaintiff in a motor vehicle accident, plaintiff appeals from an order that, inter alia, denied her cross motion for summary judgment on the issue of serious injury within the meaning of Insurance Law § 5102 (d). We affirm. We note as a preliminary matter that defendants contend for the first time on appeal that plaintiff failed to allege in her bill of particulars or supplemental bill of particulars that she suffered a serious injury in the nature of a fracture, and thus that contention is not properly before us (*see Smith v Besanceney*, 61 AD3d 1336, 1336-1337).

Even assuming, arguendo, that plaintiff met her initial burden of establishing as a matter of law that she sustained a fracture as a result of the subject accident (*see Insurance Law § 5102 [d]*), we conclude that defendants raised an issue of fact to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). According to the affirmed report of the physician who examined plaintiff on behalf of defendants, which defendants submitted in support of their motion for summary judgment dismissing the complaint, plaintiff did not sustain a fracture in the subject accident. Plaintiff has abandoned on appeal her reliance in her cross motion on any of the other categories of serious injury set forth in her bills

of particulars (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: June 9, 2017

Frances E. Cafarell
Clerk of the Court