At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of May, 2005.

P R E S E N T:

HON. DAVID I SCHMIDT,

Justice.

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CEDRIC FLEMING, et ano.,

Plaintiffs,

- against - Index No. 45928/99

THOMAS GRAHAM, et al.,

Defendants.

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THOMAS GRAHAM, et al.,

Third-Party Plaintiffs

- against - Index No. 75596/03

PINSTRIPES GARMENT SERVICES, LLC,

Third-Party Defendant.

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The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers Third Pty Pls Memo of Law in Opp to Mot.	7

Upon the foregoing papers, third-party defendant Pinstripes Garment Service, LLC (Pinstripes) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing third-party plaintiffs' complaint based upon third-party plaintiffs' alleged violation of the

Vehicle and Traffic Law or, in the alternative, based upon third-party plaintiffs' failure to demonstrate Pinstripes' liability pursuant to Workers' Compensation Law § 11.

This is an action for personal injuries allegedly sustained in a motor vehicle accident on October 20, 1999, when the van owned by Pinstripes collided with the school bus driven by defendant/ third-party plaintiff Thomas Graham and owned by defendant/ third-party plaintiff Evergreen Bus Service, Inc. and Caravan Transportation, Inc. (all third-party plaintiffs, are referred to, collectively, as Evergreen). The Pinstripes vehicle was driven by plaintiff Jamel Donato (Donato). Plaintiff Cedric Fleming (Fleming) was a passenger in the Pinstripes van. Both Donato and Fleming were employees of Pinstripes at the time of the accident.

The alleged accident occurred during a rainstorm as Evergreen's bus was performing a left hand turn from Eastern Parkway onto Ralph Avenue. The Pinstripes vehicle was traveling eastbound on Eastern Parkway, while the school bus had been moving westward on Eastern Parkway before making the turn onto Ralph Avenue. At the intersection of Eastern Parkway and Ralph Avenue, the van struck the bus on its passenger side.

On March 10, 2005, this court issued a short form order denying Pinstripes' motion for summary judgment on the issue of liability and on workers' compensation grounds. That same order also denied Fleming's cross motion for summary judgment and indicated that a long form decision and order would follow. The following constitutes said long form decision and order.

In its motion for summary judgment, Pinstripes argues that Graham and Evergreen violated Vehicle and Traffic Law §§ 1141 and 1172 when Graham failed to stop at the intersection of Eastern Parkway and Ralph Avenue, then failed to yield the right of way to

Pinstripes' vehicle and, instead, attempted to make a left hand turn onto Ralph Avenue.[1] In support of its argument, Pinstripes appends a transcript of Graham's deposition testimony to show that the intersection of Ralph Avenue and Eastern Parkway is controlled by a three-color traffic light without a turn arrow and that Graham admitted that he slowed his vehicle, but did not come to a stop.[2] Third-party defendant points out that Graham testified that, prior to making

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[1] VTL § 1141 provides, as follows:

> "The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

VTL § 1172 (a) reads:

> "Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two."

[2] Pinstripes also alleges that third-party plaintiffs violated VTL § 1142. VTL § 1142, entitled, "Vehicle entering stop or yield intersection," provides, as follows:

> "Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection."

the turn, when he arrived at the intersection of Ralph Avenue and Eastern Parkway, Graham could see one block past the intersection and noticed the Pinstripes vehicle coming in the other direction. Pinstripes also observes that Graham testified that he could see clearly, despite the heavy rainfall and despite it being just after daybreak, because the streetlights were on. Therefore, Pinstripes argues that Graham disregarded the oncoming Pinstripes vehicle, which he clearly saw, and decided to turn left onto Ralph Avenue in violation of the Vehicle and Traffic Law. While Pinstripes attaches transcripts of the deposition testimony of Pinstripes' driver, Donato, wherein he stated the Pinstripes vehicle was traveling at about 20 miles per hour, and the testimony of Pinstripes' passenger, Fleming, which reflects that Donato was traveling between 20-25 miles per hour, Pinstripes contends that the speed of its vehicle has no bearing on either third-party plaintiffs' failure to yield the right of way or on Graham's failure to see what could have been seen with the proper use of his senses.

Pinstripes also urges that its motion for summary judgment should be granted pursuant to Workers Compensation Law § 11 as it claims that third-party plaintiffs cannot show the existence of any issue of fact entitling them to common law contribution or indemnity under the two narrow grounds specified by that statute. In particular, Pinstripes alleges that there is no issue of fact regarding the existence of a contractual relationship between third-party plaintiffs

and Pinstripes requiring indemnification.[3] Indeed, Pinstripes maintains that it never entered into

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[3] Workers' Compensation Law § 11 provides, in relevant part, as follows:

> "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or other wise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee...
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> "For purposes of this section the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
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> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand

any contract with third-party plaintiffs.

Secondly, Pinstripes argues that there is no issue of fact as to whether plaintiff sustained a "grave injury" as would render an employer liable pursuant to § 11 of the Workers' Compensation Law. In this regard, Pinstripes submits the unaffirmed November 4, 2004 report of Dr. William B. Head, Jr., a neurologist, in which he concludes that plaintiff showed no sign of cognitive impairment or brain damage. Dr. Head refers to the unaffirmed report of the December 9, 1999 examination of plaintiff by Dr. Raj Murali, a neurologist, which indicates that plaintiff only suffered a small contusional injury to the left posterio parietal region of the brain without sequelae.

Third-party defendant also appends photographs depicting Fleming's facial injuries to support its argument that his injuries do not rise to the statutory threshold of a severe facial disfigurement constituting a "grave injury." In addition, Pinstripes includes the unaffirmed March 15, 2004 report of Graham's own expert, plastic surgeon Dr. David Feldman, which states that none of Fleming's scars should prevent him from pursuing normal activities, that Fleming's right eyelid scar would benefit from future revisions, and that another plastic surgeon

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or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadiplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

plans to perform strip hair grafts at the eyebrow, as well as reshaping of plaintiff's right upper eyelid. Pinstripes asserts that the fact that these surgical revisions are medically possible and are advised proves that said plaintiff's injuries do not rise to the level of permanent and severe facial disfigurement required by the Workers' Compensation Law.

A defendant moving for summary judgment has the initial burden of demonstrating that he or she has established a prima facie case in favor of summary judgment by coming forward with admissible evidence showing the absence of material issues of fact and that the cause of action has no merit (*see Tessier v N.Y.C. Health and Hosp. Corp.*, 177 AD2d 626 [1991]; *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 [1985]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Rentz v Modell*, 262 AD2d 545 [1999]). Here, Pinstripes fails to cite any evidence that its vehicle was "within the intersection or so close as to constitute and immediate hazard", thereby requiring Evergreen's vehicle to yield the right of way as required by VTL § 1141, nor has Pinstripes established that the three-color traffic light governing the intersection of Ralph Avenue and Eastern Parkway was red from the perspective of Evergreen's bus, thereby requiring Evergreen to stop at the intersection pursuant to VTL § 1172 (a). Further, Pinstripes has not shown that Evergreen's vehicle had entered the intersection or was "approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection" in accordance with VTL § 1142. Hence, Pinstripes' motion for summary judgment is denied for failure to set forth a prima facie case as to liability.

As regards Pinstripes' liability pursuant to the exceptions delineated in the Workers' Compensation Law, the court notes that reports or statements by physicians which were neither sworn to nor affirmed to be true under penalty of perjury do not constitute competent, admissible evidence on a summary judgment motion (*see Moore v Tappan*, 242 AD2d 526 [1997]). Moreover, the photographs Pinstripes attaches to its motion reflect numerous facial scars that are plainly visible to the observer. Consequently, Pinstripes fails to make out a prima facie showing in favor of summary judgment based on Workers' Compensation Law § 11 and, therefore, Pinstripes' motion for summary judgment is, in all respects, denied *(Rentz v Modell*, 262 AD2d 545 [1999]).

Plaintiff Fleming cross-moves for summary judgment on the issue of liability as against defendants/ third-party plaintiffs. Fleming argues that Evergreen's bus negligently turned left directly into the path of the Pinstripes vehicle, despite having an unimpeded view of the road. Fleming also contends that, since he was merely a passenger in Pinstripes' motor vehicle, he was free from negligence, regardless of whether or not Donato drove in a negligent manner.

While plaintiff was merely a passenger in Pinstripes' vehicle, he, nonetheless, fails to cite any evidence that, pursuant to VTL § 1142, Pinstripes' vehicle had either entered the intersection which Evergreen's vehicle was moving across or was "approaching so closely on said highway as to constitute an immediate hazard." Hence, Fleming has likewise failed to make a prima facie showing in his favor and against defendants/ third-party plaintiffs and, consequently, his cross motion is denied (*Rentz v Modell*, 262 AD2d 545 [1999]).

Moreover, even if Pinstripes and Fleming had established their prima facie entitlement to summary judgment, their respective motion and cross motion would still be denied. Summary judgment is the procedural equivalent of a trial and must be denied if there is any doubt as to the existence of any triable issues (*see Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]. All competent evidence must be viewed in a light most favorable to the party opposing the motion (*see B-S Indus. Contrs., Inc. v Town of Wells*, 173 AD2d 1053 [1991]). Here, defendants/third-party plaintiffs Graham and Evergreen oppose both the motion and cross motion. As regards Pinstripes' motion for summary judgment, they urge that an order of June 6, 2003, which denied Fleming's prior summary judgment motion, precludes summary judgment on liability herein.

Evergreen further alleges that discovery proceedings following the June 6, 2003 order failed to resolve any of the questions of fact that the court previously determined existed. Third-party plaintiffs note that the deposition testimony of Graham and Pinstripes was either consistent with testimony referred to in the earlier motion or created additional questions of fact as to liability. Graham and Evergreen further assert that, preliminarily, a question of fact exists as to whether Donato had been speeding. They maintain that a resolution of that issue is required in order to determine whether or not the Pinstripes vehicle would have constituted an immediate hazard, thereby requiring Evergreen's school bus to yield the right of way pursuant to VTL § § 1141, 1172, and 1142. They contend that Graham could not be found to have violated the Vehicle and Traffic Law because, assuming Donato was traveling at the speed to which he

testified, i.e., 20 miles per hour, and assuming Graham first saw Donato's vehicle when it was 600 feet away, Graham had over one minute in which to complete the turn. Donato would have traveled only 25 feet in the two to three seconds Graham took to turn, leaving him 575 feet away from the intersection.[4] Similarly, Graham and Evergreen allege that had Donato been traveling within the posted speed limit of 30 miles per hour, in the 2-3 seconds it took Graham to almost clear the intersection, which he started to do when Donato was 600 feet away, the Pinstripes vehicle still would not have been considered an immediate hazard.[5] Third-party plaintiffs note that Graham testified that the traffic light was green as the bus proceeded through the turn. Evergreen further points out that, since Donato had only limited memory of the accident, third-party plaintiffs retained Dr. Irving Ojalvo, an engineer, as an accident reconstruction expert and they refer to his report, which was annexed to Pinstripes' motion. They observe that Dr. Ojalvo concluded that Donato was traveling at an excessive rate of speed under the circumstances and that, as a result, Donato caused the accident. He opined that since Fleming penetrated the windshield, Pinstripes' van was probably traveling at least 30 miles per hour at impact and between 40 and 50 miles per hour before braking. In addition, Evergreen points out that after taking into consideration Fleming's medical records, the accident report, the specifications for

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[4] Third-party plaintiffs calculate that at 20 m.p.h., Donato would have been traveling approximately 8.3 feet per second. To travel 600 feet, it would take 72.2 seconds (600 divided by 8.3). 8.3 feet x 3 seconds = 24.9 feet.

[5] Third-party plaintiffs calculate that at 30 m.p.h., Donato would have been traveling 12.6 feet per second. In three seconds, he would have gone 37.8 feet. To travel 600 feet would have taken approximately 47.6 seconds.

the van, and the laws of physics, Dr. Ojalvo determined that Fleming was not wearing a seat belt at the time of the accident or his injuries would have been significantly less severe.

Third-party plaintiffs urge that the issue of whether Fleming sustained a "grave injury" or permanent and severe facial disfigurement must be submitted to a jury for resolution. They note that plaintiff's medical records, photographs and his own physical presentation reflect facial scarring and that the annexed report of their plastic surgeon, David L. Feldman, M.D., indicates the presence of multiple scars, several of which cannot be further improved.

Graham and Evergreen also allege that plaintiff's cross motion is untimely because it was filed almost two years after the note of issue was served and that plaintiff lacks a good excuse for his delay. Third-party plaintiffs annex a copy of the note of issue filed on February 20, 2003 and this court's September 15, 2004 order vacating plaintiff's note of issue and striking the case from the trial calendar because of outstanding discovery. They also submit the court's January 6, 2005 order which restored the case to the trial calendar.

In addition, third-party plaintiffs claim that the cross motion is also barred by the order of June 6, 2003 which found that plaintiff is not entitled to summary judgment because of existing factual issues. Finally, they assert that there are questions of fact regarding plaintiff's comparative negligence in failing to wear a seatbelt at the time of the accident.

In reply, Pinstripes argues that its motion is not time barred because of the earlier court order since, on the date of the prior order, the third-party action against Pinstripes had not yet been commenced. Pinstripes also contends that the note of issue was stricken on September 15,

2004 to allow discovery, thereby resetting the time for the third-party plaintiffs to move for summary judgment. Pinstripes asserts that the depositions of Evergreen and Graham, which were conducted after the court's June 6, 2003 order, resolve any questions of fact since their deposition testimony reveals that Graham violated the Vehicle and Traffic Law as Pinstripes' vehicle was traveling lawfully on the road immediately before Graham chose to attempt his left turn without stopping or yielding the right of way.

Regarding the issue of whether the June 6, 2003 decision is binding as against Pinstripes, the court notes that the prior motion was made by Fleming, not Pinstripes. Moreover, Pinstripes was impleaded into this action on May 22, 2003 and Fleming's first summary judgment motion is dated April 18, 2003. Although Pinstripes' liability appears to be derivative of that of Donato and Donato failed to oppose the earlier motion, nonetheless, their interests are not necessarily identical. Hence, the court may entertain Pinstripes' motion. In any event, even if Pinstripes' motion were considered a motion to renew, pursuant to CPLR 2221, the court would address Pinstripes' motion for summary judgment on that basis as well, as the facts elicited from the deposition of Graham and Evergreen only became available after the initial motion (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1992]; *F & G Heating Co. v Bd. of Educ.*, 103 AD2d 791 [1984]).

Pinstripes' motion is not time barred as a result of any delay subsequent to the filing of the note of issue. Following the vacatur of the first note of issue on September 15, 2004, a second note of issue was filed on January 6. 2005. This motion was served on January 14, 2005

and filed on January 19, 2005 and is well within the 120-day limit period within which to move for summary judgment, as required by CPLR 3212 (a), as well as the 60-day limit for such motions in Supreme Court, Kings County. (Part 13, Uniform Rules of the Civil Term, Sup. Ct., Second Judicial District, Kings County).

With respect to the issue of Evergreen's liability, although Pinstripes alleges that Graham failed to stop as required by law, failed to yield the right of way to the Pinstripes' vehicle and failed to see that which was to be seen, questions of fact remain, including, but not limited to, whether the speed at which Donato was traveling was excessive. Contrary to Evergreen's assertion that Graham saw the van when it was a block away, Graham testified that he saw the Pinstripes vehicle when it was halfway down the block, i.e., when it was the length of one football field or 300 feet away. Nonetheless, assuming Donato were traveling at 20 miles per hour (or 29.3 feet per second), to travel 300 feet would take 10.2 seconds. At the end of Graham's three-second turn, the Pinstripe vehicle would have been 212 feet away from

the intersection at the time of impact.[6] Assuming Donato were traveling at 30 miles per hour (or 44 feet per second), to travel 300 feet would have taken 6.8 seconds. At the end of Graham's three second turn, the Pinstripes vehicle would have been 168 feet away.[7] Since the collision occurred at the intersection, there remains a question of fact as to whether the Pinstripes' vehicle was traveling at an excessive rate of speed.

While third-party defendant maintains that Fleming's photographs do not depict injuries which rise to the level of a "grave injury," those facial scars are plainly visible from the photographs. In addition, Dr. Feldman's report indicates that he does not favor revision of some of these scars because he does not believe their appearance can be improved. Hence, there is a question of fact as to whether plaintiff sustained a "grave injury" as required by Workers'

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[6] Pinstripes does not explain how it arrived at the 8.3 feet figure to represent the distance traveled per second, given a vehicle traveling at 20 miles per hour. The court calculates, as follows:

1 mile = 5280 ft.
There are 3600 seconds in one hour.
20 m.p.h. = 20 x 5280 ft. per hour = 105,600
= 29.3 feet per second (divide 105,600 by 3600)
29.3 feet x 3 seconds = 87.9 ft.
300 - 88 = 212 ft.

[7] 30 m.p.h. = 30 x 5280 feet per hour
= 158,400 ft. per hour
= 44 ft. per second (divide 158, 400 by 3600)

44 ft. x 3 seconds = 132
300 - 132 = 168 ft.
300 ft divided by 44 = 6.8 secs.

Compensation Law § 11. For the foregoing reasons, the motion by Pinstripes is, in all respects, denied.

Fleming's cross motion for summary judgment is, in reality, a motion to renew. Since the depositions of Graham and Evergreen were not held before the prior motion and the facts elicited therefrom were not previously available, renewal is granted (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1992]; *F & G Heating Co. v Bd. of Educ.*, 103 AD2d 791 [1984]). The Kings County Hospital Center Inpatient Discharge Summary contains a notation that Fleming was unrestrained. The report of the accident reconstruction expert and the deposition testimony of Pinstripes (by Jay Ellis, its President), reflect that Fleming told his employer that he was not wearing a seatbelt at the time of the accident (Pinstripes mot., Exh. I at 33), which is contrary to said plaintiff's testimony. Under the circumstances, there is a question of fact regarding Fleming's comparative negligence and whether he was wearing a seatbelt at the time of the accident and the cross motion is, accordingly, denied.

The foregoing constitutes the decision and order of this court.

E N T E R

J. S. C.

HON. DAVID L. SCHMIDT