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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

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CHRISTOPHER CORTESELLI,
Plaintiff,
-against-
TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, DORA ISRAEL, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,
Defendant.

INDEX NO: 21165/08

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ERIC M. PARCHMENT, an infant under the age of 18, by his mother and natural guardian, DANITZA PARCHMENT and DANITZA PARCHMENT, individually,
Plaintiffs,
-against-
TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,
Defendants.

Motion Sequence # 6
Submitted January 4, 2010

INDEX NO: 21643/08

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STEFAN TESSLER, individually, and as parent and natural guardian of plaintiff CLARA TESSLER,
Plaintiffs,
-against-
DIANE WOLFE, JOHN SQUIRES and TIMOTHY WOLFE,
Defendants.

INDEX NO.21863/08

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**The following papers were read on this motion for summary judgment:**

**Notice of Motion and Affs.....1-3**
**Affs in Opposition.....4&5**
**Affs in Reply.....6&7**

Upon the foregoing papers, it is ordered that this motion by plaintiffs Eric M. Parchment ("Eric") and his mother Danitza Parchment for an Order pursuant to CPLR 3212 granting summary judgment in their favor finding that Eric's injuries satisfy the threshold requirement of Insurance law § 5104(a), and for an Order pursuant to CPLR 3211(b) dismissing affirmative defenses of defendants' Timothy Wolfe, Diane Wolfe and John Squires' is disposed of as follows:

The plaintiffs' motion for summary judgment is granted, the Wolfe defendants and defendant John Squires having conceded that Eric has suffered a fracture and therefore satisfied the criteria of the no-fault threshold. So much of the plaintiffs' motion which seeks dismissal of the first, second, third and fourth affirmative defenses is granted. So much of the plaintiffs' motion seeking to dismiss the fifth affirmative defense is denied without prejudice to renewal upon the completion of discovery.

This is an action to recover money damages for personal injuries arising out of an occurrence which took place on September 27, 2008 at about 2:30 a.m. on South Road, in Port Washington, N.Y. Eric, a high school student was a passenger in a motor vehicle operated by defendant Timothy Wolfe who had a junior's or Class DJ drivers license. The vehicle was owned by his mother, defendant Diane Wolfe and her husband, John Squires. It had reportedly rained the day before and the roads were damp. Timothy, who reportedly was driving at excessive speed, lost control of his vehicle and struck a tree head on. Eric

was restrained by seatbelt and was still in the vehicle after impact. Eric suffered a fracture to his right femur which required immediate surgery, lacerations to his right knees and elbows, and injuries to his right knee, right shoulder, and left wrist. He underwent a treatment regiment which included physical therapy and pain management.

Eric and his mother brought this action against Timothy Wolfe, Diane Wolfe, John Squires and additional defendants. A prior order of this Court (Galasso, J.) dated May 19, 2009 granted the summary judgment in favor of the Parchment plaintiffs, as to their first cause of action against Timothy Wolfe on the issue of liability and as to the second cause of action against Diane Wolf and John Squires on the issue of their vicarious liability. In a separate motion by order dated June 3, 2009 (Lally, J.), this Court denied the Wolfe defendants' and John Squires' motion for an Order consolidating the instant action with the other two actions brought against them and instead joined the three actions for a joint trial.

It must be noted that the Wolfe defendants and John Squires apparently are treating the Parchments' motion to dismiss their affirmative defenses (CPLR 3211[b]) as one for summary judgment due to the Parchments' request for summary judgment as to the issue of the no fault threshold. The record clearly indicates that the Parchments submitted expert testimony only to that issue. Thus, it is readily apparent that CPLR § 3211(b) is the procedural mechanism by which they seek dismissal of certain affirmative defenses. It is beyond cavil that this court cannot sua sponte convert this motion to dismiss to a motion for summay judgment absent adequate notice to both parties (CPLR § 3211(c); *Mihlovan v Grozavu,* 72 NY2d 506).

Therefore, where as here, the plaintiffs properly challenge the factual basis of a defense pursuant to CPLR § 3211(b), the burden falls upon the defendant to come forth

with sufficient evidence to raise an issue of fact with respect to the defense (*Becker v Elm Air Conditioning Corp.*, 143 AD2d 965; *Leonard v Leonard,* 31 AD2d 620). Upon a motion to dismiss a defense pursuant to CPLR 3211(b), the defendant is entitled to the benefit of every reasonable interpretation of the pleading which is to be liberally construed and, if there is any doubt as to the availability of a defense, it should not be dismissed. The movants bear "the burden of demonstrating that those defenses [a]re without merit as a matter of law" (*Butler v Catinella,* 58 AD3d 145; *Vita v New York Waste Services*, 34 AD3d 559).

As to the first affirmative defense of culpable conduct including contributory negligence or assumption of risk, the Wolfe defendants and John Squires aver that Eric was not using or misusing his seatbelt which caused him to sustain injuries. This court addressed the seatbelt issue by stating that it is relevant to the issue of damages (prior order of this Court, Galasso, J. dated May 19, 2009). The Court also stated that the fact that Eric was a passenger in Timothy's car, makes him liable to Eric; "...assertions, or any involving erratic driving, are irrelevant for the simple reason that plaintiff [Eric] was a passenger in the defendant's [Timothy's] vehicle. As between plaintiff and the defendant driver (and vicariously liable owner), defendant is culpable for the accident."

The Wolfe defendants and John Squires do not offer anything more than conclusory statements to opine that Eric was not properly restrained. They also attempt to undermine the sufficiency and reliability of Eric's testimony regarding his seatbelt by pointing out that Eric was admittedly "drunk" and/or "high" when he got into Timothy's car. Notwithstanding what appears to be an altered state of mind on Eric's part, his condition

at the time of the accident does not render his testimony incompetent or untruthful. (See *People v Goddard*, 153 AD2d 758).

In sum, the Wolfe defendants and John Squires statements regarding Eric's use or nonuse of a seatbelt are conclusory statements which contain opinions and not facts (*Seiler v Ricci's Towing Service,* 210 AD2d 972). Therefore, so much of this motion which seeks an order dismissing the affirmative defense regarding Eric's culpable conduct is granted.

As to the second affiramtive defense, failure to state a cause of action, this Court has already determined that Timothy was liable for Eric's injuries and that his conduct was culpable. (See aforesaid prior order). The issue of vicarious liability has also been determined.

There remain for discussion the third and fourth causes of action for negligence per se as to Timothy's driving without the proper drivers license and Diane Wolfe's and John Squires' negligent, wilful and wanton and reckless conduct in permitting Timothy to drive without the proper drivers license.

It is not disputed that Timothy was driving with a junior's driver's license at about 2:30 a.m. which was violative of Vehicular and Traffic Law §501(3)(a) (ii); however it is argued that his failure to possess the proper license was not the proximate cause of the accident. The statute states in part: "...[A] class DJ...license shall permit the holder to operate a vehicle in accordance with the following restrictions...from five o'clock in the morning to nine o'clock in the evening, to and from a place of business where the holder is regularly employed, or when accompanied by a duly licensed parent, guardian, a person

in a position of loco parentis, driver education teacher or driving school instructor." Accordingly, the statute sets up a standard of care, the unexcused violation of which is negligence per se (*Coogan v Torrisi*, 47 AD3d 669). Therefore, so much of this motion which seeks an order dismissing the second affirmative defense relative to Timothy is granted.

The motion to dismiss the affirmative defense as to the cause of action alleging that Diane Wolfe and John Squires were wilful, negligent and conduct in permitting Timothy to drive without a proper drivers license is granted for the reasons as stated in the foregoing discussion.

As to the third affirmative defense, failure to use seatbelts, for the foregoing reasons stated in the dicsussion of the first affirmative defense, the motion to dismiss this affirmative defense is granted.

As to the fourth affirmative defense, plaintiff did not sustain a serious injury, the plaintiffs' motion seeking to dismiss the fourth affirmative defense is granted as the Wolfe defendants and John Squires, in their affirmation in opposition, have conceded that Eric has sustained a serious injury pursuant Insurance Law § 5102.

The fifth affirmative defense alleges that Eric failed to mitigate his pain and discomfort by not having the surgery to remove the screws in his legs when his physician told him it was safe and timely to do so. The Wolfe defendants and John Squires also state that further discovery has to be completed to adequately support this affirmative defense, specifically citing the deposition of Danitza Parchment which was scheduled of January, 2010 after the filing of this motion.

Although the Wolfe defendants and John Squires offer no or minimal factual support to their claim that Eric failed to mitigate his damages, discovery has not been completed and certain parties have not been deposed as of the date of this motion. Under such circumstances, the court must deny that portion of the motion with leave to renew on the issue of whether this affirmative defense should be dismissed pending completion of discovery. (*Falk v Gallo*, 18 Misc.3d 1146A, 859 NYS2d 894, 2009 N.Y. Misc. Lexis 1040; citing *Seiler v Ricci's Towing Services, Inc.*, 210 AD2d 972).

Accordingly, the plaintiffs' motion for summary judgment is granted and plaintiffs' motion to dismiss defendants' first, second, third and fourth affirmative defenses is granted; and to dismiss defendants' fifth affirmative defense is denied with leave to renew upon the completion of all discovery.

Dated: March 17, 2010

UTE WOLFF LALLY, J.S.C.



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