SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

FREDERICK STEINMANN & ALYSIA STEINMANN,	TRIAL / IAS PART 29 NASSAU COUNTY
Plaintiff,	Index No. 6071/09
- against -	Motion Sequence No. 002 #001
FREDERICK STEINMANN,	
Defendant.	

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1,2
Answering Affidavits	3,4
Replying Affidavits	5,6
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The underlying personal injury action arises from a January 30, 2009 accident, at 34 Cherry Street, Douglaston, New York, where the plaintiff assisted his father in moving an inoperable Dodge Durango motor vehicle from the driveway to the garage where the son was pinned between the vehicle and the back wall of the garage. The defendant moves to vacate the note of issue and statement of readiness, and to strike this case from the calendar upon the ground this action is not ready for trial because independent medical examinations, one of which has been scheduled, as well as other items of discovery are incomplete, or as an alternative permitting the defendant to conduct the vascular and neurological independent medical examination despite the filing of the note

of issue, directing the plaintiff to submit to the taking of x-rays and an ultrasound scan at the independent medical examination, and compelling the plaintiff to provide an authorization to permit the defendant to obtain copies of the recent MRI films taken of the plaintiff's left knee. The defense attorney states, in a May 12, 2010 affirmation supported by other papers, the defendant should be permitted to conduct independent medical examinations given the extensive vascular and neurological injuries to the plaintiff. The defense attorney requests the Court compel the plaintiff to submit to x-rays, specifically with respect to AP and lateral views of both femurs and knees, and a Doppler/ultrasound scan of both lower legs. The defense attorney indicates these examinations are material and necessary to the defense, and adds the these examinations will neither delay the trial nor prejudice the plaintiffs, but would severely and irreparably prejudiced the defense on damages if these examinations are not conducted by the physicians.

The plaintiffs oppose this defense motion, and they cross move for summary judgment on the issue of liability. The plaintiffs' attorney states, in a May 27, 2010 affirmation supported by other papers, the defense motion should be denied because the defendant is not entitled to a neurological examination since the defendant failed to promptly schedule it, and failed to provide any unusual or unanticipated circumstances for a third examination of the plaintiff. The plaintiffs' attorney asserts the defendant should not be permitted to have the plaintiff submit to another vascular examination with x-rays and a Doppler/ultrasound scan examination since the plaintiff was already examined by the same plaintiff's expert, and the defense failed to previously request these tests. The plaintiffs' attorney avers the defendant never made any demand nor request for an authorization to obtain the recent MRI films of the plaintiff's legs prior to bringing this motion, but the plaintiff recently served the defendant with recent MRI films of the plaintiff's legs to conserve judicial resources.

The plaintiffs' attorney states, in a May 26, 2010 affirmation supported by other papers, the evidence shows the defendant was negligent as a matter of law, and the

defendant is liable for these injuries to the plaintiff. The plaintiffs' attorney asserts, pointing to the plaintiff's September 23, 2009 deposition testimony, and the defendant's October 2, 2009 deposition testimony, the defendant admitted stepping on the vehicle accelerator when he meant to utilized the brake, and the vehicle surged forward striking his son pinning him to the back wall in the defendant's garage. The plaintiffs' attorney argues the sole proximate cause of this January 30, 2009 accident was the negligence of the defendant.

The defense attorney states, in a June 14, 2010 affirmation supported by the June 14, 2010 affidavit of David F. Toler, a professional engineer, who examined the subject vehicle and the accident site on December 8, 2009, there are material issues of fact with respect to the comparative negligence of the plaintiff. The defense attorney submits, with the obvious risk of an accident, the plaintiff positioned himself in front of the malfunctioning vehicle as it was driven forward by the defendant. The defense attorney points out the length of the battery charger cables and the dimensions of the vehicle and the garage permitted the plaintiff to stand to the side rather than in front of the vehicle. The defense attorney notes the plaintiff was under no compulsion to stand where he did despite the plaintiff's claim the defendant told him where to stand.

The plaintiffs' attorney reiterates, in a June 22, 2010 reply affirmation to the defense opposition to the plaintiffs' cross motion, the plaintiffs' contention regarding the lack of any material issue of fact. The plaintiffs' attorney avers the plaintiff attempted to move more toward the driver's side of the vehicle. The plaintiffs' attorney asserts the defendant saw the plaintiff, and the defendant stepped on the accelerator instead of the brake. The plaintiffs' attorney discounts the opinion of the defense expert as insufficient because it was offered 42 days after the filing of the note of issue, and is defective because it fails to contain the requisite language, to wit, "under the penalties of perjury." The plaintiffs' attorney points out the opinion of the defense expert is improperly notarized since the County is not indicated as required under the caption. The plaintiffs'

attorney also states the purported affidavit is speculative and conclusory.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (***Ugarriza v. Schmieder***, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***). This Court is persuaded there is no material issue of fact on the issue of liability

requiring resolution by a jury, including comparative negligence and assumption of the risk.

Accordingly, the defense motion is granted only to the extent of directing the plaintiff to Frederick Stenmann to submit to a neurological examination by the defense expert within 30 days after service of a copy of this court order with notice of entry, and the defense motion is denied to vacate the note of issue and statement of readiness, and to strike this case from the calendar. The Court notes the plaintiff recently served the defendant with recent MRI films of the plaintiff's legs.

The plaintiffs' cross motion is granted for partial summary judgment on the issue of liability. An inquest is ordered on the issue of damages only. Entry of judgment is stayed pending a determination of damages.

So ordered.

Dated: **September 14, 2010**

ENTER:

J. S. C.

NON-FINAL