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SHORT FORM ORDER

INDEX No. 05-7807
CAL. No. 10-00428-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6-30-10 (#005, #006)
MOTION DATE 7-28-10 (#007)
ADJ. DATE 9-1-10
Mot. Seq. # 005 - MD
006 - XMD
007 - MD

JOHN McGUINNESS and NINA McGUINNESS, Plaintiffs, - against - HVT, INC., CHRISTINE J. BOKINA and ERIC BOKINA, Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiffs 90 East Main Street Bay Shore, New York 11706 PETROCELLI & CHRISTY Attorney for Defendant HVT, Inc. 217 Broadway, Suite 505 New York, New York 10007-2909 NEIL L. KANZER, ESQ. Attorney for Defendants Bokina 1325 Franklin Avenue, Suite 340 Garden City, New York 11530

Upon the following papers numbered 1 to 65 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 41 - 56 ; Notice of Cross Motion and supporting papers 20 - 21 ; Answering Affidavits and supporting papers 22 - 36; 57 - 61; 62 - 63 ; Replying Affidavits and supporting papers 37 - 40; 64 - 65; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant HVT, Inc. seeking summary judgment dismissing plaintiffs' complaint, the cross motion by defendants Christine Bokina and Eric Bokina seeking summary judgment dismissing plaintiffs' complaint, and the motion by plaintiffs John McGuinness and Nina McGuinness seeking summary judgment in their favor on the issue of liability are hereby consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant HVT, Inc. seeking summary judgment dismissing plaintiffs' complaint is denied, and it is further

ORDERED that the cross motion by defendants Christine Bokina and Eric Bokina seeking summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED that the motion by plaintiffs John McGuinness and Nina McGuinness seeking summary judgment in their favor on the issue of liability as against defendants HVT, Inc., Christina Bokina, and Eric Bokina is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff John McGuinness as a result of a motor vehicle accident that occurred on October 27, 2004 at the intersection of County Road 48 and Westphalia Road in Mattituck, New York. The accident allegedly occurred when the front end of the vehicle operated by defendant Eric Bokina and leased by defendants Christina Bokina and Eric Bokina struck the driver's side of the vehicle operated by plaintiff when Eric Bokina attempted to cross County Road 48. Defendant HVT, Inc. (hereinafter referred to as "HVT") is the owner of the vehicle operated and leased by the Bokina defendants. Plaintiff, at the time of the accident, was in the course of his employment as an insurance adjuster, and the vehicle that he was operating was owned by his employer, Government Employees Insurance Company (hereinafter referred to as "GEICO"). Plaintiff's wife, Nina McGuinness, asserts a cause of action for loss of services.

By his bill of particulars and supplemental bill of particulars, plaintiff alleges that he sustained various personal injures as a result of the subject accident, including aggravation/exacerbation of herniated discs at levels C4 through C7 and level T2-T3; aggravation/exacerbation of disc bulge at level C3-C4; aggravation/exacerbation of cervical spondylosis and cervical radiculopathy; cervicalgia; cervicogenic headaches; disc herniations at levels L4 through S1; cervical and lumbar spine sprains; chondromalacia and contusion of the left knee; right elbow medial epicondylitis; and post operative scarring of the cervical and lumbar spines. Plaintiff alleges that as a result of the injuries he sustained in the accident he underwent a two-level anterior cervical discectomy and fusion, and an L5/S1 lumbar microdisckectomy. Plaintiff also alleges that he was confined to his bed and home from October 27, 2004 until the present day. Plaintiff further alleges that he has been incapacitated from his employment at GEICO since the date of the accident.

HVT now moves for summary judgment on the basis that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law § 5102(d) and that plaintiff's injuries are pre-existing, and not the result of the subject accident. In support of the motion, HVT submits a copy of the pleadings, a copy of plaintiff's deposition transcript, the sworn medical reports of Dr. Lewis Rothman and Dr. Peter Hollis. At HVT's request, Dr. Rothman performed an independent radiological review of magnetic resonance image ("MRI") films of plaintiff's brain and his cervical and lumbar regions. At HVT's request, Dr. Hollis conducted an independent neurological examination of plaintiff on October 26, 2009. HVT also submits copies of plaintiff's medical records. The Bokina defendants cross-move for summary judgment on the basis that plaintiff's injuries fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, the Bokina defendants rely on the same evidence as HVT.

Plaintiff opposes the motion and the cross motion on the ground that HVT and Bokina have failed to establish that their prima facie burden that his injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In opposition to the motions, plaintiff submits a copy of the pleadings, his own affidavit, the affidavit of Alan Leiken, PhD, and the sworn medical reports of Dr. Kerin Hausknecht, Dr. Adam Silvers, and Dr. Bonnie Rosen. Plaintiff also submits the sworn operative report of Dr. Robert Galler, the police motor vehicle accident report, copies of the photographs of the

vehicles involved in the accident, unsworn copies of plaintiff's medical records, and a copy of plaintiff's Social Security Administration's disability award letter.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Moreover, a plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***,

32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008]).

Furthermore, to qualify as a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment objective medical evidence must be presented of plaintiff's curtailment, and it must be demonstrated that plaintiff's activities were significantly curtailed (*see* ***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Nesci v Romanelli***, 74 AD3d 765, 902 NY2d 172 [2010]; ***Amato v Fast Repair, Inc.***, 42 AD3d 477, 840 NYS2d 394 [2007]). Additionally, a plaintiff must demonstrate through the use of competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2008]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]).

Dr. Peter Hollis, in his medical report, states, in pertinent part, that an examination of plaintiff's cervical spine reveals that he exhibits flexion of 15 degrees (normal is 45 degrees), extension of 30 degrees (normal is 55 degrees), right and left bending of 20 degrees (normal is 40 degrees), right rotation of 50 degrees (normal is 70 degrees), and left rotation of 10 degrees (normal is 70 degrees). It states that an examination of plaintiff's lumbar spine reveals that he exhibits forward flexion of 20 degrees (normal is 40 to 60 degrees), extension of 25 degrees (normal is 20 to 35 degrees), lateral bending of 10 degrees (normal is 15 to 20 degrees), and rotation of 10 degrees (normal is 18 degrees). The report states that there is diffuse tenderness over plaintiff's cervical , thoracic, and lumbar regions. The report states that the straight leg raising test, and the test for Tinel's sign and Phalen's sign were negative. Dr. Hollis

opines that plaintiff has chronic degenerative disc and joint disease, which is unrelated to the subject accident, and that plaintiff's chronic lumbar and cervical pain with radiculitis are subjective and unrelated to the accident.

Likewise, Dr. Lewis Rothman in his medical report states, in relevant part, that a review of the MRI of plaintiff's cervical spine reveals evidence of chronic degenerative disc disease, which is manifest by diffuse disk dessication, and chronic disc herniation/osteophyte complex at level C4/C5, and disc herniations at levels C5 through C7. Dr. Rothman's report states that when comparing plaintiff's cervical spine MRI performed on November 1, 2004 and September 18, 2005 with the MRI performed on October 17, 2004, no interval changes are evident. Dr. Rothman's report states that a review of the MRI of plaintiff's lumbar spine reveals that there is chronic degenerative disc disease and chronic degenerative joint disease, which is manifest by diffuse disk desiccation and facet hypertrophy at level L4/L5. It states that there is a minimal left lateral disc herniation at level L4/L5. The report concludes that there is no evidence of traumatic abnormality that is causally related to the accident of October 27, 2004, and that the disc herniation in plaintiff's lumbar spine "cannot be temporally related to the accident and in any case is small and without evidence of nerve root compression."

In the instant matter, HVT has failed to establish that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*). Despite the fact that HVT has submitted evidence to show that plaintiff sustained a "stiff neck" in a prior 1996 motor vehicle accident, its submissions fail to demonstrate that the injuries at issue were attributable to the prior accident or a preexisting condition, and were not exacerbated by the subject accident (*see* ***Pfeiffer v New York Cent. Mut. Fire Ins. Co.***, 71 AD3d 971, 900 NYS2d 71 [2010]; ***McKenzie v Redl***, 47 AD3d 775, 850 NYS2d 545 [2008]; ***Scarano v Wehrens***, 46 AD3d 797, 847 NYS2d 644 [2007]; ***Cebularz v Diorio***, 32 AD3d 975, 822 NYS2d 118 [2006]). It is well established that an aggravation of a preexisting condition can, under certain circumstances, constitute a serious injury (*see* ***Gentile v Snook***, 20 AD3d 389, 799 NYS2d 230 [2005]; ***Walsh v Kings Plaza Replacement Serv.***, 239 AD2d 408, 658 NYS2d 345 [1997]; ***Washington v Mercy Home for Children***, 232 AD2d 549, 648 NYS2d 956 [1996]). Plaintiff alleges in his bill of particulars that the subject accident aggravated and/or exacerbated preexisting conditions in his cervical and lumbar regions. Thus, while the medical reports of HVT's experts show that plaintiff suffered from preexisting conditions in his cervical and lumbar regions, such reports are insufficient to show prima facie that plaintiff did not sustain an injury within the "limitations of use" categories of serious injury (*see* ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2007]). Instead, HVT's medical experts' reports support the existence of a triable issue of fact as to whether the subject accident exacerbated any of plaintiff's prior cervical or lumbar conditions (*see* ***Rabinowitz v Kahl***, __AD3d __, 2010 NY Slip Op 7914 [2d Dept 2010]; ***Washington v Asdotel Enters., Inc.***, 66 AD3d 880, 887 NYS2d 623 [2009]; ***Carr v Macaluso***, 64 AD3d 741, 882 NYS2d 654 [2009]). Moreover, the vague and conclusory statements that plaintiff's chronic lumbar and cervical pain with radiculitis are subjective, and that the disc herniation in plaintiff's lumbar spine "cannot be temporally related to the accident and in any case is small and without evidence of nerve root compression," belie Dr. Hollis's and Dr. Rothman's findings (*see generally* ***Diaz v New York Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]; ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 580 [1997]).

Further, while a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him or her from performing substantially all

of his or her material daily activities for at least 90 of the 180 days immediately following the accident (*see e.g.* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2008]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2008]), HVT's reliance on plaintiff's testimony in the instant matter is insufficient to meet its burden on the motion (*see* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2009]; ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2008]; ***Torres v Performance Auto. Group, Inc.***, *supra*; *cf.* ***Geliga v Karibian***, 56 AD3d 518, 867 NYS2d 519 [2008]). Plaintiff testified at his deposition that he has been unable to return to work as an insurance adjuster since the accident occurred, and that modified duty was not an option in his position. Plaintiff testified that his doctors never informed him that he was able to return to work. He testified that he underwent a cervical discectomy with fusion surgery on April 19, 2005, and that he underwent a lumbar microdiskectomy surgery on September 19, 2008, because of the injuries he sustained in the subject accident. He testified that the pain radiating into his legs caused him to walk with a limp and drag his right leg. Plaintiff further testified that he is unable to play baseball, which he played once a week as part of a minor league team, or to perform household chores, and has had to hire outside help to perform his household activities. Having determined that HVT failed to establish its initial burden, it is unnecessary for the court to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Bright v Moussa***, 72 AD3d 859, 898 NYS2d 865 [2010]; ***Alma v Samedy***, 24 AD3d 398, 805 NYS2d 417 [2005]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2005]; ***Bebry v Farkas-Galindez***, 276 AD2d 656, 714 NYS2d 734 [2000]). Accordingly, HVT's motion to dismiss plaintiffs' complaint is denied. The Bokina defendants' cross motion for summary judgment dismissing plaintiffs' complaint for failure to sustain a serious injury under Insurance Law § 5102 (d), therefore, also is denied.

Lastly, plaintiffs move for summary judgment on the issue of liability. Plaintiffs allege that defendant Eric Bokina's actions, namely entering the subject intersection in contravention of a traffic control device and failing to yield the right of way to plaintiff John McGuinness's vehicle, were the sole proximate cause of the subject accident. Plaintiffs also allege that HVT and Christina Bokina are vicariously liable for Eric Bokina's actions. In support of the motion, plaintiff submits a copy of the pleadings, his own affidavit, a copy of the police motor vehicle accident report, copies of the parties' deposition transcripts. Plaintiff also submits a copy of the lease agreement between defendants, and a copy of the New York State Department of Motor Vehicle Database's vehicle identification number record expansion.

HVT opposes the instant motion on the ground that there are material issues of fact as to whether plaintiff's operation of his vehicle contributed to the happening of the subject accident. In opposition to the motion, HVT submits copies of prior unrelated police motor vehicle accident reports that occurred at the subject intersection, and copies of correspondence between the Town of Southold community and the Suffolk County Department of Public Works. HVT also submits a copy of the October 16, 2006 written agreement between the Town of Southold and the County of Suffolk to install a traffic control device at the subject intersection, and a copy of John McGuinness's No-Fault application. The Bokina defendants also oppose plaintiffs' motion on the ground that there are material issues of fact as to whether John McGuinness's conduct contributed to the subject accident's occurrence.

Vehicle and Traffic Law §1142 (a) states, in pertinent part, that the driver of a motor vehicle approaching a stop sign shall stop, and after having stopped, shall yield the right-of-way to any vehicle

that has entered the intersection or is approaching so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection (*see also* ***Guadagno v Norward***, 43 AD3d 1432, 842 NYS2d 844 [2007]; ***Galvin v Zacholl***, 302 AD2d 965, 755 NYS2d 175 [2003], *lv denied* 100 NY2d 512, 767 NYS2d 393 [2003]; ***Kelsey v Degan***, 266 AD2d 843, 697 NYS2d 426 [1999]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1997]).

Further, a driver is required to see that which through the proper use of his or her senses he or she should have seen, and a driver who has the right of way is entitled to anticipate that the other driver will comply with the obligation to yield (*see* ***Johnson v Burns***, 71 AD3d 736, 895 NYS2d 742 [2010]; ***Gregis v Miccio***, 39 AD3d 468, 834 NYS2d 253 [2007]; ***Le Claire v Pratt***, 270 AD2d 612, 704 NYS2d 354 [2000]). Moreover, a driver who has the right of way has a duty to use reasonable care to avoid a collision and may be held negligent for failing to take evasive action (*see* ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2009]; ***Pena v Santana***, 5 AD3d 649, 650, 774 NYS2d 744 [2004]). However, the driver must have sufficient time to act and the conduct of the other driver must be foreseeable (*see* ***Pena v Santana***, 5 AD3d 649, 774 NYS2d 744 [2004]; ***Lupowitz v Fogarty***, 295 AD2d 576, 744 NYS2d 480 [2002]; Vehicle and Traffic Law §§ 1142 (b), 1163).

Plaintiff testified at an examination before trial that the accident occurred during the course of his employment when he was en route to an appointment. Plaintiff testified that traffic was light and that he was traveling westbound, at a speed of 25 miles per hour, in the left lane of County Road 48. Plaintiff testified that as he approached the intersection he observed a large truck stopped in the left turn lane of County Road 48, and that it obstructed his view of the intersection. He testified that as he approached the intersection he was looking straight ahead, but prior to entering the intersection he looked to his left, directly at the large truck, and that he did not see any approaching vehicles. He testified that he does not recall if he looked to his right prior to entering the intersection or if there were any traffic control devices controlling his direction of travel. He testified that he observed defendants' vehicle "one or two seconds" before the impact occurred, and that defendants' vehicle was traveling at a high rate of speed. He testified that when he first observed defendants' vehicle it was approximately three feet from his vehicle, crossing over County Road 48, and that the front of defendants' vehicle already had passed the large truck stopped in County Road 48's left turn lane. Plaintiff testified that at the time of impact his foot was on the accelerator, and that he tried to veer his vehicle to the right in an attempt to avoid the accident, but he did not blow his horn prior to the collision. Plaintiff further testified that the impact to his driver's side door by defendants' vehicle was heavy and caused his vehicle to "spin out" and his air bags to deploy.

Eric Bokina testified at an examination before trial that he was traveling northbound on Westphalia Avenue prior to the accident, and that he was heading home from taking his children to preschool. He testified that the road was dry, and the weather was clear. He testified that there was a flashing red traffic light and a stop sign controlling his direction of travel on Westphalia Avenue, and that there was a flashing yellow traffic light controlling the direction of travel on County Road 48. He testified that when he noticed the flashing red light at the intersection he was traveling approximately 15 to 20 miles per hour. Eric Bokina also testified that there was a "dump truck pulling a trailer with a bulldozer or backhoe" stopped in the left turn lane of County Road 48, which he noticed when he stopped at the stop sign on Westphalia Road, and that it obstructed his view of the intersection. He testified that he "never saw" plaintiff's vehicle prior to the impact, and that as a result of the impact his vehicle "turned 180 degrees," coming to rest in a southerly direction, in the westbound lane of County Road 48. Eric Bokina

further testified that he observed plaintiff "slumped" over his steering wheel following the accident.

Although a driver who fails to yield the right of way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142, and is negligent as a matter of law (***Klein v Crespo***, 50 AD3d 745, 745, 855 NYS2d 633 [2008]), "there can be more than one proximate cause of an accident" (***Cox v Nunez***, 23 AD3d 427, 427, 805 NYS2d 604 [2005] *see* ***Todd v Godek***, 71 AD3d 872, 895 NYS2d 861 [2010]). Based upon the adduced evidence, plaintiffs have failed to demonstrate their entitlement to judgment as a matter of law that Eric Bokina's operation of his vehicle was the sole proximate cause of the subject accident's happening (*see* ***Topalis v Zwolski***, 76 AD3d 524, 906 NYS2d 317 [2010]; ***Spicola v Piracci***, 2 AD3d 1368, 768 NYS2d 867 [2003]; ***Cox v Nunez***, *supra*; *cf.* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259 [2009]). Plaintiff and Eric Bokina both testified that prior to the accident their views of the intersection were obstructed by the large vehicle in the left turn lane of County Road 48. Such testimony, considered in light of plaintiff's testimony that his foot was on the accelerator at the time of impact, and his inability to recall if there was a traffic control device controlling his direction of travel, raises material issues of fact as to the speed of plaintiff's vehicle, his attentiveness as he approached the intersection, and whether his conduct contributed to the happening of the accident (*see* ***Romano v 202 Corp.***, 305 AD2d 576, 759 NYS2d [2003]; ***Gonzalez v County of Suffolk***, 277 AD2d 350, 716 NYS2d 404 [2000]). In light of plaintiffs' failure to meet their prima facie burden, the court need not consider the sufficiency of defendants' papers in opposition (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Accordingly, plaintiffs' motion for summary judgment in their favor on the issue of liability is denied.

Dated: 15 Dec. 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION