SHORT FORM ORDER

COPY

INDEX No. 09-33254
CAL. No. 11-00406MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

***PRESENT:***

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 7-26-11
ADJ. DATE 1-16-12
Mot. Seq. # 002 - MG
# 003 - MG
# 004 - MG

JANINE GAGNON individually and as parent and natural guardian of DILLON GAGNON an infant under the age of 18 and SABRINA GAGNON, an infant under the age of 14,

Plaintiffs,

- against -

WILLIAM OMAN, DANIEL D. NETUSIL, MICHAEL PESCINO and RENEE T. BELGRADO,

Defendants.

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Upon the following papers numbered 1 to 61 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24, 25 - 36 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 37 - 43 ; Replying Affidavits and supporting papers 44 - 45 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#002) by the defendant Daniel Netusil seeking summary judgment dismissing the complaint, the motion (#003) by the defendant William Oman seeking summary judgment dismissing the complaint, and the unopposed motion (#004) by the defendants Michael Pescino and Renee Belgrado seeking summary judgment dismissing the complaint hereby are consolidated for the purposes of this determination; and it is

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***ORDERED*** that the motion by the defendant Daniel Netusil seeking summary judgment dismissing the complaint and all cross claims against him is granted; and it is

***ORDERED*** that the motion by the defendant William Oman seeking summary judgment dismissing the cause of action of the infant plaintiff Dillon Gagnon on the grounds that he did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) is granted; and it is further

***ORDERED*** that the unopposed motion by the defendants Michael Pescino and Renee Belgrado seeking summary judgment dismissing the complaint and all cross claims against them is granted.

The plaintiff Janine Gagnon commenced this action on behalf of herself and her infant children, the infant plaintiffs Dillon Gagnon and Sabrina Gagnon, to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Sound Avenue and Pier Avenue in the Town of Riverhead on August 31, 2008. It is alleged that the vehicle operated by the defendant Daniel Netusil was traveling eastbound on Sound Avenue when it came to a stop at the aforementioned intersection, and that, while waiting for the traffic to clear in order for him to execute a left turn, his vehicle was struck in the rear by the vehicle operated by the defendant William Oman. As a result of the impact between the Netusil and Oman vehicles, the Netusil vehicle allegedly was pushed into the westbound lane of Sound Avenue, directly in front of the vehicle operated by the defendant Michael Pescino and owned by the defendant Rene Belgrado (hereinafter referred to as the "Belgrado vehicle"), resulting in a collision between the Netusil and Belgrado vehicles. The plaintiffs were passengers in the Belgrado vehicle at the time of the accident.

By his bill of particulars, the infant plaintiff Dillon Gagnon alleges that he sustained various personal injuries as a result of the subject accident, including a concussion, prepatellar bursitis, and a cyst in the right sinus. The infant plaintiff further alleges that he was confined to his bed and his home for approximately one week, and that he was partially disabled for approximately six to eight weeks following the subject accident.

The defendant Oman now moves for summary judgment on the basis that the injuries allegedly sustained by the infant plaintiff as a result of the subject collision fail to meet the "serious injury" threshold requirement of the Insurance Law. In support of the motion, Oman submits copies of the pleadings, the infant plaintiff's deposition transcript, and the infant plaintiff's medical reports. Oman also submits the sworn medical report of Peter Ajemian, M.D. At Oman's request, Dr. Ajemian conducted an independent orthopedic examination of the infant plaintiff on August 25, 2010. The defendant Netusil also moves for summary judgment dismissing the infant plaintiff Dillon Gagnon's cause of action on the basis that he failed to sustain a serious injury within the meaning of the Insurance Law. In support of the motion, Netusil submits unsworn copies of the infant plaintiff's medical reports and the sworn medical report of Dr. Ajemian.

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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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 [2d Dept 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 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Based upon the adduced evidence, the defendants Oman and Netusil have established, prima facie, their entitlement to judgment as a matter of law that the infant plaintiff Dillon Gagnon did not sustain a serious injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Defendants' examining orthopedist, Dr. Ajemian, states in his medical report that an examination of the infant plaintiff reveals that he has full range of motion in his left knee, that his motor strength is intact, that the straight leg raising test is normal, and that the infant plaintiff is able to heel-toe walk. Dr. Ajemian states that the infant plaintiff stance and gait are normal, that he is able to squat normally, and that there is no evidence of prepatellar bursitis or chondromalacia. Dr. Ajemian opines that the infant plaintiff is not disabled, that the left knee contusion he sustained in the subject accident has resolved, and that the examination of the infant plaintiff's left knee is normal. In addition, the medical records of the infant plaintiff submitted by the defendants demonstrate that the injury he sustained to his left knee had resolved, and that he was capable of his normal daily living activities.

Additionally, reference to the infant plaintiff Dillon Gagnon's own deposition testimony shows that he did not sustain an injury within the "90/180" category of serious injury (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). Therefore, the burden shifted to the infant plaintiff to come forward with competent admissible medical evidence based on

objective findings, sufficient to raise a triable issue of fact that he sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*).

The infant plaintiff Dillon Gagnon opposes the defendants Oman and Netusil's motions on the grounds that the defendants failed to meet their prima facie burden, and that he sustained injuries within the "limitations of use" categories and the 90/180 category of the Insurance Law. In opposition to the motion, the infant plaintiff relies on the same evidence presented in the defendants' motions for summary judgment.

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 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). 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***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). 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]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the defendants Oman's and Netusil's prima facie showing, the infant plaintiff Dillon Gagnon has failed to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). Although, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]), the infant plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). Here, the medical reports submitted by the infant plaintiff are without probative value, since they are unaffirmed and, therefore, are inadmissible (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, 91 AD3d 751; 936 NYS2d 283 [2d Dept 2012]; ***Diaz v Chauhdry***, 91 AD3d 590, 935 NYS2d 901 [2d Dept 2012]; ***Capriglione v Rivera***, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]). In any event, the medical records submitted by the infant plaintiff demonstrate that he sustained a left knee contusion with

prior conduct that brought about the emergency situation, even though he or she acted reasonably during the emergency (*see* ***Stewart v Ellison***, 28 AD2d 252, 813 NYS2d 397 [1st Dept 2006]; ***Foster v Sanchez***, 17 AD3d 312, 792 NYS2d 579 [2d Dept 2005]; ***Mead v Marino***, 205 AD2d 669, 613 NYS2d 650 [2d Dept 1994]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact, those issues may, in appropriate circumstances, be determined as a matter of law (*see* ***Lonergan v Almo***, 74 AD3d 902, 904 NYS2d 86 [2d Dept 2010]; ***Vitale v Levine***, 44 AD3d 935, 844 NYS2d 105 [2d Dept 2007]).

Here, the defendants Pescino and Belgrado have met their prima facie burden on their motion for summary judgment by submitting evidence that demonstrates that Pescino's operation of the Belgrado vehicle was not negligent, and that Pescino was faced with an emergency situation, not of his own making at the time of the subject accident (*see* ***Minor v C & J Energy Savers, Inc.***, 65 AD3d 532, 883 NYS2d 587 [2d Dept 2009]; ***Marsch v Catanzaro***, 40 AD3d 941, 837 NYS2d 195 [2d Dept 2007]). In her affidavit Ann Iraggi asseverates that the Netusil vehicle was struck in the rear by the Oman vehicle, while it was stopped waiting for an opportunity to make a left turn, causing the Netusil vehicle to be pushed over into the Belgrado vehicle's lane of travel. "A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic. Such an event constitutes a classic emergency situation, thus implicating the emergency doctrine" (***Gajjar v Shah***, 31 AD3d 377. 377-378, 817 NYS2d 653 [2d Dept 2006]; *see* ***Ardila v Cox***, 88 AD3d 829, 931 NYS2d 120 [2d Dept 2011]; ***Palma v Garcia***, 52 AD3d 796, 861 NYS2d 115 [2d Dept 2008]). Therefore, since the collision occurred within seconds of when Pescino first saw the Netusil vehicle crossing into his lane of travel, the emergency doctrine applies, and any alleged failure by Pescino to exercise his best judgment is insufficient to constitute negligence (*see* ***Held v McMillan***, 45 AD3d 805, 847 NYS2d 135 [2d Dept 2007]; ***Dormena v Wallace***, 282 AD2d 425, 723 NYS2d 72 [2d Dept 2001]). In any event, Pescino's testimony that he applied his brakes when he saw Netusil's vehicle enter his lane of travel, leaving him with virtually no opportunity to avoid the collision, established that he acted reasonably under the circumstances in trying to avoid the collision (*see* ***Tsai v Zong-Ling Duh***, 79 AD3d 1020, 913 NYS2d 748 [2d Dept 2010]; ***Lee v Ratz***, 19 AD3d 552, 798 NYS2d 80 [2d Dept 2005]). Neither the plaintiffs nor the defendants Netusil or Oman have submitted papers in opposition to the motion. Accordingly, the defendants Michael Pescino and Renee Belgrado's motion for summary judgment dismissing the complaint is granted.

Dated: 1/24/13

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION