

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

MIKAIL WARDAK and RAYHAN WARDAK,
an infant by is natural guardian, MIKAIL WARDAK,
BILAL WARDAK, an infant by his natural guardian,
MIKAIL WARDAK, and MIKAIL WARDAK,
individually and PASHTOON HAIDARZADAH
WARDAK,

Index No.: 009808/09
Motion Sequence...01
Motion Date... 08/25/10

Plaintiffs,

-against-

ENAYAT AHMAD ZENHOM and
M. AHMAD ZENHOM,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion.....x
- Affidavit in Opposition.....x
- Reply Affirmation.....x

Upon the foregoing papers, the Defendants’ motion seeking an order pursuant to CPLR § 3212 and Insurance Law §§ 5102 (d) and 5104 (a) granting them summary judgment dismissing the infant Plaintiffs, Rayhan Wardak and Bilal Wardak’s complaint is determined as hereinafter provided.

By their guardian, the infant Plaintiffs in this action seek to recover damages

for injuries they allegedly suffered as a result of allegedly witnessing their father, the Plaintiff Mikail Wardak, get pinned against a retaining wall when he was hit by a parked car which had been hit by a vehicle owned by the Defendant, Enayat Ahmad Zenhom and operated by the Defendant, M. Ahmad Zenhom on April 17, 2009. The accident happened when Mikail Wardak was directing M. Ahmad Zenhom as she was pulling into the Plaintiffs' driveway at 30 Winthrop Drive, Woodbury, New York and she put her foot on the accelerator instead of the brake. The infant Plaintiffs allege that they have suffered emotional distress, post-traumatic stress syndrome and shock and fright as a result of their observations.

The Defendants seek summary judgment dismissing the infant Plaintiffs' complaint on the grounds that they were not in the zone of danger when Mikhail Wardak was struck and assuming, *arguendo*, that they were, they did not sustain serious injuries as required by Insurance Law § 5104 (a) as defined by Insurance Law § 5102 (d).

“On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627 (2005), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Sheppard-Mobley v. King, supra*, at p. 74; *Alvarez v. Prospect Hosp., supra*; *Winegrad v. New York*

Univ. Med. Ctr., supra. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v. Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 521 (2d Dept. 2006), *citing Secof v. Greens Condominium*, 158 A.D.2d 591 (2d Dept. 1990).

“In order to recover for an alleged emotional injury based on the zone of danger theory of liability, a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member’s death or serious injury while in the zone of danger.” *Stamm v. PHH Vehicle Management Services, LLC*, 32 A.D.3d 784, 786 (1st Dept. 2006) *lv den.*, 8 N.Y.3d 814 (2007), *citing Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984); *DeCinto v. Lawrence Hosp.*, 299 A.D.2d 165, 166 (2002); *lv den. in part and dism. in part*, 100 N.Y.2d 549 (2003). “The emotional injury must be not only serious and verifiable but also ‘tied, as a matter of proximate causation, to the observation of the serious injury or death of the family member and such injury or death must have been caused by the conduct of the defendant.’ ” *Stamm v. PHH Vehicle Management Services, LLC, supra*, at p. 786, quoting *Bovsun v. Sanperi, supra*, at p. 231-232.

“[A] causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury under the Insurance Law . . . [however,] such injury – as well as being ‘serious and verifiable’ – must also be established by objective medical

evidence and causally related to the motor vehicle accident.” *Bissonette v. Compo*, 307 A.D.2d 673 (3rd Dept. 2003), citing *Chapman v. Capoccia*, 283 A.D.2d 798, 799 (3rd Dept. 2001); *Kristel v. Mitchell*, 270 A.D.2d 598, 599 (3rd Dept. 2000); *Sellitto v. Casey*, 268 A.D.2d 753, 755-756, (3rd Dept. 2000); *Cushing v. Seemann*, 247 A.D.2d 891, 892-893 (4th Dept. 1998); *Spinard v. Gasser*, 235 A.D.2d 687, 688-689 (3rd Dept. 1997); *see also, Villeda v. Cassas*, 56 A.D.3d 762 (2nd Dept. 2008); *Taranto v. McCaffrey*, 40 A.D.3d 626 (2nd Dept. 2007).

At his Examination Before Trial, Rayhan Wardak testified that at the time of the accident, he was standing in the driveway about two or three feet away from his father watching him direct M. Ahmad Zenhom drive her car into their driveway; that he was moving in the opposite direction when the car was coming towards him and his dad; and, that he screamed when he saw the car hit his dad. He testified that while he observed his injured father, he himself was perfectly okay, although he was struck by pieces of the car. He also testified that he had not seen any doctors as a result of witnessing his father’s accident, but that he has seen his school psychologist at school weekly since about a week after the accident. He testified that while he did not wish to see her anymore, he has to because she comes and gets him to talk. He testified that he has trouble studying, doing homework and concentrating but his grades have remained stable. He also testified that he recalled having a nightmare when his father was in the hospital four or five months after the accident.

Bilal Wardak testified at his Examination Before Trial that he was just hanging

around on their lawn when the accident happened and that he “wasn’t really paying attention until after the accident” because “there was nothing really going on until the accident happened.” Nevertheless, he testified that he did actually see the accident and that he saw the car come in contact with his father. He testified that after the accident, he went over to his father but he also trailed the front yard screaming for an ambulance. He testified that he saw a school psychologist a few days after the accident and that he went to her only a total of twice. He testified that he told her that he was worried about how life would be with a handicapped father and he testified that he also discussed the accident with a guidance counselor. Nevertheless, he testified that he had occasional nightmares which come and go as a result of what he saw and that he continues to suffer from sleep problems. He also testified that he gets depressed and experiences flashbacks of the accident.

The Plaintiff, Pashtoon Haidarzadah Wardak testified at her Examination Before Trial that Rayhan told her about bad dreams a few times after the accident. She also testified that she called into a psychologist on television once for advice on handling Rayhan and that she had talked to Rayhan’s teachers, school principal and the psychologist about his strange behavior. She also testified that since the accident, Bilal has told her that he has problems sleeping and that he was nervous and depressed.

After fully discussing the accident and its affects on Rayhan’s lifestyle, Board Certified Psychiatrist, Dr. Solomon Miskin, who examined Rayhan on April 22, 2010 has affirmed that “Rayhan Wardak is currently a full time student in the fourth grade. From a

psychiatric point of view, there is no disability and Rayhan can continue in school on a full time basis without restriction and can participate in everyday activities of daily life without restriction.” Similarly, having also examined Bilal that day, he affirmed that “Bilal Wardak is currently a full time student in tenth grade. From a psychiatric point of view, there is no evidence of a disability. Bilal Wardak can continue in school on a full time basis without restriction [and that] at the time of his examination, Bilal Wardak demonstrates no overt clinical evidence of emotional distress, post-traumatic syndrome, shock or fright.” Nevertheless, Dr. Miskin found that both Rayhan and Bilal were continuing to suffer from “adjustment disorder of mixed emotional features, moderate severity, status post-incident dated 4/17/09.”

With respect to Rayhan Wardak, the Defendants’ evidence has not established that he was not in the zone of danger nor has it been established that there is no objective medical evidence linking his emotional and psychological injury to the accident. The Defendants have accordingly failed to establish their entitlement to summary judgment dismissing Rayhan Wardak’s claim.

However, the evidence presented demonstrates that the infant Plaintiff, Bilal Wardak was not in the “zone of danger.” His claim fails for that reason alone. The Defendants have established their entitlement to summary dismissal of Bilal Wardak’s claim. The burden accordingly shifts to the Plaintiffs to establish the existence of a material issue of fact with respect to Bilal Wardak’s claim. They have failed to do so. Their reliance on

Mikail Wardak's testimony at his Examination Before Trial fails. His testimony also puts Bilal Wardak completely outside of the zone of danger in "the grassy area by the folding chair."


Accordingly, it is hereby

ORDERED, that the motion by the Defendants, interposed pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff, Bilal Wardak's complaint is **GRANTED**; and it is further

ORDERED, that the motion by the Defendants, interposed pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff, Mikail Wardak's complaint is **DENIED**

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 10, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
NOV 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE