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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**BETINA FILS-AIME,**

**Plaintiff,**

**-against-**



**TRIAL PART: 50**

**INDEX NO.:018821/01  
ACTION NO. 1**

**MOTION DATE:9-15-05  
SUBMIT DATE:9-29-05  
SEQ. NUMBER - 012**

**RYDER TRS, INC., MATTHEW D. VERMILYEA,  
CRISTOFARO SCACCIA, MARIO A. SCACCIA,  
ERIC Y. DUNST, and SIMMIE DUNST, CORNELL  
UNIVERSITY, INTEGRAMED AMERICA, INC.,  
MPD MEDICAL ASSOCIATES OF NEW YORK  
and REPRODUCTIVE SPECIALISTS OF NEW  
YORK, LLP,**

**Defendants**

-----x  
**MAGDA JACHOWICZ, an infant, by MACIEJ  
JACHOWICZ, as parent and natural guardian,  
HANNA JACHOWICZ, an infant, by MACIEJ  
JACHOWICZ, as parent and natural guardian  
and MACIEJ JACHOWICZ, Individually,**

**Plaintiffs**

**-against-**

**ACTION NO. 2**

**INDEX NO. 2635/02**

**MATTHEW D. VERMILYEA, RYDER, TRS., INC.,  
CRISTOFARO SCACCIA, MARIO A. SCACCIA,  
ERIC Y. DUNST and SIMMIE DUNST BETINA  
FILS-AIME, CORNELL UNIVERSITY,  
INTEGRAMED AMERICA, INC., MPD MEDICAL  
ASSOCIATES, OF NEW YORK, and REPRODUCTIVE**

**SPECIALISTS OF NEW YORK, LLP,**  
**Defendants**

-----x  
**MATTHEW D. VERMILYEA**  
**Third-Party Plaintiff,**

**-against-**

**THIRD-PARTY  
ACTION**

**CORNELL UNIVERSITY and UNITED EDUCATORS  
INSURANCE RISK RETENTION GROUP, INC.**

**Third-Party Defendants,**  
-----x

**The following papers have been read on this motion:**

<b>Notice of Motion, dated 8-19-05.....</b>	<b>1</b>
<b>Affirmation in Opposition, dated 9-8-05.....</b>	<b>2</b>
<b>Affirmation in Opposition, dated 9-14-05.....</b>	<b>3</b>
<b>Affirmation in Opposition, dated 9-21-05.....</b>	<b>4</b>
<b>Affirmation in Reply, dated 9-26-05.....</b>	<b>5</b>

Upon the foregoing papers it is ordered that this motion by Maciej Jachowicz, as defendant on counterclaims alleged by defendants in action # 2 (index no. 2635/02), for an order pursuant to CPLR 3212 for summary judgment is granted and all such counterclaims are dismissed.

By way of proof annexed to the affirmation of his attorney, the moving defendant has provided *prima facie* proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092) that he is entitled to judgment as a matter of law, shifting the burden to the motion opponents to come forward with evidence demonstrating the existence of issues of fact meriting a trial

(see, e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, the transcript of Jachowicz's deposition indicate that he had been driving on Glen Cove Road, and, at its intersection with Hillside Avenue, was stopped for a light in the right lane. The operator of the vehicle to his left, also stopped, asked him for directions. The light turned green and Jachowicz took his foot off the brake, but did not press the accelerator. He heard the sound of screeching tires, and a loud bang. He held the steering wheel tighter, and heard a second bang on the driver's side. A split second after the second bang his car was struck. This amounts to proof that he took no action that would constitute negligence on his part.

In opposition, the motion opponents raise two issues. The first is that the moving party failed to annex the supplemental summons and (second) amended complaint (of the Jachowicz plaintiffs), but rather an earlier version of the amended complaint which was superseded by the newer pleading. He thus was in technical violation of CPLR 3212(b), which provides that a motion for summary judgment be supported by, among other things, a copy of the pleadings. However, on a motion to dismiss a failure to annex the pleadings may be overlooked by a court if the record is otherwise sufficiently complete (*Welch v Hauck*, 18 AD3d 1096; see CPLR 2001) and should not lead to denial in any event but, rather, dismissal of the motion without prejudice to renewal (*Green v Wood*, 6 AD3d 976). As the Court has an ample basis for deciding this motion notwithstanding the presentation of the wrong pleading, and the correct amended complaint was annexed to the movant's reply papers, it will overlook the procedural defect and address the merits.

In that regard, the sole basis presented is that there is some evidence that the infant

plaintiffs in the Jachowicz actions, Hanna and Magda Jachowicz, were not restrained by seat belts, in violation of Vehicle and Traffic Law § 1229-c(1). The statute provides that no person shall operate a motor vehicle unless all back-seat passengers under the age of 16 are restrained by seat belts, and there is no dispute that both infant plaintiffs were under 16 at the time of the accident. Based thereon, the motion opponents contend that their father, the movant herein, was negligent as a matter of law, as he was in violation of the Vehicle and Traffic Law (see *Hellenhecht v Radeber*, 309 AD2d 834).

However, at subdivision (8) section 1299-c also provides that “non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages...” (see also *Boyd v Trent*, 297 AD2d 301; *Baker v Kelly*, 241 AD2d 947). As the present motion concerns only the counterclaim defendant’s alleged freedom from liability, and the sole evidence sought to be raised to place this in issue is inadmissible, the Court finds that the motion opponents have failed to rebut the *prima facie* showing made by the movant. Accordingly, his motion for summary judgment dismissing the counterclaim must be granted.

This motion was referred to this Court on January 3, 2006.

The foregoing constitutes the Decision and Order of the Court.


ENTER

DATED: January 17, 2006

**ENTERED**

JAN 19 2006

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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