

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ALLAN L. WINICK,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

JAMES HILL, DEO SALICK and
MURRAY THEOPHILUS,

Plaintiff(s),

MOTION DATE: November 30, 2001

MOTION SEQUENCE: 004, 005,

006, 007

INDEX NO. 11181/00

-against-

Action #1

THOMAS MOLNAR, STACY A. MOLNAR and
ERNEST VITOLO,

Defendant(s).

ERNEST VITOLO and BETH VITOLO,

Plaintiff(s).

INDEX NO. 10324/00

-against-

Action #2

STACY A. MOLNAR and THOMAS MOLNAR,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause

Answering Affidavits

Replying Affidavits

Briefs: Plaintiff's/Petitioner's

Defendant's/Respondent's

Motion by defendants Stacy A. Molnar and Thomas Molnar for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaints and all cross-claims against them is granted.

Cross-motion by defendant Thomas Molnar for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaints and all cross-claims against him

or, in the alternative, an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaints of plaintiffs Deo Salick and Murray Theophilus in action No. 1 and plaintiffs Ernest Vitolo and his wife Beth Vitolo in action No. 2 on the grounds that they did not sustain a serious injury as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d) is granted as provided herein.

Cross-motion by defendant Stacy A. Molnar for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaints of plaintiffs Deo Salick and Murray Theophilus in action No. 1 and plaintiffs Ernest Vitolo and his wife Beth Vitolo in Action No. 2 on the grounds that they did not sustain a serious injury as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d) is granted as provided herein.

Cross-motion by defendant Ernest Vitolo for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint of plaintiffs Deo Salick and Murray Theophilus on the grounds that they did not sustain a serious injury as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d) is granted.

These actions arise out of a motor vehicle accident which occurred on January 1, 2000, on Bath Avenue in Brooklyn. In the area where the accident occurred, Bath Avenue is a two-way street with one lane traveling in each direction and a parking lane on each side. The road is generally straight and level and is divided by a double yellow line. The speed limit is 30 m.p.h. and at the time of the accident, the weather was clear and the street was dry. Defendant Thomas Molnar was driving a vehicle owned by defendant Stacy A. Molnar westbound on Bath Avenue. Defendant Ernest Vitolo, a police sergeant en route to work, was driving his vehicle on Bath Avenue in the opposite direction, i.e., eastbound. In order to pass a city bus which was double parked in the eastbound lane, Vitolo's vehicle crossed over the double yellow line into the westbound lane. A head-on

collision with Molnar occurred.

The Molnars presently seek summary judgment dismissing the complaints brought by James Hill, Deo Salick and Murray Theophilus, who were Thomas Molnar's three passengers and are plaintiffs in action No. 1 and Ernest Vitolo and his wife, who are plaintiffs in action No. 2.

"It is axiomatic that a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic (*see, Velez v Diaz*, 227 AD2d 615; *Koch v Levenson*, 225 AD2d 592; *Greifer v Schneider*, 215 AD2d 354; *Tenenbaum v Martin*, 131 AD2d 660). Indeed, such a scenario presents an emergency situation, and the actions of the driver presented with such a situation must be judged in that context (*see, Koch v Levenson, supra; Mangano v New York City Hous. Auth.*, 218 AD2d 787; *Greifer v Schneider, supra; Glick v City of New York*, 191 AD2d 677)." (**Bentley v Moore**, 251 AD2d 612, 613; see also, **Hentschel v Campbell Carpet Servs.**, 256 AD2d 500). However, "[a] driver confronted with an emergency situation may still be found to be at fault for the resulting accident where his or her reaction is found to be unreasonable or where the prior tortious conduct of the driver contributed to bringing about the emergency (*see, Ferrer v Harris*, 55 NY2d 285, 293; *Hentschel v Campbell Carpet Servs.*, 256 AD2d 500)." (**Mehring v Cahill**, 271 AD2d 415). Nevertheless, mere speculation that a driver who was faced with a crossover vehicle "may have failed to take some unspecified accident avoidance measures or in some way contributed to the occurrence of the accident, without evidentiary support in the record, is insufficient to defeat a motion for summary judgment (*see, Salazar v Ospina*, 253 AD2d 550, 551; *Williams v Econ*, 221 AD2d 429, 430)." (**Mehring v Cahill, supra**, at p. 416; see also, **Child v Suffolk County Water Authority**, 283 AD2d 537; **Abitol v Schiff**, 276 AD2d 571; compare, **Hentschel v Campbell Carpet Servs., supra**).

It is undisputed that defendant Vitolo crossed over into the defendant Molnar's lane. Defendant Vitolo maintains that although he crossed over and was traveling along side the double parked bus in the westbound lane, he saw defendant coming toward him as soon as he pulled out from around the back of the bus. In addition, Vitolo claims that he was able to bring his vehicle to a complete stop before he was hit by Molnar near the front wheel of the double-parked bus. And, Molnar had admittedly just seen a vehicle pass the double parked bus in his lane. Thus, defendant Vitolo argues that Molnar was on notice of the danger of on-coming traffic and that he was negligent in his response to him. Defendant Vitolo further notes that he saw defendant Thomas Molnar purchase a six pack of beer after the accident and that he was charged with violations of Vehicle and Traffic Law §1192.1 and §1192.3 after the accident. Those charges, however, were dismissed.

Defendant Thomas Molnar disputes defendant Vitolo's version of the accident. He maintains that both vehicles were moving at the time of impact and that the collision occurred along side the rear wheel of the double-parked bus. Molnar maintains that he was only five to ten feet away from defendant Vitolo when he first saw him in his lane and that he had already passed half the bus.

"Even assuming that there was sufficient time for [Molnar] to react and apply his brakes, under the emergency circumstances presented, [Molnar] was not obligated to exercise his best judgment and any error in his judgment [is] not sufficient to constitute negligence (*see, Moller v Lieber*, 156 AD2d 434, 435)." (**Greifer v Dschneider**, 215 AD2d 354, 356). Since the collision indisputably occurred within just seconds of the time that Molnar first saw Vitolo's vehicle approaching in his lane, "[Molnar] was not obligated to exercise [his] best judgment and any error in [his] judgment was not sufficient to constitute negligence (*see, Stevens v Kirby*, 86 AD2d 391; *Matter of Eagle Ins. Co. v Olephant*, 81 AD2d 886; *Greifer v Schneider, supra*)." (**Bentley v Moore, supra**, at p. 613).

The Molnar defendants' motions for summary judgment dismissing the complaints and all cross-claims against them are accordingly granted. (See, Coss v Sunnydale Farms, Inc., 268 AD2d 499).

The Court turns next to the applications to dismiss Salick, Theophilus and Vitolo's complaints pursuant to Insurance Law §5102.

The Vitolo plaintiffs' complaint against the Molnar defendants has been dismissed, thus, whether Mr. Vitolo sustained a serious injury is moot.

As for plaintiffs Salick and Theophilus, defendants have submitted the affirmations of a doctor establishing that neither have suffered a serious injury. Charles Pitman, a Board Certified Orthopedic Surgeon, examined plaintiff Theophilus as well as his medical records on January 12, 2001, and concluded that he had suffered a cervical and lumbar sprain/strain as well as a left shoulder and left knee strain which had long since fully resolved themselves. Dr. Pitman examined plaintiff Salick as well as his medical records on the same day and similarly concluded that he too suffered cervical and lumbar sprains as well as a contusion of his right shoulder and both legs which had all completely resolved.

Through Dr. Pitman's affirmation, movants have established **prima facie** that neither Salick nor Theophilus sustained a serious injury thereby shifting the burden to them to establish the existence of a question of fact. (Gaddy v Eyler, 79 NY2d 955).

In opposition, plaintiffs Salick and Theophilus have submitted their treating chiropractor's affirmation which was not sworn to before a notary public as well as his unsworn narrative reports. None of these submissions constitute evidentiary proof in admissible form. (Young v Ryan, 265 AD2d 547; Doumanis v Conzo, 265 AD2d 296).

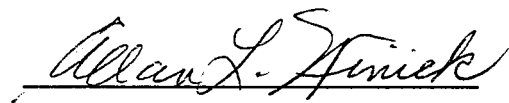
In any event, the chiropractor's affirmation does not set forth any objective proof of the injuries themselves (Grossman v Wright, 268 AD2d 79; Mersica v Alford, 243 AD2d 613; Magras v Colasuonno, 278 AD2d 388), and plaintiffs may not rely on unsworn medical

reports. (**Grasso v Angerami**, 79 NY2d 813; **Rozengauz v Lok Wing Ha**, 280 AD2d 534; **Merisca v Alford**, *supra*, citing, **Friedman v U-Haul Truck Rental**, 216 AD2d 266). Furthermore, plaintiffs' chiropractor failed to set forth the objective tests, if any, which he performed to arrive at his conclusions concerning the alleged restrictions of movement suffered by both plaintiffs (**Wells v Lewis**, ___ AD2d ___, 733 N.Y.S.2d 911; **Grossman v Wright**, *supra*) nor has he quantified the degree of restriction of movement suffered by them. (**Rozenganz v Lok Wing Ha**, *supra*; **Mersica v Alford**, *supra*). Plaintiffs Salick and Theophilus have failed to meet their burden.

Summary judgment, therefore, is granted to the defendant Vitolo and the plaintiffs Salick and Theophilus's complaints are dismissed.

This constitutes the order of the court.

Dated: January 16, 2002



Allan L. Winick J.S.C.

ENTERED

JAN 23 2002

**NASSAU COUNTY
COUNTY CLERKS OFFICE**