SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

NICHOLAS LUTZKY, JR. and CHRISTOPHER VRABEL,

Plaintiffs,

- against -

SALVATORE J. ROMANO, ROBERT J. ROMANO, STEVEN BAEZ and ANA L. BREA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 24927/09
Motion Seq. Nos: 04, 05, 06
07, 08
Motion Dates: 12/08/10
12/08/10
01/05/11
01/05/11
01/05/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 04), Affirmation and Exhibits	1
Affirmation in Support	2
Notice of Cross-Motion (Seq. No. 05), Affirmation and Exhibits	3
Affirmation in Opposition and Exhibits	4
Reply Affirmation	5
Reply Affirmation	6
Affirmation in Opposition and Reply Affirmation	7
Notice of Motion (Seq. No. 06), Affirmation and Exhibits	8
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Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Salvatore J. Romano ("S. R.") and Robert J. Romano ("R. R.") move

(Motion Seq. No. 04), pursuant to CPLR § 3212, for an order granting them summary judgment due to plaintiffs' failure to prove a prima facie case of liability against them. Plaintiffs Nicholas Lutzky, Jr. ("Lutzky") and Christopher Vrabel ("Vrabel") oppose the motion and cross-move (Motion Seq. No. 05), pursuant to CPLR § 3212, granting them summary judgment against defendants Steven Baez ("Baez") and Ana L. Brea ("Brea") on the issue of liability and setting this matter down for a trial as the issue of damages only. Defendants Baez and Brea oppose both defendants S. R. and R. R.'s motion (Seq. No. 04) and plaintiffs' cross-motion (Motion Seq. No. 05). Defendants S. R. and R. R. oppose plaintiffs' cross-motion (Motion Seq. No. 05).

Defendants S. R. and R. R. additionally move (Motion Seq. No. 06), pursuant to CPLR § 3212, for an order granting them summary judgment on the ground that plaintiffs did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Defendants Baez and Brea cross-move (Motion Seq. No. 07), pursuant to CPLR § 3212, for an order granting them summary judgment on the ground that plaintiff Lutzky did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Defendants Baez and Brea also cross-move (Motion Seq. No. 08), pursuant to CPLR § 3212, for an order granting them summary judgment on the ground that plaintiff Vrabel did not sustain a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiffs oppose defendants S. R. and R. R.'s motion, as well as both of defendants Baez and Brea's cross-motions.

The action arises from a motor vehicle accident involving a collision between a 2009 BMW 328 owned by defendant Brea and operated by defendant Baez and a 2008 Honda Accord owned by defendant S.R. and operated by defendant R.R. Plaintiff Lutzky was a passenger in

the right side backseat of defendants S.R. and R.R.'s automobile. Plaintiff Vrabel was a passenger in the front seat of defendants S.R. and R.R.'s automobile. The accident occurred at approximately 8:33 p.m., on October 25, 2009, on Meadowbrook State Parkway near its intersection with Zeckendorf Boulevard, County of Nassau, State of New York. It is alleged that at the time of the accident, the 2008 Honda Accord being operated by defendant R.R., in which plaintiffs were passengers, was traveling in the left northbound lane of the Meadowbrook State Parkway. As said vehicle was traveling straight and fully within the left lane of travel, the 2009 BMW 328, operated by defendant Baez, attempted to change lanes from the middle lane to the left lane where defendants R.R. and S.R.'s automobile was traveling. Defendant Baez attempted an abrupt and quick lane change as a result of his engagement in a race with an uninvolved black GTI vehicle. According to defendant Baez's Examination Before Trial ("EBT") testimony, he admits that the accident occurred as his vehicle was straddling the line located on the roadway between the middle and left lanes, while he was in the process of changing from the middle lane to the left lane. The rear left driver's side portion of defendant Baez's vehicle struck the front right passenger side of defendants R.R. and S.R.'s vehicle. Defendants R.R. and S.R.'s vehicle then crashed into the concrete median.

As a result of the accident, plaintiff Lutzky claims that he sustained the following injuries:

Scapholunate ligament tear right hand and wrist with sever pain, swelling and deformity;

Right arm contusion;

Swelling over the distal portion of the forearm.

As a result of the accident, plaintiff Vrabel claims that he sustained the following injuries:

> L5-S1 paracentral right disc herniation with contact of the right S1 nerve root as it exits (*sic*) the thecal sac;
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> Mild broad bulge at L4-5;
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> Inability to sleep;
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> Inability to defecate without severe pain;
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> Weight loss;
>
> Cerebral concussion;
>
> Loss of consciousness;
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> Vomiting;
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> Left temple ecchymosis;
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> Severe anxiety reaction;
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> Back pain;
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> Neck pain;
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> Pain and tenderness over the transverse mid abdomen;
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> Right rib and chest pain;
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> Left knee pain.

On or about December 1, 2009, plaintiffs commenced this action by service of a Summons and Verified Complaint. Issue was joined by defendants S.R. and R.R. on or about December 29, 2009. Issue was joined by defendants Baez and Brea on or about February 23, 2010.

The Court will first address the summary judgment motion and cross-motions (Seq. Nos. 06, 07, 08) that pertain to the threshold arguments of the respective parties.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve

issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendants' examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car* Systems, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st

Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiffs Lutzky and Vrabel claim that as a consequence of the above described automobile accident, they have sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law and which fall within the following statutory categories of injuries:

1) a permanent consequential limitation of use of a body organ or member; (Category 7)

2) a significant limitation of use of a body function or system; (Category 8)

3) 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.(Category 9).

As previously stated, to meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler,*79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot,*

supra. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis, supra*. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants S.R. and R.R.'s motion and defendants Baez and Brea's cross-motions. In support of their motion (Seq. No. 06), defendants S.R. and R.R. submit the pleadings, plaintiffs' Verified Bill of

Particulars, the affirmed reports of John C. Killian, M.D., who performed an independent orthopedic medical examination of plaintiff Lutzky on August 12, 2010 and an independent orthopedic medical examination of plaintiff Vrabel on August 13, 2010, the transcript of plaintiff Lutzky's EBT testimony and the transcript of plaintiff Vrabel's EBT testimony. In support of their cross-motion with respect to plaintiff Lutzky (Seq. No. 07), defendants Baez and Brea submit the pleadings, plaintiffs' Verified Bill of Particulars, the transcript of plaintiff Lutzky's EBT testimony, the affirmed report of John C. Killian, M.D., who performed an independent orthopedic medical examination of plaintiff Lutzky on August 12, 2010 and the affirmed report of Scott S. Coyne, M.D., who reviewed plaintiff Lutzky's right wrist MRI that was performed on December 8, 2009, at Orthopedic Associates of Manhasset. In support of their cross-motion with respect to plaintiff Vrabel (Seq. No. 08), defendants Baez and Brea submit the pleadings, plaintiffs' Verified Bill of Particulars and the affirmed reports of Scott S. Coyne, M.D., who reviewed plaintiff Vrabel's thoracic spine MRI that was performed on February 18, 2010, at Metropolitan Diagnostic, and plaintiff Vrabel's lumbosacral spine MRI that was performed on November 12, 2009, at Metropolitan Diagnostic.

Dr. John C. Killian, a board certified orthopedic surgeon, reviewed plaintiff Lutzky's medical records and conducted a physical examination of plaintiff Lutzky on August 12, 2010. *See* Defendants S.R. and R.R.'s Motion (Seq. No. 06) Affirmation in Support Exhibit C; Defendants Baez and Brea's Cross-Motion (Seq. No. 07) Affirmation in Support Exhibit E. Said examination included an evaluation of plaintiff Lutzky's right wrist and hand. Dr. Killian states, "[o]n inspection the normal bony and soft tissue contours of his right wrist and hand were maintained without evidence of atrophy, asymmetry, deformity, swelling or discoloration. On palpitation he did not complain of tenderness and there was no palpable swelling or deformity.

The range of motion of his wrist was tested (by visual observation) and found to be full and symmetrical with the left wrist with dorsiflexion and palmar flexion to 70 degrees (normal 70 degrees), radial deviation to 15 degrees (normal 15 degrees) and ulnar deviation to 30 degrees (normal 30 degrees). He did not complain of pain with any of the wrist motions. Finkelstein's test was negative and there were no specific areas of tenderness over the tendons in the wrist. There was no clicking or instability on the radial side of the wrist between the scaphoid and lunate. He had normal grip strength. On sensory testing he reported normal sensation. It was noted that there were equally heavy callouses on the palms of both hands. His forearms were measured and found to be symmetrical at 11" in circumference and his wrists were symmetrical at 7" in circumference." Dr. Killian concluded "that Mr. Lutzky has recovered fully from the problems with his right wrist for which he was treated after this accident. There is no objective evidence of any residual impairment of disability from any injury from this accident. He is capable of working at his normal capacity and performing all of his usual activities of daily living without limitations."

Dr. Killian also reviewed plaintiff Vrabel's medical records and conducted a physical examination of plaintiff Vrabel on August 13, 2010. *See* Defendants S.R. and R.R.'s Motion (Seq. No. 06) Affirmation in Support Exhibit D. Said examination included an evaluation of plaintiff Vrabel's spinal column and a neurological examination. With respect to the spinal column, Dr. Killian states, "[o]n inspection in the standing position the normal cervical lordosis, thoracic kyphosis and lumbar lordosis were maintained without evidence of atrophy, asymmetry, deformity or muscle spasm. His hed was held in a normal attitude, his shoulders and pelvis were level and there was no evidence of scoliosis. On palpitation he complained of tenderness in the mid to lower cervical spine and in the trapezii on both sides. He complained of

extreme tenderness from the mid thoracic spine through the rest of the thoracic spine down the lumbar spine to include the bony outer aspect of the sacrum and he complained of bilateral paraspinal tenderness from the thoracic spine down to the buttocks on both sides. He complained of equal tenderness to light touch and deeper pressure and he complained of pain with pinch roll testing over the entire thoracic and lumbar regions. There was no palpable muscle spasms or deformity. The spinal motions were tested (by visual observation) and found that cervical flexion and extension were full at 45 degrees (normal 45 degrees), right and left rotation were full at 80 to 90 degrees (normal 80 to 90 degrees) and right and left lateral flexion were full at 45 degrees (normal 45 degrees) with complaints of pain going into the upper back and middle back with all of the motions of the neck. All attempts to test the motion of his thoracolumbar spine elicited complaints of significant pain and he held he (*sic*) entire trunk rigidly, allowing at most 5 to 10 degrees of extension (normal 40 degrees), 5 to 10 degrees of right and left rotation (normal 30 degrees) and 5 to 10 degrees of right and left lateral flexion (normal 35 degrees). He complained of comparable pain with rotating the trunk as a unit holding the hand at the sides. When he was asked to bend forward he refused to attempt to do so complaining that it would hurt too much. Straight leg raising was symmetrical on both sides in the sitting position at 70 to 80 degrees with complaints of pain in the back but without complaints of pain going into the leg. Bowstring testing was negative." With respect to the neurological examination, Dr. Killian states, "[t]he upper and lower extremity neurological examination was done and it was found that the reflexes including the biceps, triceps, brachioradialis, knee jerks and ankle jerks were intact and symmetrical. All major muscle groups in both upper extremities and lower extremities were 5 out of 5 in strength and symmetrical. Sensation was intact and symmetrical to pin and light touch over both upper

extremities but on testing sensation in the lower extremities he indicated that there was a feeling of numbness to pin and light touch over the lower thighs just above the knees on both dies but sensation was intact and symmetrical to pin and light touch extending from the knees down to the feet on both sides." Dr. Killian concluded "[t]here were no consistently positive objective physical findings in this examination to confirm Mr. Vrabel's subjective complaints. There were significant inconsistencies and exaggerations indicating major symptom magnification for motivational purposes. I do not feel that the minor disc abnormalities seen on the diagnostic imaging studies are clinically significant or that he has any impairment from disability from injuries from this accident. He is capable of working at his normal capacity and performing all of his usual activities of daily living without restrictions due to injuries caused by the 10/25/09 accident. There is no need for further causally related orthopedic evaluation, follow-up or treatment."

Dr. Coyne conducted an independent film review of plaintiff Vrabel's thoracic spine MRI that was performed on February 18, 2010, at Metropolitan Diagnostic, and plaintiff Vrabel's lumbosacral spine MRI that was performed on November 12, 2009, at Metropolitan Diagnostic. *See* Defendants Baez and Brea's Cross-Motion (Seq. No. 08) Affirmation in Support Exhibit D. With respect to his review of the thoracic spine MRI, Dr. Coyne's findings were "[m]ild to moderate degenerative changes are certainly longstanding, pre-existent and causally unrelated to the accident approximately 4 months earlier on October 25, 2009. This MRI demonstrates no osseous or soft tissue abnormality or other trauma casually related to the October 25th 2009 accident." With respect to his review of the lumbosacral spine MRI, Dr. Coyne's findings were "[t]his MRI reveals degenerative disc and facet joint changes, which are focally advanced at L5-S1, and more mild changes at other levels. These degenerative changes

are certainly chronic and long-standing, preexistent and causally unrelated to the accident approximately 4 months earlier on October 25, 2009. This MRI demonstrates no osseous or soft tissue abnormality or other trauma casually related to the accident of October 25, 2009."

The Court notes that Dr. Killian fails to set forth the specific tests administered on plaintiffs to arrive at his findings with respect to the examination of plaintiff Lutzky's right wrist and plaintiff Vrabel's spinal column. In fact, Dr. Killian merely bases his conclusions on "visual observation" not any objective tests which he administered, nor were measurements of range of motion taken with a goniometer. Where the defendants' expert fail to set forth objective tests administered which resulted in normal ranges of motion, the court will find that the defendants have failed to meet their *prima facie* burden. *See Perez v. Fugon*, 52 A.D.3d 668, 861 N.Y.S.2d 86 (2d Dept. 2008); *Giammalva v. Winters*, 59 A.D.3d 595, 873 N.Y.S.2d 227 (2d Dept. 2009); *Stern v. Oceanside School District*, 55 A.D.3d 596, 865 N.Y.S.2d 325 (2d Dept. 2008); *Giammanco v. Valerio*, 47 A.D.3d 674 (2d Dept. 2007).

Furthermore, Dr. Killian fails to address plaintiffs' claim in their Bill of Particulars that they were unable to perform substantially all of the acts which constitute their usual and customary daily activities for ninety (90) out of one hundred eighty days (180) following the accident. *See* Defendants S.R. and R.R.'s Motion (Seq. No. 06) Affirmation in Support Exhibit B; Defendants Baez and Brea's Cross-Motion (Seq. No. 07) Affirmation in Support Exhibit C; Defendants Baez and Brea's Cross-Motion (Seq. No. 08) Affirmation in Support Exhibit C. The Court will find that defendants S.R., R.R., Baez and Brea have failed to meet their *prima facie* burden on a summary judgment motion, such as the instant one, where plaintiffs allege to have suffered serious injury under this category and defendants' medical expert does not address this allegation in his affirmations. *See Nemhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 (2d

Dept. 2005). *See also Sayers v. Hot*, 23 A.D.3d 453, 805 N.Y.S.2d 571 (2d Dept. 2005); *Perez v. Ali*, 23 A.D.3d 363, 804 N.Y.S.2d 115 (2d Dept. 2005); *Peplow v. Murat*, 304 A.D.2d 633 (2d Dept. 2003).

Where, as here, defendants S.R., R.R., Baez and Brea have failed to demonstrate that they have met their *prima facie* burden, the Court will deny the motions for summary judgment on the threshold issue regardless of the sufficiency of the opposition papers. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *David v. Bryon*, 56 A.D.3d 413, 867 N.Y.S.2d 136 (2d Dept. 2008); *Barrera v. MTA Long Island Bus*, 52 A.D.3d 446, 859 N.Y.S.2d 483 (2d Dept. 2008); *Breland v. Karnak Corp.*, 50 A.D.3d 613, 854 N.Y.S.2d 765 (2d Dept. 2008). Therefore, the Court hereby holds that defendants S.R. and R.R.'s motion for summary judgment on the threshold issue (Seq. No. 06) is denied. Defendants Baez and Brea's cross-motions for summary judgment on the threshold issue (Seq. Nos. 07 and 08) are also denied.

The Court will now address the summary judgment motion and cross-motion (Seq. Nos. 04, 05) that pertain to the liability arguments of the respective parties.

Defendants S.R. and R.R. submit in their motion (Seq. No. 04) that defendant Baez admitted in his EBT testimony that the accident occurred as his vehicle was straddling the line located on the roadway between the middle and left lanes, while he was in the process of changing from the middle lane to the left lane. The rear left driver's side of defendant Baez and Brea's vehicle stuck the front right passenger side of defendants S.R. and R.R.'s vehicle. Defendants S.R. and R.R. argue that "[s]ince the Romano vehicle was traveling fully within his own lane of travel at the time of the subject accident, it is respectfully asserted that the co-defendant, Steven Baez was the proximate cause of the subject incident." Defendants S.R. and R.R. further submit that defendant Baez admitted in his EBT that he was racing with another

vehicle at the time of the subject accident and that, subsequent to the accident, he was charged with and pled guilty to the crime of Reckless Driving. Defendants S.R. and R.R. add that the plaintiffs cannot prove that any acts of defendants S.R. and R.R. were the proximate cause of injury and that defendants S.R. and R.R. should be absolved as a matter of law from any liability for this incident based upon the sworn testimony of the parties in this proceeding. They contend that there are no issues of fact to inculpate them in any way as responsible for the loss.

In their cross-motion (Seq. No. 05), plaintiffs oppose the liability motion made by defendants S.R. and R.R. and move for summary judgment on the issue of liability against defendants Baez and Brea. With respect to defendants Baez and Brea, plaintiffs argue that "[t]aken together, the transcript of the defendants herein, clearly demonstrate that as a matter of law that defendants Baez as driver and Brea as owner were negligent in the happening of this accident and that a factual question exists as to whether defendant Robert Romano shared that responsibility." Plaintiffs submit that "[t]here can be no argument whatsoever that defendant, Steven Baez was negligent in the happening of the subject accident....Defendant Baez pleaded guilty to reckless driving and that violation of law is negligence per se which cannot be disregarded....Mr. Baez (*sic*) testimony at his examination before trial was so demonstrative of negligence that it shocked the conscience....He acknowledged that while on the Meadowbrook Parkway, he entered into a speed race with another car, the identity of which he did not know...."

With respect to their opposition of defendants S.R. and R. R.'s motion for liability summary judgment, plaintiffs argue that "[n]otwithstanding the rather gross negligence committed by defendant Baez the testimony of defendant Romano likewise establishes questions of fact as to whether he was negligent precluding him escaping a trial on the issues of

liability. Defendant Romano acknowledged that for a period of fifteen minutes before the occurrence, while he was driving his vehicle with the windows closed, a marijuana cigar was being passed around by the occupants of the vehicle. A factual dispute exist (*sic*) between Romano who testified that the initial source of the marijuana was plaintiff, Christopher Vrabel....Romano stated that for those fifteen minutes there was marijuana smoke circulating within the vehicle to the extent that he had to put the defroster on because he things that the windows were foggy from the marijuana smoke....During the course of this he continued driving and although he claims to have asked once that they throw it out he did nothing else such as stopping to require that be done....Furthermore, the Court will take judicial notice that as a state highway the speed limit on the Meadowbrook Parkway is 55 miles an hour. Defendant Romano testified that at the time of the accident he was driving in excess of the speed limit, at 60 miles per hour....Plaintiff, Christopher Vrabel, at his examination before trial...testified that it was Romano who was the source of the marijuana. Having conceded that he allowed marijuana to be smoked in the closed environment of the car and a speed in excess of the speed limit, defendant Romano cannot extricate himself for liability issues on a motion for summary judgment."

Defendants Baez and Brea oppose both summary judgment liability motions. They argue that there are questions of fact as to all of the movants' potential culpable conduct for the subject accident which requires denial of their respective motions in all respects. Defendants Baez and Brea submit that the admissible evidence demonstrates that defendant R.R. was partially at fault for the happening of the subject accident as he was operating his vehicle while under the influence of marijuana and was speeding at the time of the accident. They add that defendant R.R. admitted at his EBT that he was smoking marijuana in this vehicle with the windows up in the minutes before the subject accident. Defendants Baez and Brea contend that

there are clearly questions of fact as to defendant R.R.'s comparative negligence in the subject accident which can only be resolved at trial.

Defendants Baez and Brea further argue that there are questions of fact as to plaintiffs comparative negligence related to the subject accident. While defendants Baez and Brea acknowledge "that generally speaking New York law holds than an innocent passenger cannot be comparatively at fault for the happening of a motor vehicle accident, in this matter there are clearly questions of facts (*sic*) as to whether or not plaintiffs were, in fact, innocent passengers in the happening of the accident or whether they contributed towards Romano's impaired state prior to the accident such that they may be comparatively liable for same. Defendants Baez and Brea state that plaintiff Vrabel testified at his EBT that he knew defendant R.R. was not only abusing marijuana at the time of the subject accident, but that defendant R.R. had also taken anxiety medication in the time prior to the subject accident. However, plaintiff Lutzky testified at his EBT that no one was ever smoking marijuana in the vehicle in the time leading up to the subject accident. Defendants Baez and Brea argue that there are clearly questions of fact as to the credibility of the plaintiffs given their varying versions as to what occurred in defendant R.R.'s vehicle and as a result their comparative negligence in contributing to the happening of the subject accident. "A question of fact exists as to whether Romano or plaintiff Nicholas Lutzky provided the marijuana which led to Romano's intoxication prior to the accident. Further, beyond who provided the marijuana, plaintiffs were fully aware that they were passengers in a vehicle driven by an intoxicated person and thereby assumed the risk of injury resulting from that intoxication. These issues of fact, in addition to the issue of credibility, can only be resolved by a jury and are not appropriate for resolution on a motion for summary judgment. As such it is respectfully submitted that there are questions of fact as to whether or

not plaintiffs are truly innocent passengers in the happening of the subject accident or whether they bear some comparative fault for the happening of the subject accident in taking part in the use (*sic*) marijuana by Romana and/or providing the marijuana to Romano prior to the subject accident."

While recognizing the gross negligence committed by defendant Baez, the Court finds that there exist material issues of fact concerning the comparative negligence on the part of defendants S.R. and R.R., as well the comparative fault of plaintiffs.

Therefore, based upon the foregoing, defendants S.R. and R.R.'s motion for summary judgment on the issue of liability (Seq. No. 04) is hereby denied. Plaintiffs cross-motion for summary judgment on the issue of liability (Seq. No. 05) is also hereby denied.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part (CCP), on September 22, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 20, 2011