

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LISA HUMPHERY, RALPH NICHOLAS, an infant by his
mother LISA HUMPHERY, and SADE NICHOLAS,
an infant by her mother LISA HUMPHERY,

Index No.: 25264/2009

Plaintiffs,

**AFFIRMATION IN
OPPOSITION**

-against-

GARRY BROWN and R&S CAR & LIMO, INC.,

ORAL ARGUMENT REQUESTED

Defendants.

-----X
GENE BERARDELLI, ESQ., an attorney duly admitted to practice law in the
State of New York affirms the following under the penalties of perjury:

1. My name is GENE BERARDELLI, ESQ. and I am an associate of NOVO LAW FIRM, P.C., attorneys for the Plaintiff, LISA HUMPHERY, RALPH NICHOLAS, an infant by his mother LISA HUMPHERY, and SADE NICHOLAS, an infant by her mother LISA HUMPHERY, and, as such, I am familiar with the facts and circumstances contained herein. I submit this affirmation, memorandum of law and exhibits attached hereto in opposition of the Defendants' instant motion for summary judgment.
2. Defendants' motion for summary judgment must be denied because:
 - (a) As to liability, Defendants fail to meet their burden, leaving issues of fact in dispute and engaging in bad faith.
 - i. EBT testimony by the Defendant-driver GARRY BROWN not only defeats summary judgment on the grounds of credibility, inconsistency and reliability, but also shows (in light most favorable to Plaintiffs) him to be liable for hitting the plaintiff-pedestrians with his cab, the only motor vehicle involved herein;
 - ii. Defendants misinform this Court by willfully omitting the *AMENDED* Police Report and related documentation, including Defendant-driver GARRY BROWN's statement!, whereby it is clearly established that Defendants owned and operated the only

vehicle involved in the accident and were responsible for injuring the Plaintiffs.

(b) Infant-plaintiff's RALPH NICOLAS' injuries satisfy the requirements of Insurance Law Section 5102(d) in a number of ways. Most prominently, Ralph's neurological impairment is permanent and severe. Defendants omit evidence of Ralph's weeks of coma, a prominent forehead scar, and traumatic brain injuries with ongoing impairment. A report from Hal Gutstein, M.D., a neurologist, proves this point. According to the evidence, Ralph's life is irreparably harmed and his prognosis is poor to date. Moreover, his forehead scar is three-inches long, thick, raised and discolored.

(c) Infant-plaintiff's SADE NICHOLAS' "zone of danger" claim is exempt from Section 5102(d) requirements. The evidence proves that SADE NICHOLAS is a victim of Defendants exposing her to an unreasonable risk of bodily injury and death, and actually resulted in severely and permanently injuring her mother and brother, shocking and frightening her then and emotionally damaging her since the accident.

3. Attached hereto and marked "EXHIBIT A" is a copy of the Amended Police Report made by Detective Daniel Ryan, along with three follow-up informational reports made by Det. Ryan.
4. Attached hereto and marked "EXHIBIT B" is a copy of PD Form 301-061 - a witness statement made by Defendant GARRY BROWN recorded by Det. Ryan which bears Mr. Brown's initials. It should be noted that Det. Ryan noted taking this report and the circumstances surrounding the interview on p. 3 of "EXHIBIT A"
5. Attached hereto and marked "EXHIBIT C" is a copy of the narrative report of neurologist Hal Gutstein, M.D. along with copies of Kings County Hospital records for Plaintiff-minor RALPH NICOLAS which Dr. Gutstein notes he reviewed.
6. Attached hereto and marked "EXHIBIT D" is a copy of Department of Education records, including psychological-educational evaluations and testing, that determined that Plaintiff-minor RALPH NICOLAS required special education. It should be noted that these records were reviewed and addressed by Dr. Gutstein in his evaluation contained in "EXHIBIT C".

7. Attached hereto and marked "EXHIBIT E" are photos taken by our office on April 26, 2012 depicting Plaintiff-minor RALPH NICOLAS's three-inch scar on his left forehead.
8. Plaintiff incorporates herein all of the accompanying documents and positions, which address the Defendants' motion.
9. Accordingly, we request that the Court deny Defendants' motion for summary judgment in its entirety.

Dated: New York, New York
May 25, 2012

Respectfully submitted,



GENE BERARDELLI, ESQ.

NOVO LAW FIRM, PC

Attorney for Plaintiff(s)

LISA HUMPHERY, RALPH NICHOLAS,

an infant by his mother LISA

HUMPHERY, and SADE NICHOLAS,

an infant by her mother LISA

HUMPHERY,

299 Broadway, 17th floor

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(212) 233-6686

Our File No. 09-0825

TO:

Bhumika P. Trivedi, Esq.

BAKER. McEVOY, MORRISEY & MOSKOVITS, P.C.

Attorneys for Defendants

GARRY BROWN and R&S CAR & LIMO, INC.

330 W. 34th Street, 7th Floor

New York, New York 10001

212-857-8203

File No. 754230

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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LISA HUMPHERY, RALPH NICHOLAS, an infant by his
mother LISA HUMPHERY, and SADE NICHOLAS,
an infant by her mother LISA HUMPHERY,

AFFIDAVIT OF
PLAINTIFF
LISA HUMPHERY

Plaintiffs,

Index No.: 25264/2009

-against-

GARRY BROWN and R&S CAR & LIMO, INC.,

Defendants.

-----X
Plaintiff LISA HUMPHERY, having been duly sworn, deposes and states:

1. My name is LISA HUMPHERY and I am the Plaintiff in this matter. I write this affirmation on behalf of myself and my children RALPH NICHOLAS and SADE NICHOLAS, who are also Plaintiffs in this matter. The purpose of this affidavit is to oppose the Defendants' motion for summary judgment, which my attorney tells me is looking to dismiss this case for different reasons.
2. On Sunday, February 8, 2009, my children and I exited a bus at the intersection of Utica Avenue and Avenue H in Brooklyn. After exiting the bus, we began to cross Utica Avenue. I was holding my childrens' hands.
3. As we were crossing, I saw what I could only describe as a white shadow quickly approaching me and my children. I realized it was a speeding car.
4. I immediately tried to push my children out of it's path. The next thing I remember I was in the hospital and in a great deal of pain.
5. When I first asked my family about my children, I was told that my son Ralph had been badly injured and that Sade was not physically harmed other than some cuts, but was extremely emotionally distressed.
6. When I was in the hospital, a Detective Daniel Ryan from the NYPD came to visit me. He told me that I was struck by a taxi driven by GARRY BROWN and that he was immediately arrested for driving with a

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suspended license. He also told me that Mr. BROWN had alcohol on his breath at the scene.

7. Initially, the Police believed that my family and I were the victims of a "hit and run" involving another vehicle in addition for Mr. BROWN's vehicle that had left the scene.
8. On May 12, 2009, While recovering at my sister's home, I had another conversation with Detective Ryan, whom I called after he left a contact card at my home. He asked me if I recalled a white SUV involved in the collision. I told him that I thought I did and told him about the "white shadow" coming towards me, but couldn't describe the vehicle itself.
9. After discussing my recollections with me, Detective Ryan told me that he believed the "white shadow" were the headlights of Mr. BROWN's car.
10. Detective Ryan also told me there wasn't any evidence of any white SUV hitting me or being involved in the accident. He told me that my "body print" was left on the front of the taxi cab, which was damaged and that no other vehicles passed.
11. He also told me that Ralph was hit with such a heavy impact that he "flew across the street" after Mr. BROWN hit him.
12. I told him that my family had mentioned to me that Sade's pants were ripped at the bottom as if she had been dragged.
13. I was told that my statement and Mr. BROWN's statements would become part of an amended Police Report, which would change the status from "hit and run" to saying that Mr. BROWN - the only vehicle at the scene - struck my family and I.
14. Mr. BROWN is absolutely liable for this accident. I read his own account where he told the Police that he swerved and then "BOOM" - he hit my family and I, and then pulled over to call the Police. For him to change his story and say he didn't hit us is simply a lie. His motion for summary judgment for no liability for hitting me and my family must be denied.

15. As a result of the accident, my son Ralph suffered a great deal of setbacks. In 2009, upon returning to school, his teachers told me that he had totally dropped off from where he was intellectually. They said he was easily

distracted, unfocused and struggling in classes, like "he was there, but not there." He had to be left back that year.

16. The school knew about the accident and recommended that he be evaluated to see if he needed to be placed in Special Education. Unfortunately, the evaluation recommended his placement in Special Education.
 17. He remains in Special Education to this day. He suffers from headaches and gets light-headed and has a lot of trouble remembering things. He also has nightmares and sometimes wakes up screaming. He has been under the care of a neurologist since the accident.
 18. I recently took him to see Dr. Gutstein, a neurologist. He confirmed my worst fears that he informed me that Ralph suffered Traumatic brain injuries and that he believes that Ralph's chances of full recovery are poor. According to Dr. Gutstein, Ralph's injuries are permanent.
 19. Ralph also has a tough road ahead of him in the future, as Dr. Gutstein says that he is at higher risk of developing other brain disorders like epilepsy, depression, or Alzheimer's Disease.
 20. Clearly, these traumatic and permanent injuries would meet the state standard for "permanent" injury in anyone's view. Therefore, Defendant's motion for summary judgment against Ralph must be denied.
- ***
21. Sade suffers more emotionally than physically since the accident. While I was in the hospital, my relatives told me that Sade was an emotional wreck.
 22. To this day, Sade is scared to cross the street and is very hesitant.
 23. To this day, Sade has nightmares about the accident.
 24. To this day, Sade will constantly come check on me to see if I'm ok, as if she's worried about something happening to me.
 25. To this day, Sade clings to me and feels that she needs to be around me all the time.

26. I am not the only one that has seen the changes in Sade. Her school counselor has recommended therapy for her and the entire family as a result of the emotional trauma of the accident.
27. I have not been able to get Sade to a therapist to work out these emotional issues, as I have had to endure multiple surgeries to heal from, among other injuries, a broken jaw, loss of many teeth, broken right knee, broken right shoulder, collapsed lung and lacerated liver - all while managing Ralph's physical, mental and emotional challenges.
28. I do intend to have Sade see a therapist in the near future, as I am very concerned about the emotional distress that the Defendants caused her by putting my daughter in such close proximity to danger and for subjecting her to the emotional tolls of seeing me and her brother so severely and permanently injured.
29. Based on the above, I believe that Sade's case should not be dismissed.
30. The Defendants have permanently damage my life and the lives of my children. I beg this Court to not allow them to escape justice and to deny whatever relief they seek.

Date: May 24, 2012
New York, New York

LISA HUMPHERY

SWORN TO BEFORE ME

THIS 24th DAY OF MAY, 2012

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 25264/2009

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LISA HUMPHERY, RALPH NICHOLAS, an infant by his
mother LISA HUMPHERY, and SADE NICHOLAS,
an infant by her mother LISA HUMPHERY,

Plaintiffs,

-against-

GARRY BROWN and R&S CAR & LIMO, INC.,

Defendants.
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**MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

NOVO LAW FIRM, PC

Attorney for Plaintiff(s)

LISA HUMPHERY, RALPH NICHOLAS, an infant by
his mother LISA HUMPHERY, and SADE
NICHOLAS, an infant by her mother LISA
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TO:

Bhumika P. Trivedi, Esq.

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Attorneys for Defendants

GARRY BROWN and R&S CAR & LIMO, INC.

330 W. 34th Street, 7th Floor

New York, New York 10001

212-857-8203

File No. 754230

PRELIMINARY STATEMENT

Defendants' motion for summary judgment based on liability must be denied. EBT testimony by the Defendant-driver GARRY BROWN not only defeats summary judgment on the grounds of credibility, inconsistency and reliability, but also shows (in light most favorable to Plaintiffs) him to be liable for hitting the plaintiff-pedestrians with his cab, the only motor vehicle involved herein. Also, Defendants misinform this Court by willfully omitting the *AMENDED* Police Report and related documentation, including Defendant-driver GARRY BROWN's statement!, whereby it is clearly established that Defendants owned and operated the only vehicle involved in the accident and were responsible for injuring the Plaintiffs.

Infant-plaintiff's RALPH NICOLAS' injuries satisfy the requirements of Insurance Law Section 5102(d) in a number of ways. Most prominently, Ralph's neurological impairment is permanent and severe. Defendants omit evidence of Ralph's weeks of coma, a prominent forehead scar, and traumatic brain injuries with ongoing impairment. A report from Hal Gutstein, M.D., a neurologist, proves this point. According to the evidence, Ralph's life is irreparably harmed and his prognosis is poor to date. Moreover, his forehead scar is three-inches long, thick, raised and discolored.

Infant-plaintiff's SADE NICHOLAS' "zone of danger" claim is exempt from Section 5102(d) requirements. The evidence proves that SADE NICHOLAS is a victim of Defendants exposing her to an unreasonable risk of bodily injury and death, and actually resulted in severely and permanently injuring her mother and brother, shocking and frightening her then and emotionally damaging her since the accident.

STATEMENT OF FACTS

Plaintiffs LISA HUMPHERY and her minor children RALPH NICHOLAS and SADE NICHOLAS were pedestrians who had just gotten off of a bus at the intersection of Utica Avenue (a two-way thoroughfare) and Avenue H in Brooklyn. (Humphery EBT, p. 11). While crossing, Ralph was holding his mother's hand. (Ralph Nicolas EBT,

p. 9). As Plaintiffs were crossing Utica Ave., they were struck by a vehicle that Plaintiffs could not personally identify. (Humphery EBT, p. 19; Sade Nicholas EBT, p. 11). Plaintiff Lisa Humphery only remembers seeing a "white shadow" rapidly approaching her. (Humphery EBT; Exhibit A, p. 4).

After thorough investigation by the NYPD, they determined that Defendant GARRY BROWN, a taxi driver operating a taxi owned by Defendant R&S CAR & LIMO, INC. struck the Plaintiffs. (Exhibits A & B). In an interview with Detective Daniel Ryan, Defendant GARRY BROWN admitted that he "tried to swerve to the left then 'BOOM' and I pulled over." (Exhibit B) He also admitted that no other vehicles were involved or in the immediate vicinity when he struck Plaintiffs (Id.) and that no other cars or trucks passed him just prior to the collision.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, movant must prove clearly that no material and triable issues of fact are presented before the Court. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); Ugarriza v. Schneider, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979); Licari v. Elliot, 57 N.Y.2d 203, 455 N.Y.S.2d 570 (1982). On such motions, the Court should draw all reasonable inferences in favor of the non-moving party. The movant has the initial burden of proving entitlement to summary judgment. Winegrad v. N.Y.U. Medical Center, *supra.*; Friends of Animals v. Associated Fur Manufacturers, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

Once movant offers such proof, the burden shifts to the opposing party who, in order to defeat the motion for summary judgment, must then proffer evidence in admissible form "show[ing] facts sufficient to require a trial of any issue of fact". N.Y. C.P.L.R. § 3212(b); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The opposing party must present facts sufficient to require a trial on any issue

of fact through producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v. Aeroxon Products, Inc., 148 A.D.2d 499, 538 N.Y.S.2d 843 (2d Dept., 1979), and must also assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established. Castro v. Liberty Bus Co., 79 A.D.2d 1014, 435 N.Y.S.2d 340 (2d Dept., 1981). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law.

I. THERE ARE MANY TRIABLE ISSUES OF FACT AS TO LIABILITY FOR THIS ACCIDENT.

The issue herein is whether the Defendants are entitled to summary judgment on the issue of liability given (1) the issues of credibility that arise out of Defendants' inconsistent testimony (2) that Defendants attempted to deliberately mislead the Court by failing to provide a full and complete Police Report and (3) that Defendant made admissions to the police prior to his EBT testimony that tend to prove that he was responsible for striking the Plaintiffs.

A. Defendants' Inconsistent Statements Raise Triable Issues of Fact.

A court may not weigh the credibility of witnesses on a motion for summary judgment, "unless it clearly appears that the issues are not genuine, but feigned". Conciatori v. Port Authority of New York and New Jersey, 46 A.D.3d 501, 503, 2007 N.Y. Slip Op. 09549, 2 (2d Dept., 2007); Glick & Dolleck v Tri-Pac Export Corp., 22 N.Y.2d 439, 239 N.E.2d 725, 293 N.Y.S.2d 93 (N.Y. 1968). Thus, the mere existence of issues of credibility defeats a motion for summary judgment.

1. Defendant's Inconsistent Statements Create An Issue of Fact.

The fundamental issue of fact herein is whether Defendant Brown hit the Plaintiff-pedestrians. In May of 2009, he admitted that he did. In May of 2011, he denied hitting

them, and became angered and agitated at an EBT when confronted with the inconsistency.

EBT Testimony: Defendant Brown appeared herein for an EBT on May 2, 2011. Defendant Brown admitted in his EBT testimony that he failed to keep proper lookout, stating that he does not remember and does not know where he was looking at the time of the accident. (Brown EBT, p. 37, line 2-11). He then claims to see pedestrians "a few feet in front" of him walking from left to right before the accident. (Brown EBT, p. 40, line 16 - 23). Seeing them, he swerves to the left into the opposite lane of traffic (Brown EBT, p. 39, line 12 - 22) to "avoid someone" (Brown EBT, p. 59, line 24-25). At his EBT, Defendant Brown claims he did not hit anyone, but cannot explain how he knows for sure that he didn't. (Brown EBT, p. 59, line 7-17).

NYPD Witness Statement: His denial differs from an account taken by the NYPD prior to his testimony on May 12, 2009, where Defendant Brown (who, according to the AMENDED Police Report voluntarily met at the Highway 2 station house with a Detective Daniel Ryan) states:

I was driving N/B (Northbound) on Utica Ave. in the left lane to drop off my F/Pass (Front Seat Passenger) when I got to the middle of the intersection of Ave. H. I saw someone crossing from my left to right (W to E) (wearing an orangy colored jacket). I tried to swerve to the left then "BOOM" and I pulled right over (by the KFC). I then called 911.

(Exhibit B, emphasis added; Exhibit A, p. 3, para. 2). The initials "G.B." follow the handwritten statement (right below the word "BOOM") and they are underlined.

After giving Defendant Brown an opportunity to review the document (Brown, EBT, p. 80, line 11 - 13) Plaintiff thoroughly examined Defendant Brown on this document:

- Defendant Brown confirmed the initials written on the line are his. (Brown EBT, p. 80, line 19-24)
- Defendant Brown confirmed that the phone number appearing on the document is his cell phone number. (Brown EBT, p. 98, line 12-14).

- Defendant Brown confirmed that the date of birth listed on the document is correct. (Brown EBT, p. 109, lines 21-24).
- Defendant Brown confirmed the statement of driving northbound on Utica Avenue in the left lane. (Brown EBT, p. 112, line 7-12).
- Defendant Brown confirmed the statement that he was going to drop off the female passenger. (Brown EBT, p. 112, line 13-15).
- Defendant Brown confirmed the statement that he saw someone crossing from his left to his right when he got to the middle of the intersection of Utica Avenue and Avenue H. (Brown EBT, p. 112, line 16-21).
- Defendant Brown confirmed the statement that he swerved to the left. (Brown EBT, p. 113, line 3-5).

Despite all these factual confirmations within the document of statements attributed to him, Defendant Brown could "not exactly" recall remembering the "BOOM" he mentioned to the detective, (Brown EBT, p. 115, lines 6-8), but admits that he cannot contradict the report with any other information (Brown EBT, p. 126, lines 4-6).

Defendant Brown cannot account for why he pulled his vehicle over after seeing pedestrians in the street - a curious reaction given that Defendant Brown contends there was nothing wrong with his vehicle, he was not dropping off his passenger, that he did not hit anyone and was not checking on any already-injured pedestrian. (Brown EBT, p. 119, lines 8-18).

The record also reveals that Defendant BROWN became increasingly agitated when confronted with his prior statement:

Q: Does F here stand for front or female, do you know?

MR. ZUCKER: Objection. Advising him not to answer.

A: I don't know. You are asking me all these questions I don't know. All right, all right, I won't get angry.

Q: You seem frustrated and kind of clinching your fists. Tell me, why are you angry?

MR. ZUCKER: Counsel, it's totally inappropriate to say that.

MR. NOVOFASTOVSKY: *It's what happened.*

Q: *Are these questions making you angry?*

A: *No.*

MR. ZUCKER: *Objection. We are going to take a short break.*

(Brown EBT, p. 87, lines 6-25). It should be noted that Defendant BROWN abruptly ended the EBT immediately after this exchange - less than two hours after starting.

At the very least, the statement given to the police months after the accident recounting a "BOOM" clearly contradicts his EBT testimony given years after the accident claiming that he wasn't involved in any accident, thus creating an issue of fact to be decided.

2. *Defendant Provided the Court an Incomplete and Uncorrected Police Report.*

Incredibly, Defendants have attempted to deliberately mislead this Court into believing that the Police Report provided as Defendants' Exhibit B is a true and accurate account of the accident. What Defendants failed to attach to their motion papers is the AMENDED Police Report, which eliminates their original belief that this was a "hit and run" accident:

*AT T/P/O THIS COLLISION WAS ORIGINALLY REPORTED
AS A "LEAVING THE SCENE". INVESTIGATION DID
REVEAL THAT NO OTHER VEHICLES WERE INVOLVED.*

(Exhibit A, p.1). Det. Ryan, "made this determination based on the evidence and after interviews with witnesses and the victim", (Exhibit A, p.2, para. 2), including Defendant BROWN. In addition to the handwritten statement discussed above, Detective Ryan further notes his interview with Defendant BROWN:

*Mr. Brown was also asked if there were any other vehicles involved
or in the immediate vicinity when the collision occurred. He said
no.*

*[Detective Ryan] then asked if he had heard that a white vehicle
might have also been involved. Mr. Brown said that he had heard*

that also, but again stated no. No other cars or trucks were involved or had passed him just prior to the collision.

(Exhibit A, p. 3, para. 5). It should be noted the handwritten statement was made as a part of the interview by Detective Ryan for this amended report (Exhibit A, p. 3, para. 4).

The Court should be astonished at the lengths which Defendants attempted to go to mislead it into believing that they are free from liability. If anything, the amended report leaves little doubt that Defendants are completely liable for this accident. Defendants' summary judgment motion must be denied on this basis.

3. Defendant's Testimony Is Not Credible.

Defendant BROWN's convenient failure to recollect the "BOOM" described in his written statement to the Police is one of many points that strain credulity, calling his entire EBT testimony into question. However, it is far from the only specious claim made herein - virtually every material fact which Defendant BROWN testified about is fraught with inconsistencies and incomplete information:

- Defendant BROWN recalls a female passenger in his vehicle. However:
 - Defendant BROWN states at his EBT that she was sitting in the back seat (Brown EBT, p. 33, lines 17 - 21), but told Det. Ryan that she was in the front seat. (Exhibit A, p. 3).
 - Defendant BROWN states at his EBT that he does not recall where he picked up the female passenger. (Brown EBT, p. 27, lines 6-11).
 - Defendant BROWN states at his EBT that he does not recall where he was going to drop off the female passenger (Brown EBT, p. 27, lines 14-18), yet stated to Det. Ryan that (1) he was dropping off the passenger at "Beverly Ave." (Exhibit B).
- Defendant BROWN recalls seeing another vehicle in the right lane pass him, but does not know how far away it was from him when he approached the intersection of Utica Ave. and Avenue H. (Brown EBT, p. 36, lines 2 - 12).

- Later on, Defendant Brown claims that vehicle to be a "White SUV" that he claims was involved in the accident, but later says that he didn't see it do anything (Brown EBT, p. 68, lines 15-23), and he admits that he never filed an MV-104 claiming that a white SUV was involved herein. (Brown EBT, p. 70, lines 5-18).
- Defendant BROWN does not recall how fast he was driving, but "knows" he was traveling 30 MPH before the accident - but only because the police told him that was their estimate. (Brown EBT, p.29, lines 15-23).
- As discussed earlier, Defendant BROWN admits to failing to keep proper lookout. (Brown EBT, p. 37, line 2-11).
- Defendant BROWN does not know the number of pedestrians he saw crossing. (Brown EBT, p. 41, line 19 - p. 42, line 14).
- Defendant BROWN admits that he did not inspect his vehicle for damage at any time. (Brown EBT, p. 46, lines 4 - 14).
- Defendant BROWN does not recall talking to the Police at the scene of the accident. (Brown EBT, p. 49, line 25 - p. 50, line 13).

The lack of consistent and credible testimony from Defendant BROWN falls far short of the bar to clear Defendants' heavy burden of proving that no material fact exists as to their liability. The Court cannot grant summary judgment on such suspect evidence.

II. THERE ARE GENUINE ISSUES OF FACT AS TO WHETHER PLAINTIFF'S SUSTAINED SERIOUS INJURIES ARISING OUT OF THIS MOTOR VEHICLE ACCIDENT.

The issue before the Court is whether the Plaintiff raised triable issues of fact that defeat summary judgment based on the Insurance Law's "threshold injury" standard.

The Defendants have the initial burden of establishing a *prima facie* entitlement to summary judgment by submitting admissible evidence demonstrating that Plaintiff did not sustain a serious injury arising out of the subject motor vehicle accident. Kearse v. New York City Transit Authority, 16 A.D.3d 45, 789 N.Y.S.2d 281 (2d Dept. 2005). Then,

the Plaintiff must submit evidence in opposition to Defendants' motion. Id. The evidence must be sworn, signed physician's affirmations and records. Zeigler v. Ramadhan, 5 A.D.3d 1080, 744 N.Y.S.2d 211 (4d Dept. 2004).

Conflicting findings of doctors on a summary judgment motion pursuant to NY Insurance Law § 5102(d) raises issues of credibility and are sufficient to demonstrate a triable issue of fact precluding summary judgment. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992); Robbie v. Schweers, 146 A.D.2d 764, 537 N.Y.S.2d 72 (2d Dept. 1989); Williams v. Clark, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); Gibson v. Tordoya, 44. A.D.3d 1000, 844 N.Y.S.2d 431 (2d Dept., 2007).

A. *Ralph Nicolas is suffering from permanent consequential limitation / significant impairment of use.*

The issue herein is whether Plaintiff Ralph Nicolas suffered injuries that breach the threshold requirement contained in § 5102 the Insurance Law when the affirmation by a neurologist, who consulted his medical records and physically examined the Plaintiff, causally connects Defendants' negligence to confirmed serious injuries resulting in permanent consequential limitation and significant limitation of use, specifically, "permanent" traumatic brain injuries that have impaired Ralph mentally and intellectually since the accident, and where chances of full recovery from said injuries are "poor".

To establish that the Plaintiff suffered permanent consequential limitation or a significant limitation of use, s/he must present medical evidence containing either objective, quantitative evidence with respect to diminished range of motion, or a qualitative assessment comparing Plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member function or system. Toure v. Avis Rent-A-Car Systems, 98 N.Y.2d 345, 353, 746 N.Y.S.2d 865 (2002). Complaints of pain corroborated by a doctor's opinion that is based on objective results of post-accident testing defeats summary judgment. Quinn v Licausi, 263 AD2d 820 (3d Dept 1999).

Dr. Gutstein's report makes Ralph's injuries abundantly clear - he has unfortunately suffered permanent traumatic brain injuries caused by the Defendants that will impair him for the rest of his life. (Exhibit C). Dr. Gutstein details specifically that Ralph suffered "Concussion (PCS) with loss of consciousness, moderate to severe Traumatic Brain Injuries (TBI), frontal scalp hematoma, subarachnoid hemorrhage with residual cognitive, behavioral, affective impairments, Post Traumatic Stress Disorder (PTSD) and post traumatic headaches." (Exhibit C, p.2). Ralph also bears a notable 3-inch scar on his left forehead. (Exhibit C p.2; Exhibit E, photos 1-3).

He causally connects these injuries to the accident of February 8, 2009 "with a reasonable degree of medical certainty." (Exhibit C, p.2).

Dr. Gutstein notes that these neurological injuries "are considered serious and life altering in this young boy" because "he sustained functional impairments that have substantially interfered with his ability to return to his previously normal lifestyle" as a result of his injuries. (Exhibit C, p. 2-3).

In addition, Ralph's future outlook is bleak:

After Ralph Nicholas' head trauma, things that once were easy and familiar become strange and difficult. Intensive mental effort is usually required to do things that required little or no effort before her (sic) accident. School, social, personal and family life has been adversely affected. As Ralph ages he is likely to become less efficient at his school and job. It is likely that he will become unpredictable, unreliable and even contentious.

(Exhibit C, p. 3). Chances of Ralph's full and complete recovery is "poor" and the injuries "are considered permanent in nature." (Exhibit C, p. 3).

Dr. Gutstein's report leaves no doubts - Defendants are not entitled to summary judgment based on § 5102(d) of the Insurance Law.

B. Sade Nicholas suffered extreme emotional distress, fright and shock from being exposed to the "zone of danger" created by Defendants.

The issue herein is whether a genuine issue of fact exists herein as to whether Plaintiff Sade Nicholas is entitled to recover for damages under a theory of "zone of danger" when (1) the Defendant's negligent operation of his motor vehicle exposed her to unreasonable risk of bodily injury and (2) said negligent operation was a substantial factor in injuring Plaintiffs Lisa Humphery (her mother) and Ralph Nicholas (her brother) - right in front of Sade.

A plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of serious physical injury of a member of her immediate family where (1) the defendant's conduct negligently exposes the plaintiff to unreasonable risk of bodily injury or death and (2) is also a substantial factor bringing about injury or death of plaintiff's immediate family member. Bovsun v. Sanperi, 61 N.Y.2d 219, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984). The plaintiff must present evidence of contemporaneous awareness of the seriousness of the family member's injuries, which is dependent upon the given facts and circumstances. Lopez v. Gomez, 305 A.D.2d 292, 761 N.Y.S.2d 601 (1st Dep't 2003).

Defendants completely misunderstand Sade's claim - she is not only the victim of Defendants' negligence because they exposed her to an unreasonable risk of bodily injury and death, but because their resultant negligence was a substantial factor in severely and permanently injuring her mother and brother, shocking and frightening her then and emotionally damaging her since the occurrence

Her mother has seen first-hand how this accident has effected Sade emotionally, noting extreme changes in her behavior and outlook on life. (Humphery Affidavit, p. 3-4). She is scared to cross streets and experiences nightmares that persist to this day. (Humphery Affidavit, p.3). Her mother also notes that Sade's school counselor has recommended therapy for Sade, but the family has been unable to start therapy given the many challenges - physical, mental and emotional - that they all have had to overcome since the occurrence.

Sade's fragile emotional state directly resulting from exposure to Defendants' "zone of danger" is a genuine issue of fact for a jury to decide. This Court must allow her claim to continue.

III. IN THE ALTERNATIVE, SUMMARY JUDGMENT IS PRE-MATURE.

This matter is not ripe for summary judgment for any party. As mentioned earlier, additional discovery is needed in this matter to determine outstanding issues of fact, including, but not limited to: the deposition of non-party NYPD Det. Daniel Ryan, who interviewed all parties and is the only person known to have personally inspected the damage to the vehicle in question, which Defendants have since spoiled, along with impound records which Defendant BROWN admits he "discarded". (Brown EBT, p. 75, line 6 - p. 76, line 18). This discovery would shed additional light on outstanding issues of fact regarding liability and Defendants' abrogation of duties.

CONCLUSION

Defendants cannot be granted summary judgment against all Plaintiffs on liability based on evidence that is not only disputed but lacks consistency and credibility.

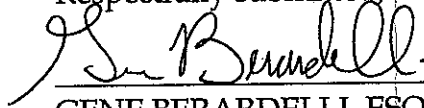
Defendants' motion for summary judgment against Plaintiff RALPH NICHOLAS based on the Insurance Law's "threshold injury" standard must also be denied. Plaintiffs have presented expert medical opinion based on certified records attached and examinations stating that he suffers from serious and permanent injuries caused by this motor vehicle accident. These injuries severely limited Ralph, and continue to do so to this day and for the rest of his life.

Finally, Defendants' motion for summary judgment as to Plaintiff SADE NICHOLAS must be denied, as it fails to account for her claim of negligent infliction of emotional distress resulting from Defendants exposing her to a "zone of danger" that severely and permanently injured her mother and brother.

Based on the foregoing, Defendants' motion for summary judgment must be denied in its entirety.

Dated: New York, New York
May 25, 2012

Respectfully submitted,



GENE BERARDELLI, ESQ.

NOVO LAW FIRM, PC

Attorney for Plaintiff(s)

LISA HUMPHERY, RALPH NICHOLAS,

an infant by his mother LISA

HUMPHERY, and SADE NICHOLAS,

an infant by her mother LISA

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Our File No. 09-0825

08-0825

At an I.A.S. Trial Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 5th day of September 2012

P R E S E N T :

Hon. _____ Justice

Humphrey Plaintiff(s)

Cal. No.

Index No.

STIPULATION

- against -

Jerry Brown et al. Defendant(s)

The following papers numbered 1 to read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	
_____ Affidavit (Affirmation)	
Pleadings - Exhibits	
Stipulations - Minutes	
Filed Papers	

That part of defense motion for summary judgment as to Ralph Nicholas on the threshold issue is withdrawn

Motions adjourned until November 21, 2012

For Clerks use only
MG _____
MD _____
Motion Seq. # _____

E N T E R

Barry McCoy
Kearney

J.S.C.
John Bradell
NOV LAY FIRM, P.C.
ATTY FOR TR.

At an I.A.S. Trial Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 6th day of Feb 20

P R E S E N T :
 Hon. Bunyan
 Justice

Lisa Humphery, Ralph Nichols
 an infant by mother Lisa Humphery Plaintiff(s)
 and Sade Nicholas an
 infant by her mother, Lisa Humphery
 - against -

Cal. No. 49
 Index No. 25264/09

Garry Brown and A+S
Car & Limo Inc. Defendant(s)

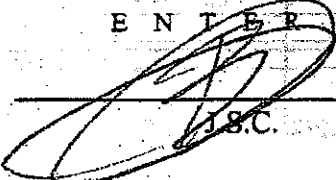
The following papers numbered 1 to	read on this motion	Papers Numbered
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Answering Affidavit (Affirmation)		<u>3</u>
Reply Affidavit (Affirmation)		<u>4</u>
Affidavit (Affirmation)		<u>5</u>
Pleadings - Exhibits		
Stipulations - Minutes		
Filed Papers	<u>None of 1 or</u>	<u>6</u>

It is hereby ordered that the
 Ms are withdrawing their serious injury
 motion as to Sade Nicholas with leave
 to renew upon the completion of discovery

As to the remainder of the motion for summary
 judgment on the issue of liability, said motion
 is denied as the police report contains admissions
 by defendant driver. The same driver also admitted
 his initials at the amended police report.

For Clerks use only
 MG
 MD
 Motion Seq. #

See Vade v Rose CR 13 3rd 1868 (2004)
 and Kemenyash v Megaw 306 AD2d 1574
 (2003)

ENTER

 J.S.C.

HON. BERT A. BUNYAN
 JUSTICE N.Y.S. SUPREME COURT