SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

AUGUSTO SALDANA, as Administrator of the Estate of ANTHONY P. SALDANA, Deceased.

Plaintiff,

-against-

Index No.: 011997/09
Motion Sequence...01, 02
Motion Date...12/21/12

JUAN J. GUZMAN, FREDY R. LOPEZ, SPENCER M. MOLINA and LAURA H. ELDREDGE,

Defendants.

X

Papers Submitted:
Notice of Motion (Mot Seq. 01).....x
Notice of Cross-Motion (Mot. Seq. 02).....x
Affirmation in Opposition.....x
Affirmation in Partial Opposition and Partial Support of Cross-Motion.....x
Affirmation in Opposition to Cross-Motion and Reply to Motion.....x
Reply Affidavit.....x

Upon the foregoing papers, the motion by the Plaintiff, AUGUSTO SALDANA, as Administrator of the Estate of ANTHONY P. SALDANA, Deceased (hereinafter "Saldana" or "Plaintiff's Decedent") (Mot. Seq. 01), seeking an order pursuant to CPLR § 3212 granting the Plaintiff summary judgment on the issue of liability, and the Cross-motion by the Defendants, SPENCER M. MOLINA (hereinafter "Molina") and LAURA H. ELDREDGE (hereinafter "Eldredge") (Mot. Seq.02), seeking

(1) an order pursuant to CPLR § 3212, dismissing the Plaintiff's claim for conscious pain and suffering; and (2) an order pursuant to CPLR § 3103 (a), issuing a Protective Order, suppressing the criminal transcript of the cross-movant, Molina's criminal court plea for purposes of this motion and any subsequent proceeding, are decided as provided herein.

The Plaintiff commenced this personal injury and wrongful death action as a result of an automobile accident that occurred on October 3, 2008 at approximately 3:10 a.m. on Plandome Road, Plandome, County of Nassau. The Plaintiff's decedent, who was eighteen-years-old at the time of the accident, died as a result of his injuries. On October 3, 2008, the Plaintiff's decedent was a front-seat passenger in a motor vehicle operated by the Defendant, Guzman, and owned by the Defendant, Lopez. It is alleged that the Defendant, Guzman, lost control of his vehicle and crashed into a tree as a result of drag racing with a motor vehicle operated by the Defendant, Molina, and owned by the Defendant Eldredge.

Defendant Molina's Cross-Motion for a Protective Order:

The Plaintiff's counsel avers that summary judgment should be granted to the Plaintiff on liability based upon a theory of collateral estoppel as the Defendants, Guzman and Molina, pled guilty regarding criminal charges stemming from the same incident complained of in the complaint in this action. The Cross-motion filed by the Defendants, Molina and Eldgredge, seek, inter alia, a protective order, suppressing the transcript of Molina's criminal court plea for purposes of this motion and any subsequent

proceeding. The Court must first determine whether the motion to suppress the transcript of the guilty plea of the Defendant, Molina, should be granted in order to prevent the improper use of protected records.

The Defendants' Cross-motion is being brought pursuant to CPLR § 3101 (a), which provides the following:

> "**Prevention of abuse**. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Typically, a motion for a protective order is made before an actual disclosure of the documents sought to be protected are disclosed; hence, the title of the provision, "Prevention of abuse". There are instances, however, where the abuse has already occurred in connection with a disclosure that has already been made. In those instances, the Court has the power to rectify the wrong pursuant to CPLR § 3103, subdivision (c). At this juncture, the appropriate procedure is to make a motion to suppress pursuant to subdivision (c) of CPLR § 3103 which states, in pertinent part, that "if any disclosure...has been improperly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed". Accordingly, the Court will deem the portion of the

Defendants' Cross-motion seeking a protective order brought pursuant to subdivision (c) of CPLR § 3103.

It is not disputed that the Defendant, Molina, was adjudicated as a youthful offender at the time of his plea. Subdivision 2 of the Criminal Procedure Law § 720.35 states:

> "Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, or a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

The parties have failed to set forth a specific requirement, or statute permitting the use of the records or specific authorization from the court which rendered the youthful adjudication status to the Defendant, Molina, that would permit this Court's consideration of his criminal records.

Court records, while out of the court's actual possession, are not beyond its control. This power stems from the inherent power of a court to control its own records. *Matter of Dorothy D.,* 49 N.Y.2d 212 (1980). The confidentiality afforded by CPL § 720.35 (2) covers all court records relating to the youthful offender adjudication, including copies of records no longer in the possession of the court. Accordingly, the

Cross-motion for a protective order to suppress the transcript of the Defendant, Molina's criminal court plea is **GRANTED** to the extent that those records have already been deemed confidential pursuant to CPL § 720.35.

Plaintiff's Motion for Summary Judgment on the Issue of Liability as Against Defendants, Molina and Eldredge:

The Plaintiff seeks summary judgment as against the Defendant, Molina, on the issue of liability based upon his criminal court plea. Where the court that rendered the youthful offender adjudication has not specifically authorized the disclosure of the records in question to the plaintiff, the civil court may not consider them on the plaintiff's application for summary judgment on liability based upon those records. *See Royal Globe Insurance Co. v. Mottola*, 89 A.D.2d 907 (2d Dept. 1982) (Special Term erred in considering youthful offender records which showed that defendant had admitted setting fire which was subject of civil action on plaintiff's application for partial summary judgment in the civil action. Court which rendered the youthful offender adjudication had not specifically authorized disclosure of the records to plaintiff as required by statute). In light of the Court's determination that the confidential transcript of the Defendant, Molina's criminal court plea was improperly obtained and subsequently disclosed, the Court cannot grant summary judgment to the Plaintiff as against the Defendant, Molina, based upon a theory of collateral estoppel.

Counsel for the Plaintiff argues that, notwithstanding the youthful offender adjudication, the Defendant, Molina's own testimony from the Examination Before Trial

in the case at bar warrants summary judgment on the issue of liability in favor of the Plaintiff. In that regard, counsel for the Plaintiff relies on the Defendant, Molina's testimony that he was operating his motor vehicle above the speed limit together with the Defendant, Guzman's motor vehicle on Plandome Road. Moreover, counsel states that Molina's testimony establishes that he and Guzman acted together in a particular course of conduct which created an unreasonable danger to the Plaintiff which eventually caused his death.

The Court finds that the Plaintiff has not presented sufficient evidence to establish that he is entitled to summary judgment on the issue of liability as against the Defendants, Molina and Eldredge. Specifically, the Plaintiff has not eliminated all issues of fact with respect to whether the Defendant, Molina's conduct was the proximate cause of the Plaintiff's death. In *Policastro v. Savarese*, 171 A.D.2d 849 (2d Dept. 1991), a cased relied upon by the Plaintiff, the court found that although there was no contact between drag racing vehicles, the defendants "agreed either expressly or impliedly, to engage in a particular course of conduct which created an unreasonable danger to other uses of the highway and which was a proximate cause of the accident". *Id.* at 853. That case supports the theory that where two cars are involved in a "drag race", the driver of the car that did not make contact and was not involved in the accident may in fact be held liable. The challenge there involved a jury instruction based on a theory of concerted action liability.

The Plaintiff's reliance on *Policastro* is misplaced. The Plaintiff is not asking this Court to make a determination as to whether the Defendant, Molina, may be held liable. Rather, the Plaintiff is requesting that this Court determine that the Defendant, Molina, was negligent as a matter of law. At this stage of the proceedings, there is insufficient evidence to grant the relief requested as against the Defendants, Molina and Eldredge.

Accordingly, the Plaintiff's motion for summary judgment on the issue of liability as against the Defendants, Molina and Eldredge is **DENIED**. This Court's determination, however, is without prejudice to the Plaintiff's right to properly apply to the County Court for disclosure of the records in question, and, in the event disclosure is granted, to thereafter renew its motion for summary judgment as against the Defendants, Molina and Eldredge.

Plaintiff's Motion for Summary Judgment on the Issue of Liability as Against Defendants, Guzman and Lopez:

In support of that branch of the motion which seeks summary judgment as against the Defendants, Guzman and Lopez, the Plaintiff's counsel submits the criminal transcript of the Defendant, Guzman, where the Defendant pled guilty to criminally negligent homicide, a class E felony; assault in the third degree, a misdemeanor; reckless driving, a misdemeanor; and driving while impaired, a violation. (*See*, Transcript of Plea in *People v. Guzman*, Indictment No.: 1234N/09, dated January 12, 2010, attached to the Plaintiff's Notice of Motion as Exhibit "B") Specifically, during the Court's allocution of

the Defendant, Guzman, he admitted that on October 3, 2008, he caused the death of the Plaintiff's decedent, Saldana, with criminal negligence. Guzman admitted in open court that he and Molina were driving separate cars, traveling in the same direction, speeding and cutting each other off when Guzman lost control of the car, crashed and caused the death of Saldana. (*See* Exhibit "B", pages 5-7) He also admitted that he was operating the motor vehicle while his ability to drive was impaired by alcohol and in a manner that unreasonably endangered users of the public highway. (*Id.*)

The Defendant, Guzman, also testified at an Examination Before Trial on February 24, 2011, where he stated that he was speeding at a rate of about 60 miles per hour on Plandome Road which had a posted speed limit of 20-25 miles per hour. (*See* Guzman EBT Transcript, pages 58-9) The Defendant, Guzman, testified that while driving at that rate of speed, he entered a curve, the car started to shimmy, he lost control and crashed into a tree. (*Id.* at 65) The Plaintiff's decedent, Saldana, was a passenger in the motor vehicle operated by Guzman.

Counsel for the Plaintiff states that the Defendant, Guzman, is collaterally estopped from re-litigating the issues at bar as they have been previously resolved against Guzman in a prior proceeding in which he had a fair opportunity to fully litigate same. Counsel further states that the Plaintiff is entitled to summary judgment on the issue of liability as against the Defendant, Lopez, as a matter of law pursuant to Vehicle and Traffic Law § 388 [1], which states, in pertinent part, that "[e]very owner of a vehicle

used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner".

The Defendants, in opposition to the Plaintiff's motion for summary judgment, state that there are issues of fact that prevent the Plaintiff's motion from being granted, including the issues of comparative negligence and proximate cause. Specifically, the Defendants allege that the Plaintiff's decedent was comparatively negligent in having consumed alcoholic beverages and entering into a motor vehicle with knowledge that the driver also consumed alcoholic beverages. This, the Defendants argue, puts into question whether the Defendants' conduct, even if found to be negligent, was the proximate cause of the Plaintiff's decedent's death. The Defendants contend that these questions are for the jury to determine and may not be resolved at this stage of the litigation.

The doctrine of collateral estoppel precludes a party from re-litigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point". *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449 (1985), quoting *Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981) There are two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present

action, and second, the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 455. "The doctrine applies whether the conviction results from a plea or a trial". *City of New York v. College Point Sports Assn.*, Inc., 61 A.D.3d 33, 42 (2d Dept. 2009); *Blaich v. Van Herwynen*, 37 A.D.3d 387, 388 (2d Dept. 2007). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action". (*City of New York v. College Point Sports Assn., Inc.*, 61 A.D.3d at 42; see also *Buechel v. Bain*, 97 N.Y.2d 295, 303-304 (2001).

The Defendant, Guzman's guilty pleas to criminally negligent homicide and assault in the third degree are sufficient to collaterally estop him from re-litigating the issue of whether the his negligence was a proximate cause of the accident on October 3, 2008. However, the Plaintiff failed to establish as a matter of law that he was free from culpable conduct with regard to the causation of his injuries. *See generally Strychaiski v. Dailey*, 65 A.D.3d 546 (2d Dept. 2009). The Plaintiff's comparative negligence, if any, should be considered in the analysis as to the causation of his injuries.

The admissible evidence presented herein, while minimal, sufficiently raises an issue of fact as to the Plaintiff's comparative negligence and assumption of risk. Specifically, the evidence submitted reveals that Saldana drank one forty-ounce bottle of alcohol or beer and that Guzman also drank one forty-ounce bottle of alcohol or beer

prior to operating the motor vehicle in which the Plaintiff was a passenger. While the Defendant, Molina, testified that the Defendant, Guzman, did not express any level of intoxication, was not unsteady on his feet, nor was there any odor of alcohol on Guzman's breath, the record could support a finding that the Plaintiff was either comparatively negligent or assumed the risk of harm. (*See* EBT Transcript of Molina, Exhibit "L", page 27) Indeed, the Defendant, Guzman, pled guilty to operating a motor vehicle when his ability to operate the motor vehicle was impaired by the consumption of alcohol. (*See* Criminal Transcript, page 6, attached to the Plaintiff's Notice of Motion as Exhibit "B")

The Defendants cite to two cases that involve facts similar to the case at bar, *Johnson v. White*, 85 A.D.3d 977 (2d Dept. 2011) and *Strychiaski v. Dailey*, 65 A.D.3d 546 (2d Dept. 2009). In *Johnson v. White*, the Appellate Division, Second Department found that the Supreme Court properly permitted the issue of intoxication to be raised at trial and subsequently to be charged to the Jury as there was adequate evidence to support that charge. The evidence in that case consisted of a police officer's personal observations of the plaintiff about an hour before the subject accident and testimony by the plaintiff's companion as to drinks the plaintiff consumed in the hours leading up to the accident In *Strychalski*, the Appellate Division, Second Department found that the Plaintiff was not entitled to summary judgment even though the Defendant's guilty plea established the defendant's negligence as to the proximate cause

of the accident because the Plaintiff failed to establish that he was free from culpable conduct. In so finding, the court stated that the Plaintiff accepted a ride in a motor vehicle with knowledge that the operator may be intoxicated. In furtherance of this Court's necessity to determine the underlying facts, the Court ascertained from the appellant's brief in *Strychalski* that the plaintiff had testified that he was in fact intoxicated. The appellant's brief further revealed that the operator of the motor vehicle testified that he believed he was intoxicated but not too intoxicated to drive. Based on those facts, a question of fact was raised as to the Plaintiff's level of awareness of the driver's intoxication and as to his own.

Based upon the aforementioned case law, this Court finds that awarding summary judgment to the Plaintiff on the issues of comparative negligence and assumption of risk is not warranted. It is for the trier of fact, and not the Court, to determine whether the Plaintiff's conduct contributed to his injuries and to what extent, if any. The goal of summary judgment is to issue find, rather than issue determine. *Hantz v. Fleischman*, 155 A.D.2d 415 (2d Dept. 1989). In the instant matter, the sworn testimony that the Plaintiff and the Defendants consumed forty ounces of alcohol or beer prior to the incident, together with the driving while impaired guilty plea taken by the Defendant, Guzman, is sufficient to raise an issue of fact with respect to the Plaintiff's comparative negligence and assumption of risk. The Court is not, however, making a determination at

this juncture as to whether there will be sufficient evidence presented at trial to charge the jury with instructions regarding comparative negligence and assumption of risk.

Accordingly, the branch of the Plaintiff's motion for summary judgment as against the Defendant, Guzman, is **GRANTED** only with respect to the issue of whether the Guzman's negligence was a proximate cause of the accident. In light of the Court's determination as against the Defendant, Guzman, the branch of the Plaintiff's motion for summary judgment is **GRANTED** as against the Defendant, Lopez, pursuant to Vehicle and Traffic Law § 388 [1].

Defendants' Cross-Motion to Dismiss Plaintiff's Conscious Pain and Suffering Claim:

To recover damages for pain and suffering, an injured plaintiff must have some level of awareness. *McDougald v. Garber*, 73 N.Y.2d 246, 255 (1989). Moreover, "[i]n determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered". *Regan v. Long Is. R.R. Co.*, 128 A.D.2d 511, 512 (2d Dept. 1987). However, "[m]ere conjecture, surmise or speculation is not enough to sustain a claim for [pain and suffering] damages". *Fiederlein v. New York City Health & Hosps. Corp.*, 56 N.Y.2d 573 (1982). Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed. *See, Blunt v. Zinni*, 32 A.D.2d 882 (4t Dept. 1969), *affd.* 27 N.Y.2d 521 (1970).

Submitted in support of the Defendants' cross-motion is the Certified North Shore University Hospital ("NSUH") record, the Certificate of Death, the Police Accident Report and the Autopsy Report. Counsel for the Defendants, Molina and Eldredge, states that, according to the NSUH record, at 3:15 a.m., the Plaintiff's decedent was found by EMS technicians unresponsive, with zero vital signs, including respiration, pulse and blood pressure. Counsel further states that the Plaintiff, when found, was already in cardiac arrest without any indication of consciousness. Counsel next cites to the Certificate of Death and the Police Report representing that the time of death is 3:10 a.m., the same time as the accident. As such, the Defendants' counsel contends that the Plaintiff is not entitled to recover any damages for conscious pain and suffering. Counsel for the Defendants, Guzman and Lopez, submitted an affirmation in support of the cross-motion to dismiss the Plaintiff's conscious pain and suffering claim setting forth identical arguments.

In opposition to the Cross-motion, the Plaintiff's counsel submits the Affirmation of Gerard A. Catanese, M.D. and the testimony of the Defendant, Guzman. The Defendant, Guzman, testified at his Examination Before Trial that he recalled the Plaintiff's decedent making a noise immediately after the accident. (*See* Transcript of Guzman, Exhibit "K", pages 70-1). The Defendant, Guzman, testified that a fair characterization of the noise made by the Plaintiff was a "guttural" noise. (*Id.*)

Dr. Catanese is Board Certified in Anatomic and Clinical Pathology and Forensic Pathology. Dr. Catanese states that he "believes, with a reasonable degree of medical certainty, that as a result of the October 3, 2008 motor vehicle accident, the mechanism of Mr. Anthony Saldana's death was hemorrhage and that, as a general rule, it can take up to several minutes of time to bleed 2000ml of blood from a transected aorta". (*See* Catanese Affirmation ¶ 4, attached to the Plaintiff's Affirmation in Opposition to the Defendants' Cross-Motion as Exhibit "Q") Dr. Catanese further opined that, based on the autopsy report, there were no significant injuries to the Plaintiff's brain, which makes it unlikely that he was rendered immediately unconscious following the accident. (*Id.* at ¶ 5) Moreover, Dr. Catanese stated that, with a reasonable degree of medical certainty, due to the fractures to bones and lacerations to organs, the Plaintiff experienced up to two minutes of conscious pain and suffering from his injuries following the accident. He also opined that the Plaintiff may have experienced pre-impact terror. (*Id.* at 4-5)

In Reply, the Defendants do not proffer any expert evidence to rebut the Plaintiff's expert's Affidavit.

Based upon the documentation presented, the Defendants' Cross-motion to dismiss the Plaintiff's claim for conscious pain and suffering, is **DENIED**. The Defendants have failed to show that the Plaintiff was not conscious for any period of time following the accident. The Plaintiff submitted sufficient proof in admissible form

establishing that the Plaintiff may have had some level of awareness justifying an award for conscious pain and suffering.

Preliminarily, the Defendants own submission raises an issue of fact with respect to the Plaintiff's conscious pain and suffering claim. As the Plaintiff's counsel correctly points out, the Defendants' claim that the record supports the conclusion that the time of the accident and the time of the Plaintiff's death are both 3:10 a.m., is erroneous. A plain reading of the Police Accident Report shows that the time of accident is 3:10 a.m. Contrary to the Defendants' counsel's assertions, however, the time of death is listed as 3:55 a.m. on page 2 of the Police Accident Report. Also found on page 2 is a section entitled "EMERGENCY MEDICAL SERVICES" which states that emergency medical providers were notified at 3:10 a.m., arrived at the scene at 3:11 a.m. and arrived at the hospital at 3:20 a.m. In further contradiction of the Defendants' assertion that the time of the accident and the time of death was 3:10 a.m. is the Certificate of Death which unequivocally states in box "26C" that the time of death was 3:56 a.m. on October 3, 2008.

Moreover, the Plaintiff argues in opposition that the Plaintiff suffered "pre-impact terror" in the moments leading up to the accident. In *Donofrio v. Montalbano*, 240 A.D.2d 617, (2d Dept. 1997), a case analogous to the matter *sub judice*, the decedent was the passenger in a car driven by the defendant which struck a tree. In that case, the plaintiffs were permitted to recover for the very brief period of time decedent could have

experienced pre-impact terror as he observed the vehicle in which he was a passenger move at a speed of 70–75 miles per hour towards the tree. Likewise, it is reasonable for the trier of fact to find that the Plaintiff suffered pre-impact terror as he observed the vehicle in which he was a passenger move at a speed of 60-65 miles per hour towards the tree.

Based upon the foregoing, the Defendants are not entitled to summary dismissal of the Plaintiff's claim for conscious pain and suffering.

Accordingly, it is hereby

ORDERED, that the motion by the Plaintiff (Mot. Seq. 01), seeking an order pursuant to CPLR § 3212 granting the Plaintiff summary judgment on the issue of liability, is GRANTED as against the Defendants, Guzman and Lopez on the issue of whether the Defendant, Guzman's negligence was a proximate cause of the accident and is **DENIED** on the issue of the Plaintiff's comparative negligence and assumption of risk; and it is further

ORDERED, that the portion of the Cross-motion by the Defendants, MOLINA and ELDREDGE (Mot. Seq. 02) seeking an order pursuant to CPLR § 3103 (a), issuing a Protective Order and suppressing the criminal transcript of Molina's criminal court plea for purposes of this motion and any subsequent proceeding, is **GRANTED**, consistent with the terms of this Order; and it is further

ORDERED, that the portion of the Cross-motion by the Defendants, MOLINA and ELDREDGE (Mot. Seq.02), seeking an order pursuant to CPLR § 3212, dismissing the Plaintiff's claim for conscious pain and suffering, is **DENIED**; and it is further

This decision constitutes the order of the Court.

DATED: Mineola, New York
February 29, 2012

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