**Wilkins v Stewart**

2019 NY Slip Op 33337(U)

October 23, 2019

Supreme Court, Kings County

Docket Number: 510456/2017

Judge: Dawn M. Jimenez-Salta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on October 23, 2019.

P R E S E N T:
HON. DAWN JIMENEZ-SALTA,
Justice.

-------------------------------------X

2019 NOV -4 AM 10:48
KINGS COUNTY CLERK FILED

**KIMAYA WILKINS, a minor, by her parents and natural guardians KIMBERLY WILKINS AND MICHAEL WILKINS, KIMBERLY WILKINS, individually, and MICHAEL WILKINS, individually, and MCDONALD CLINTON as guardian of the property of CARTER BRIZARD, an infant,**

**Plaintiffs,**

**Index No.: 510456/2017**

- against -

**DECISION AND ORDER**

**RALPH STEWART, HUDSON LOGISTICS, INC., SONALI CLINTON and ELIDA CLINTON,**

**Defendants.**

-------------------------------------X

Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Plaintiff McDonald Clinton ("Clinton") as Guardian of the Property of Carter Brizard ("Infant Plaintiff Brizard"), an Infant's Notice of Motion For an Order of Summary Judgment Pursuant to *CPLR 3212* in Their Favor on the Issues of Liability and Comparative Negligence against Defendants Ralph Stewart ("Stewart") and Hudson Logistics, Inc. ("Hudson") As Well As for Such Other Further Just and Proper Relief by the Court, dated March 27, 2019;

2) Plaintiffs Kimberly Wilkins and Michael Wilkins ("Plaintiffs Wilkins") as Parents and Natural Guardians of Plaintiff Kimaya Wilkins ("Infant Plaintiff Wilkins"), a Minor's Notice of Cross Motion for Summary Judgment Pursuant to *CPLR 3212* on the Issues of Liability and Comparative Negligence in Their Favor Against Defendants Stewart and Hudson As Well As for Such Other Further Just and Proper Relief by the Court, dated March 29, 2019;

3) Defendants Stewart and Hudson's Affirmation in Opposition to Motion for Summary Judgment by Infant Plaintiff Brizard, dated May 1, 2019;

4) Defendants Stewart and Hudson's Affirmation in Opposition to Cross Motion for Summary Judgment by Infant Plaintiff Wilkins, dated May 1, 2019;

5) Plaintiff Clinton and Infant Plaintiff Brizard's Reply Affirmation, dated May 7, 2019, all of which submitted

Mot Seq #s 3+4

May 8, 2019.

| Papers | Numbered |
|---|---|
| Order to Show Cause and Affidavits...................... | |
| Notice of Motion .................................................. | Infant Plaintiff Brizard 1 [Exh. A-N] and Attorney Affirmation |
| Cross Motion ...................................................... | Infant Plaintiff Wilkins 2 [Exh. A-B] and Attorney Affirmation |
| Answering Affidavit............................................ | Defendants Affirmation in Opposition to Brizard 3 [Exh. A]<br>Defendants Affirmation in Opposition to Wilkins 4 [Exh. A-B]<br>Infant Plaintiff Brizard's Reply Affirmation [Exh. A-B] |
| Supplemental Affidavits......................................... | |
| Exhibits................................................................. | |
| Other ..................................................................... | |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: This Court grants Plaintiff Clinton and Infant Plaintiff Brizard's motion as well as Plaintiffs Wilkins and Infant Plaintiff Wilkins' cross motion for summary judgment pursuant to *CPLR 3212* in their favor on the issues of liability and comparative negligence. It denies their request to strike Defendants Stewart and Hudson's Third Affirmative Defense on the Seatbelt Defense in their Answer [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

## BACKGROUND, PROCEDURAL HISTORY AND ARGUMENTS

On February 21, 2017 at approximately 11:51 a.m.. a tractor trailer owned by Defendant Hudson Logistics, Inc. ("Hudson"), a Kentucky corporation and operated by Defendant Ralph Stewart ("Stewart"), a Kentucky resident and a motor vehicle owned by Kings County, New York resident, Defendant Elida Clinton ("Elida Clinton" or "Elida") and operated by Kings County, New York resident, Defendant Sonali Clinton ("Sonali Clinton" or "Sonali") were traveling on Interstate Route 78 in Upper Macungie Township, Pennsylvania. Infant Plaintiff Kimaya Wilkins ("Infant Plaintiff Wilkins") and Infant Plaintiff Carter Brizard ("Infant Plaintiff Brizard") were rear seated passengers in Defendants Clinton's motor vehicle. Infant Plaintiff Brizard is the son of Defendant Sonali Clinton. He is the grandson of the owner of the vehicle, Defendant Elida Clinton. When Defendants Hudson and Stewart's tractor trailer attempted to move from the left lane into the right lane, it collided with Defendants Clinton's motor vehicle, causing Defendants Clinton's motor vehicle to come into contact with the center median, flipping over. As a result, Infant Plaintiff Kimaya Wilkins and Infant Plaintiff Carter Brizard sustained serious injuries. Defendant Stewart was given a citation at the scene of the accident. He ultimately pleaded guilty to violating *Title 75, Chapter 33, Sections 3309(1)* and *3111(a)* of the *Pennsylvania Motor Vehicle Code* [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply

Affirmation, Exhs. A-B].

Kings County, New York State Residents Plaintiffs Kimaya Wilkins, a minor, by her parents and natural guardians Kimberly Wilkins and Michael Wilkins, Kimberly Wilkins, individually and Michael Wilkins, individually commenced an action in Kings County, New York Supreme Court by filing a Summons and Verified Complaint on May 25, 2017 (the "Wilkins Complaint") under Index Number 510456/2017 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Stewart and Hudson interposed an Answer to the Wilkins' Complaint on July 14, 2017 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Sonali Clinton and Elida Clinton interposed an Answer to the Wilkins' Complaint on August 23, 2017 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Kings County, New York State Residents Plaintiff McDonald Clinton, grandfather as guardian of the property of Carter Brizard, an infant, commenced a separate action in Kings County New York Supreme Court by filing a Summons and Complaint under Index Number 500663/2018 on January 11, 2018 (the "Brizard Complaint") [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Stewart and Hudson interposed an Answer to the Brizard Complaint on March 2, 2018 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Sonali Clinton and Elida Clinton interposed an Answer to the Brizard Complaint on April 23, 2018 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

The two actions were consolidated under the Index Number for this case, 510456/2017 by an Order, dated April 18, 2018 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendant Sonali Clinton, the driver of the motor vehicle appeared for an Examination Before Trial ("EBT") on September 14, 2018 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply

Affirmation, Exhs. A-B].

Defendant Stewart, the driver of the tractor trailer appeared for an EBT on September 21, 2018 [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Because the Note of Issue has not yet been filed, the motions are timely [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

In their Notice of Motion for Summary Judgment on Liability and Comparative Negligence pursuant to *CPLR 3212*, dated March 27, 2019, Plaintiff Clinton and Infant Plaintiff Brizard claim that Defendant Stewart was negligent per se because he violated *Title 75, Chapter 33, Section 3309(1)* of the *Pennsylvania Motor Vehicle Code*. See *Pena v. Spade,* 145 AD3d 791, 43 NYS3d 473 (2nd Dept., 2016); *Davis v. Turner,* 132 AD3d 603, 20 NYS3d 2 (1st Dept., 2015); *Barbieri v. Vokoun,* 72 AD3d 853, 900 NYS2d 315 (2nd Dept., 2010); *Jones v. Radeker,* 309 AD2d 834, 766 NYS2d 81 (2nd Dept., 2003); *Drew v. Work,* 95 A3d 324 (Pa. Super., 2014); *Schemberg v. Smicherko,* 85 A3d 1071 (Pa. Super., 2014); *Garcia v. Bang,* 544 A2d 509 (Pa. Super., 1988); *Bumbarger v. Kaminsky,* 457 A2d 552 (Pa. Super., 1983) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Consequently, Plaintiff Clinton and Infant Plaintiff Brizard argue that Defendant Hudson is vicariously liable for Defendant Stewart's negligence regardless of whether this Court applies *Pennsylvania Law* or *New York Law*. See *New York Vehicle and Traffic Law Section 388; Lundberg v. State of New York,* 25 NY2d 467, 255 NE2d 177, 306 NYS2d 947 (1969); *Matter of Anonymous v. Molik,* 32 NY3d 30, 109 NE3d 563, 84 NYS3d 414 (2018); *Carlson v. American Intl. Group, Inc.,* 30 NY3d 288, 89 NE3d 490, 67 NYS3d 100 (2017); *Phillips v. Lock,* 86 A3d 906 (Pa. Super., 2014); *Brezinski v. World Truck Transfer Inc.,* 755 A2d 36, (Pa. Super., 2000)) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Plaintiff Clinton and Infant Plaintiff Brizard emphasize that there was no comparative negligence on the part of Infant Plaintiff Brizard because he was an innocent rear-seated passenger. See *Garcia v. Tri-County Ambulette Serv.,* 282 AD2d 206, 723 NYS2d 163 (1st Dept., 2001); *Medina v. Rodriguez,* 92 AD3d 850, 939 NYS2d 514 (2nd Dept., 2012); *Delgado v. Martinez Family Auto,* 113 AD3d 426, 979 NYS2d 277 (1st Dept., 2014); *Petty v. Dumont,* 77 AD3d 466, 910 NYS2d 46 (1st Dept., 2010) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

In their Notice of Cross Motion for Summary Judgment on Liability and Comparative Negligence pursuant to *CPLR 3212*, dated March 29, 2019, Plaintiff Kimberly Wilkins, Plaintiff Michael Wilkins and Infant Plaintiff Kimaya Wilkins incorporate and adopt all the facts and arguments in the motion filed by Plaintiff McDonald Clinton and Infant Plaintiff Brizard [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant

Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

In their Affirmation in Opposition, dated May 1, 2019 to the Motion for Summary Judgment on Liability and Comparative Negligence filed by Plaintiffs Clinton and Infant Plaintiff Brizard, Defendants Stewart and Hudson maintain that there are issues of fact regarding whether the accident was caused by Defendant Stewart or Defendant Sonali Clinton because: 1) she may have been in his "blind spot"; 2) she darted out next to the tractor trailer in a dangerous attempt to pass on the right. See *Chang v. City of New York,* 142 AD3d 401 (1st Dept., 2016); *Mohammad v. Ning,* 72 AD3d 913 (2nd Dept., 2010); *Duncalf v. Swamsington,* 2007 US Dist. LEXIS 61470 (SDNY, Aug. 21, 2007); *Bolta v. Lohan,* 242 AD2d 356 (2nd Dept., 1997); *Singh v. Thomas,* 113 AD3d 748 (2nd Dept., 2014); *Qureshi v. Brinks, Inc.,* 133 AD3d 737 (2nd Dept., 2015); *VTL Section 1123(b); Anjum v. Bailey,* 123 AD3d 852 (2nd Dept., 2014); *Phillip v. D&D Carting Co., Inc.,* 136 AD3d 18 (2nd Dept., 2015); *Ortiz v. Welna,* 152 AD3d 709 (2nd Dept., 2017); *Johnson v. Phillips,* 261 AD2d 269 (1st Dept., 1999); *Escobar v. Velez,* 116 AD3d 735 (2nd Dept., 2014) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Stewart and Hudson dispute that Defendant Stewart's plea of guilty to traffic infractions as "a matter of convenience" gives rise to liability on his part. See *VTL Section 155; Gilberg v. Barbieri,* 53 NY2d 285 (1981); *Ando v. Woodberry,* 8 NY2d 165 (1960); *Horowitz v. Kevah Konner Inc.,* 67 AD2d 38 (1st Dept., 1979) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Defendants Stewart and Hudson concede that Infant Plaintiff Brizard is free from comparative negligence provided that their seatbelt defense is fully preserved. See *VTL Section 1229-c(8); Ramirez v. Perlman,* 284 AD 82 (1st Dept., 1954); *Miller v. Long Island RR,* 212 AD2d 515 (2nd Dept., 1995); *Luther v. Novack,* 20 AD2d 549 (2nd Dept., 1963) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

In their Affirmation in Opposition, dated May 1, 2019 to the Cross Motion for Summary Judgment on Liability and Comparative Negligence filed by Plaintiff Michael Wilkins, Plaintiff Kimberly Wilkins and Infant Plaintiff Kimaya Wilkins, Defendants Stewart and Hudson incorporate by reference their affirmation in opposition to the main motion. They argue that the only substantive difference between the main motion and cross motion on comparative negligence regarding both Infant Plaintiffs is that Infant Plaintiff Kimaya Wilkins and Infant Plaintiff Brizard were different ages and their EBT testimonies are dissimilar. Consequently, the applicable law is distinct, and their seatbelt defense must be fully preserved. See *Freder v. Costello Indus., Inc.,* 162 AD3d 984 (2nd Dept., 2018); *Menagh v. Breitman,* 2010 NY Slip. Op 32892[U][Sup Ct, NY County, 2010]; *Gonzalez v. Medina,* 69 AD2d 14 (1st Dept., 1979); *Camardo v. New York State Rys.,* 247 NY 111 (1928); *Steeves v. City of Rochester,* 293 NY 727 (1944) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant

Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

In their Reply Affirmation, dated May 7, 2019, Plaintiff Clinton and Infant Plaintiff Brizard contend that there is no triable issue of fact about Defendant Stewart's negligence. See *Section 3309* of the *Pennsylvania Motor Vehicle Code; Gallo v. Jairath,* 122 AD3d 795, 996 NYS2d 682 (2nd Dept., 2014); *CPLR 3212[g]; Anzel v. Pistorino,* 105 AD3d 784 (2nd Dept., 2013); *Medina v. Rodriguez,* 92 AD3d 850 (2nd Dept., 2012); *Garcia v. Tri-County Ambulette Serv.,* 282 AD2d 206 (1st Dept., 2001); *Johnson v. Phillips,* 261 AD2d 369 (1st Dept., 1999); *Conigliaro v. Premier Poultry, Inc.,* 67 AD3d 954 (2nd Dept., 2009); *Rodriguez v. City of New York,* 31 NY3d 312, 76 NYS3d 898 (2018). Because Defendant Sonali Clinton did not follow Defendant Stewart's tractor trailer too closely, they argue that she was not a proximate cause of the accident. They point out that there is no evidence that Defendant Sonali Clinton ignored Defendant Stewart's turn signal. Moreover, she was not required to yield the right of way to a truck, moving into her lane with a turn signal flashing. See *Section 3309* of the *Pennsylvania Motor Vehicle Code; Section 3334* of the *Pennsylvania Motor Vehicle Code.* They challenge Defendant Stewart and Hudson's speculation that Defendant Sonali Clinton suddenly darted into the right lane in an attempt to pass Defendant Stewart. See *Pivetz v. Brusco,* 145 AD3d 806, 43 NYS3d 457 (2nd Dept., 2016); *Lilaj v. Ferentinos,* 126 AD3d 947, 7 NYS3d 172 (2nd Dept., 2015); *Czarnecki v. Corso,* 81 AD3d 774, 916 NYS2d 828 (2nd Dept., 2011); *Stanford v. Dushey,* 71 AD3d 988, 900 NYS2d 64 (2nd Dept., 2010). They dispute that Defendant Sonali Clinton was in Defendant Stewart's passenger side blind spot. Even if she were, they contend that it does not absolve Defendant Stewart of liability. See *Kewal v. Whitmore Equipment Leasing Co., Inc.,* 41 Misc3d 1226(A), 981 NYS2d 636 (NY Sup. 2013); *Duncalf v. Swamsington,* 2007 WL 2387968; 2007 US Dist LEXIS 61470 (SDNY, 2007); *VTL Sections 1128(d), 1202(1)(j); 1214; 1162* [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Plaintiffs underscore Defendant Stewart's responsibility for the accident. See *Anjum v. Bailey,* 123 AD3d 852, 999 NYS2d 454 (2nd Dept., 2014); *Phillip v. D&D Carting Co., Inc.,* 136 AD3d 18, 22 NYS3d 75 (2nd Dept., 2015). They emphasize that they never argued collateral estoppel regarding Defendant Stewart's plea of guilty to two traffic violations issued after the accident. See *Gilberg v. Barbieri,* 53 NY2d 285, 441 NYS2d 49 (1981); *Gardner v. Chester,* 151 AD2d 1894, 58 NYS3d 793 (4th Dept., 2017); *Shaw v. Rosha Enters. Inc.,* 129 AD3d 1574, 12 NYS3d 441 (4th Dept., 2015). They focus on Defendants' concession that Infant Plaintiff Brizard is entitled to summary judgment on the issue of comparative negligence. See *Rodriguez v. City of New York,* 31 NY3d 312, 76 NYS3d 898 (2018) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Plaintiffs maintain that Defendants may not utilize the seatbelt defense due to no evidence that Infant Plaintiff Brizard was not wearing his seatbelt at the time of the accident. Consequently, they request that the Court strike Defendants' Third Affirmative Defense. See *Spier v. Barker,* 35 NY2d 444, 363 NYS2d 916 (1974). Even if this Court were to find an issue of fact about whether Infant Plaintiff Brizard was wearing his seatbelt, they argue that it is well settled that the negligence of the parent in failing to ensure that a child is restrained in a seatbelt or car seat may not be imputed to the infant plaintiff. See *Boyd v. Trent,* 297 AD2d 301, 746 NYS2d 191 (2nd Dept., 2002); *General Obligations Law Section 3-111; Thurel v. Varghese,* 207 AD2d 220 (2nd Dept., 1995); *Kowalski v. Mohsenin,* 38 AD2d 274 (2nd Dept., 1972) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants

Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Plaintiffs emphasize that Defendants' opposition contains mere speculation along with a misrepresentation of the facts and law. They underscore that the right of a plaintiff, as a nonculpable passenger, to summary judgment on the issue of liability is not restricted by possible issues of comparative negligence between the defendant drivers. See *Gallo v. Jairath,* 122 AD3d 795, 996 NYS2d 682 (2nd Dept., 2014); *CPLR 3212[g]; Anzel v. Pistorino,* 105 AD3d 784 (2nd Dept., 2013); *Medina v. Rodriguez,* 92 AD3d 850 (2nd Dept., 2012); *Garcia v. Tri-County Ambulette Serv.,* 282 AD2d 206 (1st Dept., 2001); *Johnson v. Phillips,* 261 AD2d 269 (1st Dept., 1999); *Conigliaro v. Premier Poultry, Inc.,* 67 AD3d 954 (2nd Dept., 2009). They point out that the Court of Appeals ruled in *Rodriguez v. City of New York,* 31 NY3d 312, 76 NYS3d 898 (2018) that a plaintiff's comparative negligence no longer serves as a bar to summary judgment [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

## COURT RULINGS

This Court grants Plaintiff Clinton's and Infant Plaintiff Brizard's motion as well as Plaintiff Kimberly Wilkins', Plaintiff Michael Wilkins' and Infant Plaintiff Wilkins' cross motion for summary judgment pursuant to *CPLR 3212* on the issues of liability and comparative negligence in their favor. It denies their request to strike Defendant Stewart's and Hudson's Third Affirmative Defense on the Seatbelt Defense in their Answer [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Because this action involves a motor vehicle accident in the State of Pennsylvania, this Court must consider choice of law issues. Both Infant Plaintiffs are domiciled in the State of New York. Some of the Defendants are domiciles of the State of New York while other Defendants are domiciles of the State of Kentucky. As the New York Court of Appeals explained in *Padula v. Lilarn Props. Corp.,* 84 NY2d 519, 620 NYS2d 310 (1994), New York utilizes an interest analysis in the context of tort law in order to determine which of the two competing jurisdictions has the greater interest in the application of its law to the litigation. The Court of Appeals reasoned in *Padula v. Lilarn Props. Corp., supra* that there must be two separate inquiries to determine the greater interest. There must be a determination of: (1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss.

The Second Department clarified the "interest analysis" in *Shaw v. Carolina Coach,* 82 AD3d 98, 918 NYS2d 120 (2nd Dept., 2011) by noting a distinction between laws that regulate primary conduct (such as standard of care) versus those that allocate loss after the tort occurs. See *Cooney v. Osgood Mach.,* 81 NY2d 66; *Padula v. Lilarn Props. Corp., supra*; *DeMasi v. Rogers,* 34 AD3d 720 (2006); *King v. Car Rentals, Inc.,* 29 AD3d 205 (2006). If the conflicting laws regulate conduct, the Second Department found that the law of the place of the tort "almost invariably obtains" because "that jurisdiction has the greatest interest in regulating behavior within its borders". See *Cooney v. Osgood Mach., supra.* If "competing postevent remedial rules" are at stake, other factors are taken into consideration, principal among which is the location of the parties'

domiciles.

In *Padula v. Lilarn Props. Corp., supra,* the Court of Appeals carefully considered the distinction between *"conduct regulating" rules (emphasis added)* verses *"loss allocating" rules (emphasis added).* The Court of Appeals noted that *conduct regulating rules* have "the prophylactic effect" of governing conduct in order to prevent injuries from occurring. Consequently, if conflicting conduct regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. See *Cooney v. Osgood Mach., supra.* However, *loss allocation rules* are those which prohibit, assign, or limit liability following the tort's occurrence, such as charitable immunity statutes (e.g., *Schultz v. Boy Scouts,* 65 NY2d 189 (1985), guest statutes (e.g., *Dym v. Gordon,* 16 NY2d 120 (1965), wrongful death statutes (e.g., *Miller v. Miller,* 22 NY2d 12 (1968), vicarious liability statutes (e.g., *Farber v. Smolack,* 20 NY2d 198 (1967), and contribution rules (e.g., *Cooney v. Osgood Mach., supra*). When the conflicting rules involve the appropriate standards of conduct such as *rules of the road*, the Court of Appeals found that the law of the place of the tort will actually have a predominant, if not exclusive concern. The Court of Appeals reasoned that its law regarding similar conduct in the future is critically important and outweighs any interests of the common-domicile jurisdiction due to the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct. It also has an admonitory effect that application of its law will have on similar conduct in the future. See *Padula v. Lilarn Props. Corp., supra.*

However, when weighing the relevant considerations of conflicting *loss allocating laws* (such as vicarious liability, negligence per se, joint and several liability et al), the Court of Appeals ruled in *Neumeier v. Kuehner,* 31 NY2d 121 (1972) that the courts are guided by a series of three principles which relate to: 1) where the parties share a common domicile; 2) where the parties are domiciled in different states and the local law favors the respective domiciliary; and 3) other split-domicile cases. See also *Cooney v. Osgood Mach., supra; King v. Car Rentals, Inc., supra; Shaw v. Carolina Coach, supra.* The Court of Appeals observed that in the third situation it is usually the governing law of the place where the accident occurred unless displacement of that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigant. See *Cooney v. Osgood Mach., supra*; *Neumeier v. Kuehner, supra.*

In applying the third *Neumeier* principle for split-domicile cases, the Court of Appeals noted that courts have analyzed the purposes of each state's rule. They carefully take into account the workings of the multistate system and the need for certainty. As a result, they have determined whether, in light of those purposes, the interest of the state where the tort occurred was outweighed by the interest of another affected state (usually the domicile state of one party). See *Shaw v. Carolina Coach, supra.* While the *Neumeier* principles provide a framework for application of choice-of-law principles, the Court of Appeals emphasized that the overarching inquiry is which of the two competing jurisdictions has the greater interest in the application of its law to the litigation. See *Padula v. Lilarn Props. Corp., supra; Shaw v. Carolina Coach, supra.*

In the instant case, Plaintiff Clinton and Infant Plaintiff Brizard are domiciled in New York. Plaintiff Kimberly Wilkins, Plaintiff Michael Wilkins and Infant Plaintiff Wilkins are also domiciled in New York. Defendants Stewart and Hudson are domiciled in Kentucky. Defendant Sonali Clinton and Defendant Elida Clinton are domiciled in New York. The location of the accident is Pennsylvania. Since the parties have different domiciles and none of the parties are Pennsylvania domiciles, the instant case falls under the third *Neumeier* principle. See *Neumeier v. Kuehner, supra; Cooney v. Osgood Mach., supra; King v. Car Rentals, Inc., supra; Shaw v. Carolina Coach, supra* [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation;

Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Because the *"rules of the road"* are plainly *"conduct regulating"*, this Court will apply Pennsylvania law in that respect. See *Padula v. Lilarn Props. Corp., supra; Cooney v. Osgood Mach., supra.* See *Title 75, Chapter 33, Section 3309(1)* of the *Pennsylvania Motor Vehicle Code.* Defendant Stewart admitted that he was attempting to change lanes from the left lane to the right one at the time of the accident. Prior to the initial impact, he admitted that he did not see the sedan in the right lane. At the time of the accident, he admitted that the sedan in the right lane was slightly ahead of Defendant Stewart's tractor trailer in the left lane. Therefore, it explains the points of impact which were the front passenger side corner of the tractor trailer and the rear driver's side of the sedan near the gas cap. Since Defendant Stewart's actions caused the accident when he attempted to make a lane change without initially ascertaining that it was safe to do so, he was in contravention of *Title 75, Chapter 33, Section 3309(1)* of the *Pennsylvania Motor Vehicle Code* which states:

> (1) Driving within single lane. –A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety[1].

Moreover, Defendant Stewart pled guilty to violation of that statute, Therefore, Defendant Stewart's actions constitute negligence per se. See *Drew v. Work*, 95 A3d 324 (Pa. Super. 2014); *Schemberg v. Smicherko*, 85 A3d 1071(Pa. Super. 2014); *Garcia v. Bang*, 544 A2d 509 (Pa. Super. 1988); *Bumberger v. Kaminsky*, 457 A2d 552 (Pa. Super. 1983) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

This Court notes that none of the parties in the present case share a common domicile (first *Neumeier* principle), and none of the parties were domiciled in the state where the accident occurred (second *Neumeier* principle). Consequently, the application of New York law to the controversy regarding *loss allocating rules* would advance the substantive law purposes of New York law since it would insure that the Infant Plaintiffs, the "relatively innocent victims", are fully compensated. See *Shaw v. Carolina Coach, supra; Medina v. Rodriguez, supra; Conigliaro v. Premier Poultry, Inc., supra; Anzel v. Pistorino, supra; Freder v. Costello*

---

[1] This Court observes that the Pennsylvania statute mirrors the *New York State VTL Section 1128(a)* which states that: "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Thus, under New York law, a violation of a standard of care imposed by the *New York State VTL Section 1128(a)* constitutes negligence per se. See *Pena v. Spade,* 145 AD3d 791, 43 NYS3d 473 (2nd Dept., 2016); *Davis v. Turner,* 132 AD3d 603, 20 NYS3d 2 (1st Dept., 2015); *Barbieri v. Vokoun,* 72 AD3d 853, 900 NYS2d 315 (2nd Dept., 2010); *Jones v. Radeker,* 309 AD2d 834, 766 NYS2d 81 (2nd Dept., 2003) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

*Industries, Inc., supra; Phillip v. D&D Carting, Inc., supra; Petty v. Dumont, supra; Delgado v. Martinez Family Auto, supra.* Moreover, when the extent of victim compensation is at issue, the United States Court of Appeals for the Second Circuit determined that the plaintiff's domicile has an interest in the application of its law since that forum is where the loss is felt and where the burden to the victim's uncompensated needs may fall. See *Sheldon v. PHH Corp.,* 135 F3d 848, 853 [1998]. Thus, as the Second Circuit concluded in *Sheldon v. PHH Corp., supra,* the law of the accident site where the tort occurred should yield to the law of New York which is the law of the jurisdiction having the greatest interest in the resolution of victim compensation [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Since vicarious liability issues deal with *"loss allocating" rules*, this Court finds that the interest of the State of Pennsylvania where the tort occurred is outweighed by the interest of New York because New York is the domicile of all Plaintiffs. Consequently, application of New York law on "loss allocating" rules to the controversy would advance New York substantive law purposes because it would insure that the Infant Plaintiffs, the "relatively innocent victims" are fully compensated due to the fact that New York is the jurisdiction with the greatest interest in resolving that particular issue. See *Shaw v. Carolina Coach, supra; Sheldon v. PHH Corp., supra; Padula v. Lilarn Props. Corp., supra; Cooney v. Osgood Mach., supra; Neumeier v. Kuehner, supra.* Pursuant to the doctrine of respondeat superior, the New York Court of Appeals has repeatedly reaffirmed that an employer will be liable for the negligence of an employee while the employee was acting in the scope of his employment. See *VTL Section 388; Lundberg v. State of New York,* 25 NY2d 467, 255 NE2d 177, 306 NYS2d 947 (1969); *Matter of Anonymous v. Molik,* 32 NY3d 30, 109 NE3d 563, 84 NYS3d 414 (2018); *Carlson v. American Intl. Group, Inc.,* 30 NY3d 288, 89 NE3d 490, 67 NYS3d 100 (2017). Defendants admit in their Answer that: the tractor trailer was owned by Defendant Hudson; Defendant Stewart operated the tractor trailer on the date of the accident; Defendant Stewart was operating the tractor trailer with the permission, knowledge and consent of Defendant Hudson; and Defendant Stewart was operating the tractor trailer within the scope of his employment for Defendant Hudson. Thus, this Court finds that Defendant Hudson is vicariously liable for Defendant Stewart's negligence since he was operating the tractor trailer within the scope of his employment for Defendant Hudson[2]. See *VTL Section 388; Lundberg v. State of New York, supra; Matter of Anonymous v. Molik, supra; Carlson v. American Int'l Group, Inc, supra* [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Because of their status as innocent rear-seated passengers, this Court finds that Infant Plaintiff Brizard and Infant Plaintiff Wilkins are not comparatively negligent. As the Appellate Division found in *Garcia v. Tri-County Ambulette Serv.,* 282 AD2d 206, 723 NYS2d 163 (1st Dept., 2001), innocent rear-seat passengers who cannot possibly be found at fault are entitled to partial summary judgment on the issue of culpable conduct regarding liability. See *Medina v. Rodriguez,* 92 AD3d 850, 939 NYS2d 514 (2nd Dept., 2012); *Delgado v.*

---

[2] In fact, Pennsylvania courts have also found that an employer is vicariously liable for the wrongful acts of an employee if that act was committed during the course of and within the scope of employment. See *Phillips v. Lock,* 86 A3d 906 (Pa. Super. 2014); *Brezinski v. World Truck Transfer, Inc.,* 755 A2d 36, (Pa. Super. 2000) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

*Martinez Family Auto,* 113 AD3d 426, 979 NYS2d 277 (1st Dept., 2014); *Petty v. Dumont,* 77 AD3d 466, 910 NYS2d 46 (1st Dept., 2010); *Gallo v. Jairath,* 122 AD3d 795, 996 NYS2d 682 (2nd Dept., 2014); *CPLR 3212[g]; Anzel v. Pistorino,* 105 AD3d 784 (2nd Dept., 2013); *Garcia v. Tri-County Ambulette Serv.,* 282 AD2d 206 (1st Dept., 2001); *Johnson v. Phillips,* 261 AD2d 269 (1st Dept., 1999); *Conigliaro v. Premier Poultry, Inc.,* 67 AD3d 954 (2nd Dept., 2009). Moreover, a defendant who is negligent as a matter of law cannot raise a triable issue of fact on a summary judgment motion by pointing to the comparative negligence of another party. As the Court of Appeals ruled in *Rodriguez v. City of New York,* 31 NY3d 312, 76 NYS3d 898 (2018), to obtain partial summary judgment on defendant's liability, a plaintiff does not have to demonstrate the absence of his own comparative fault. Thus, a plaintiff's comparative negligence no longer serves as a bar to summary judgment [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

This Court denies Plaintiffs' request to strike Defendant Stewart's and Defendant Hudson's Third Affirmative Defense regarding the Seatbelt Defense. As the Second Department ruled in *Freder v. Costello Industries, Inc., supra,* the seatbelt defense does not concern any comparative fault issues since a plaintiff's alleged failure to wear a seatbelt is not relevant to the issue of liability. If properly pleaded as an affirmative defense, it may be introduced into evidence in mitigation of damages. See also *Davis v. Turner, supra; Garcia v. Tri-County Ambulette Serv., supra*; *Delgado v. Martinez Family Auto, supra; Spier v. Barker, supra* [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Because they merely offer speculation, Defendants Stewart and Hudson have failed to submit sufficient evidence to establish a material question of fact. See *Alvarez v. Prospect Hosp.,* 68 NY2d 310, 508 NYS2d 923 (1986); *Winegrad v. New York Univ. Medical Center,* 64 NY2d 851, 487 NYS2d 316 (1985); *Zuckerman v. City of New York,* 49 NY2d 557, 427 NYS2d 595 (1980) [Infant Plaintiff Brizard 1, Exhs. A-N with Attorney Affirmation; Infant Plaintiff Wilkins 2, Exhs. A-B with Attorney Affirmation; Defendants Affirmation in Opposition to Brizard 3, Exh. A; Defendants Affirmation in Opposition to Wilkins 4, Exhs A-B; Infant Plaintiff Brizard's Reply Affirmation, Exhs. A-B].

Based on the foregoing, it is hereby ORDERED as follows:

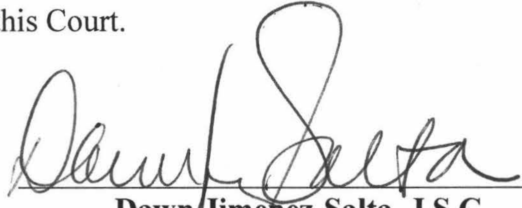
The motion by Plaintiff McDonald as guardian of the property of Carter Brizard, Infant, and cross motion by Infant Plaintiff Kimaya Wilkins, a minor by her parents and natural guardians Kimberly Wilkins and Michael Wilkins , Kimberly Wilkins, individually and Michael Wilkins, individually for summary judgment pursuant to *CPLR 3212* on the issues of liability against Defendant Ralph Stewart and Defendant Hudson Logistics, Inc., and dismissal of claims of comparative negligence against Infant Plaintiff Carter Brizard and

[THIS SPACE LEFT BLANK INTENTIONALLY]

against Infant Plaintiff Kimaya Wilkins are GRANTED. Plaintiffs' request to strike Defendant Ralph Stewart's and Defendant Hudson Logistics, Inc.'s Third Affirmative Defense on the Seatbelt Defense is DENIED.

This constitutes the Decision and Order of this Court.

DATE: October 23, 2019
Wilkins et al v. Stewart et al
Index Number 510456/2017



**Dawn Jimenez-Salta, J.S.C.**

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

2019 NOV -4 AM 10: 48
KINGS COUNTY CLERK
FILED