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Complaint [A5-A10]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
YSIDRA ESPINAL, as Administratrix for the Estate of
ELVIA L. COLLADO, deceased, and YSIDRA
ESPINAL, individually,

Index No.:

Plaintiff,

COMPLAINT

-against-

WALDO J. VARGAS,

Defendant.
-----X

Plaintiff, by and through her attorney, MICHAEL A. CERVINI, ESQ., as and for her
Complaint of the Defendant herein states and alleges:

1. On October 31, 2008, the plaintiff, YSIDRA ESPINAL, was issued Letters of Limited Administration to serve as Administratrix of the Estate of ELVIA L. COLLADO, decedent, by order of the Surrogate's Court, Queens County.
2. The decedent, ELVIA L. COLLADO, died a resident of Queens County, State of New York, on August 11, 2008.
3. That at all times hereinafter mentioned the defendant, WALDO J. VARGAS, was and still is a resident of the County of Kings, State of New York.

AS AND FOR A FIRST CAUSE OF ACTION

4. That on August 11, 2008 and at all times hereinafter mentioned, the plaintiff, ELVIA L. COLLADO, was a passenger a certain motor vehicle bearing New York State plate number EDF 5099.
5. That on August 11, 2008 and at all times hereinafter mentioned, the defendant,

WALDO J. VARGAS, operated a certain motor vehicle bearing New York State plate number EDF 5099.

6. That on August 11, 2008 and at all times hereinafter mentioned, the defendant, WALDO J. VARGAS, operated a certain motor vehicle bearing New York State plate number EDF 5099, with full consent and permission of the owner, plaintiff-decedent, ELVIA L. COLLADO.

7. That on August 11, 2008, the plaintiff-decedent, ELVIA L. COLLADO, was a passenger in the aforementioned motor vehicle operated by defendant, WALDO J. VARGAS, which was involved in a car accident.

8. That said collision took place westbound on the Belt Parkway and Springfield Blvd., in the County of Queens, State of New York.

9. That the defendant, WALDO J. VARGAS, his agents, servants and/or employees were careless, reckless and negligent in the ownership, operation, maintenance, management and control of the vehicle in that the operator of defendant's vehicle operated said vehicle at a dangerous and excessive rate of speed and failed to bring the same to a stop in order to avoid the happening of the accident; in that the defendant(s) failed to have said vehicle under reasonable and proper control; in that defendant(s) failed to take the proper means and precautions to avoid and guard against the happening of the accident; in that defendant(s) failed to exercise due care and caution in the operation, management, and control of said vehicle; in that defendant(s) failed to operate said vehicle as a reasonable and prudent person; and in that in other ways, the defendants operated said vehicle in a dangerous, careless and negligent manner. caution in the operation, management, and control of said vehicle; in that defendant(s) failed to operate said vehicle as a reasonable and prudent person; and in that in other ways, the defendants operated

said vehicle in a dangerous, careless and negligent manner.

10. Defendant, his agents, servants and/or employees were further negligent and reckless in causing this accident as a result of violating Sections 1192a and of the NYS VTL in knowingly operating the car while intoxicated by alcohol and drugs. As a result of defendant's negligent and reckless conduct, the plaintiff is entitled to both compensation and punitive damages.

11. That as a result of the foregoing contact the plaintiff, ELVIA L. COLLADO, was fatally injured.

12. That as a result of the foregoing, the plaintiff was caused to suffer a serious injury and death as that term is defined in Subdivision D of § 5102 of the Insurance Law of the City and State of New York, and being a covered person and claiming against a covered person, is entitled to recover for such non-economic loss, including pain, suffering and disfigurement, and is entitled to recover for such loss as exceeds basic economic.

13. That this cause of action that the plaintiff, YSIDRA ESPINAL, brings on behalf of the decedent, ELVIA L. COLLADO, for injuries and pain and suffering which the decedent suffered as a result of the defendant's negligence, is one which the decedent would have been entitled to maintain, had she lived, and survived and thus is entitled to maintain this action pursuant to New York Wrongful Death Statute as more fully set forth in EPTL Section 11-3.2.

14. The defendant's actions were reckless and showed a gross disregard for the decedent.

15. As a result of the aforesaid, the plaintiff(s) demands judgment against the defendant(s) in amounts commensurate with the injuries and damages sustained herein, altogether with the costs and disbursements of this action, in an amount that exceeds the

jurisdictional limits of all lower courts.

16. As a result of defendant's reckless and wanton conduct the plaintiff's estate is entitled to punitive damages in amounts commensurate with the injuries and damages sustained herein, altogether with the costs and disbursements of this action, in an amount that exceeds the jurisdictional limits of all lower courts.

17. This action is an exception to Article 16 of the Insurance Law.

AS AND FOR A SECOND CAUSE OF ACTION

18. Plaintiff repeats and reiterates each and every allegation contained in paragraphs "1" through "17" as if fully set forth herein.

19. The accident and the fatal injuries resulting in the decedent's death were caused by the negligence and recklessness of the defendant, without any negligence on the part of the decedent contributing thereto.

20. The decedent was born on or about May 11, 1986.

21. The decedent was survived by heirs-at-law and next of kin. The heirs-at law and next of kin of the decedent sustained pecuniary loss as a result of the death of the decedent, including, but not limited to, loss of society, pursuant to EPTL 5-4.1.

22. Solely as a result of the negligence of the defendant and the injuries sustained by the decedent which ultimately led to death, the decedent's estate incurred funeral and administrative expenses and sustained further pecuniary loss pursuant to EPTL 5-4.1.

23. The defendant's conduct was wanton, reckless, malicious and/or exhibited a gross indifference to, and a callous disregard for human life, safety and the rights of decedent,
ELVIA L. COLLADO.

24. Due to defendant's negligence and recklessness, plaintiff, YSIDRA ESPINAL, is entitled to damages and punitive damages in amounts commensurate with the injuries and damages sustained herein, altogether with the costs and disbursements of this action, in an amount that exceeds the jurisdictional limits of all lower courts.

25. That the instant actions are an exception to Article 16 of the CPLR.

AS AND FOR A THIRD CAUSE OF ACTION

26. Plaintiff repeats and reiterates each and every allegation contained in paragraphs "1" through "25" as if fully set forth herein.

27. Plaintiff, YSIDRA ESPINAL, is the natural mother of decedent, ELVIA L. COLLADO.

28. That prior to the accident complained of, plaintiff's daughter was healthy and sound and was able to, and did in fact, provide the plaintiff with consortium, love, aid and affection typical of the mother-daughter relationship.

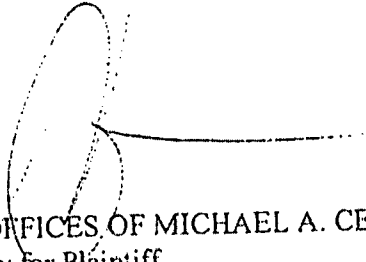
29. That due to the actions of the defendant and as a result aforesaid, plaintiff's daughter was injured and killed, and as a result thereof plaintiff, YSIDRA ESPINAL, has been deprived of her daughter's care; she has been deprived of the love, aid and affection of her daughter; she believes that the hereinabove described deprivation and impairment will continue in the future.

30. As a result of the foregoing, plaintiff, YSIDRA ESPINAL, demands judgment against the defendant(s) in amounts commensurate with the injuries and damages sustained herein, altogether with the costs and disbursements of this action, in an amount that exceeds the jurisdictional limits of all lower courts.

31. That these actions are an exception to Article 16 of the CPLR.

WHEREFORE, the plaintiff(s) demands judgment in all actions against the defendant(s) in amounts commensurate with the injuries and damages sustained herein, altogether with the costs and disbursements of this action, in an amount that exceeds the jurisdictional limits of all lower courts.

Dated: Queens, New York
November 18, 2008



LAW OFFICES OF MICHAEL A. CERVINI, P.C.
Attorney for Plaintiff
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Verified Answer [A11-A14]

BSG:CMM File No. 08-01336-01(BSG)/000240809
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
YSIDRA ESPINAL, as Administratrix for
the Estate of ELVIA L. COLLADO,
deceased and YSIDRA ESPINAL,
individually,

Plaintiff(s), Index No.: 028411/08

- against -

VERIFIED ANSWER

WALDO J. VARGAS,

Defendant(s).

-----X

The Defendant(s) WALDO J. VARGAS, answering the plaintiff(s) Complaint herein, by his/her attorneys, CHEVEN, KEELY & HATZIS, ESQS., hereby respectfully denies each and every allegation upon information and belief of the plaintiff(s) Complaint except as herein after set forth:

ANSWERING THE UNTITLED CAUSE OF ACTION

1. Deny(s) any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs of the Complaint therein designated as "1", "2" and "3" and respectfully refers all questions of Law to the Court.

ANSWERING THE FIRST CAUSE OF ACTION

2. Deny(s) any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs of the Complaint therein designated as "4", "5", "6", "7", "8", "13" and "17" and respectfully refers all questions of Law to the Court.

3. Upon information and belief, deny(s) each and every allegation contained in the paragraphs of the Complaint therein designated as "9", "10", "11", "12", "14", "15" and "16".

ANSWERING THE SECOND CAUSE OF ACTION

4. Answering paragraph(s) "18" of the Complaint, repeat, reiterate and reallege(s) each and every allegation, admission and denial contained in the preceding paragraphs of this Answer, with the same force and effect as though set forth at length herein.

5. Deny(s) any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs of the Complaint therein designated as "20", "21" and "25" and respectfully refers all questions of Law to the Court.

6. Upon information and belief, deny(s) each and every allegation contained in the paragraphs of the Complaint therein designated as "19", "22", "23" and "24".

ANSWERING THE THIRD CAUSE OF ACTION

7. Answering paragraph(s) "26" of the Complaint, repeat, reiterate and reallege(s) each and every allegation, admission and denial contained in the preceding paragraphs of this Answer, with the same force and effect as though set forth at length herein.

8. Deny(s) any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs of the Complaint therein designated as "27", "28" and "31" and respectfully refers all questions of Law to the Court.

9. Upon information and belief, deny(s) each and every allegation contained in the paragraphs of the Complaint therein designated as "29" and "30".

**AS AND FOR A FIRST, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

Upon information and belief, the injuries and/or damages, if any, alleged to have been sustained by the Plaintiff's decedent were caused in whole or part by the culpable conduct of the Plaintiff and/or Plaintiff's decedent.

**AS AND FOR A SECOND, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

This Court lacks jurisdiction over the person of the Defendant(s) due to improper service of the Summons.

**AS AND FOR A THIRD, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

In the event Plaintiff(s) recovers a verdict or judgment against the answering Defendant(s), then said verdict or judgment must be reduced pursuant to CPLR 4545(c) by those amounts which have been or will, with reasonable certainty, be paid on behalf of or indemnify Plaintiff(s) in whole or in part, for any past or future claimed economic loss, from any collateral source including but not limited to no-fault, insurance, social security, workers' compensation or employee benefit programs.

**AS AND FOR A FOURTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

The accident described in the Verified Complaint did not result in a "serious injury" to any Plaintiff and/or Plaintiff's decedent, as so defined in and by Section 5102 (d) of the Insurance Law of the State of New York. By reason of the premises aforesaid, and as expressly provided in Section 5104 of the Insurance Law of New York, Plaintiff's decedent had and has no right to institute, maintain or prosecute this action and is barred from so doing.

**AS AND FOR A FIFTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

That pursuant to Article 51 of the New York State Insurance Law, the Plaintiff(s) is not entitled to recover any sums of money for basic economic loss.

**AS AND FOR A SIXTH, SEPARATE DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

Any recovery or verdict against the answering Defendant(s) must be reduced by virtue of the failure of the Plaintiff(s) to have exercised due care to avoid, eliminate and/or mitigate the injury and/or damages allegedly sustained.

**AS AND FOR A SEVENTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

That the Plaintiff(s) damages must be mitigated by virtue of his/her failure and/or the failure of plaintiff's decedent to make use of an available seatbelt and/or violation of Section 1229(c) of the Vehicle and Traffic Law.

**AS AND FOR AN EIGHTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

That the alleged cause(s) of action stated on behalf of the Plaintiff(s) in the Complaint in the above entitled action is/are barred by the Statute of Limitations.

**AS AND FOR A NINTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

All risks and/or danger of loss or damage connected with the situation alleged in the Plaintiff's Complaint were at the time and place mentioned in the Complaint obvious and apparent and were known by the plaintiff(s) and voluntarily assumed by the plaintiff(s).

**AS AND FOR AN TENTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

The liability of the answering Defendant(s) is limited by the provisions of Article 16 of the New York Civil Practice Law and Rules (CPLR).

**AS AND FOR A ELEVENTH, SEPARATE, DISTINCT
AND COMPLETE AFFIRMATIVE DEFENSE:**

In the event any party or non-party to the above captioned action settles with the plaintiff(s), the answering defendant(s) pleads all rights as are afforded under the General Obligations law Section 15-108, as well as any other applicable statute(s) governing settlements, as to all settling and/or non-settling parties.

WHEREFORE, the aforesaid defendant(s) demand(s) judgment against the plaintiff(s), dismissing the Complaint herein, together with costs and disbursements of this action.

Dated: New York, New York
January 14, 2009

Yours, etc.

By: 

Brent S. Gollisano, Esq., Ext. 5287

CHEVEN, KEELY & HATZIS, ESQS.

Attorneys for Defendant(s)

WALDO J. VARGAS

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(212) 809-7600

Our File No.: 08-01336-01(BSG)000240809

TO:

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