

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT: HON. ROBERT A. BRUNO, J.S.C.**

-----x

ARCADIO ESTEVEZ, as Administrator of the Estate  
of JUAN R. ESTEVEZ, deceased,

Plaintiff,

-against-

PHILIP W. TAM,

Defendant.

-----x

TRIAL/IAS PART 19  
INDEX No.: 002912/13  
Submission Date: 01/09/14  
Motion Sequence: 001

**DECISION & ORDER**

**Papers Numbered**

<i>Sequence #001</i>	
Notice of Motion, Affirmation & Exhibits .....	1
Affirmation in Opposition & Exhibits .....	2
Reply Affirmation & Exhibits .....	3

Upon the foregoing papers, the defendant's motion, pursuant to CPLR §3212, seeking summary judgment dismissing those portions of the first and second causes of action of the plaintiff's Verified Complaint alleging conscious pain and suffering as a result of the subject motor vehicle accident is determined as set forth below.

This is an action to recover damages for the wrongful death of the plaintiff decedent, Juan R. Estevez, as the result of an accident that occurred on January 29, 2013. Plaintiff decedent was a pedestrian when he was struck by the vehicle operated by the defendant and occupied by non-party witnesses, Maria Rodriguez and Alexandra Rodriguez.

Defendant brings the instant motion asserting summary judgment is appropriate because plaintiff did not sustain conscious pain and suffering as the result of this accident. In support of his application, defendant provides the underlying pleadings; the deposition transcripts of: the defendant, Maria Rodriguez, Alexandra Rodriguez and Arcadio Estevez; the Affidavit of Michael M. Baden, M.D.; the autopsy report; various color photographs depicting the plaintiff decedent as well as the accident scene; the ambulatory report; the emergency room records from Nassau University Medical Center; and the police report.

Estevez v. Tam  
Index No.: 002912/13

At his deposition, the defendant testified that after his came in contact with the plaintiff, he exited his vehicle and observed the plaintiff laying on the ground. The defendant testified that the plaintiff did not speak, did not open his eyes, and "looked calm" (*Def. transcript* at pp. 19, 20). The defendant also testified that no more than two minutes passed from the time he exited his vehicle until the time he called the police (*Id.* at p. 20) and the police arrived at the accident scene within five or six minutes (*Id.* at p. 21).

Maria Rodriguez, a passenger in defendant's vehicle, testified at her deposition that she was able to see plaintiff laying in the street while seated in the defendant's vehicle (*M. Rodriguez transcript* at p. 9). She also testified that although the plaintiff was not speaking, he was moving his left hand while the defendant was talking to him (*Id.* at pp. 9 - 11).

In his affidavit, Dr. Michael M. Baden affirms that he reviewed all of the relevant records and testimony relating to this accident and opines that the plaintiff suffered severe brain damage and coma as a result of being struck by defendant's vehicle (*Baden Aff.* at ¶ "a"). He states that the body movement observed by Maria Rodriguez was not voluntary and "do not involve the brain and occur while the person is unconscious" (*Id.* at ¶ "b"). Dr. Baden reasons that "[t]he severity of the head, lung and chest injuries are evidence that [the plaintiff] lost consciousness when the car struck him, and the unconsciousness was made permanent when his head struck the ground, causing fatal brain damage" (*Id.* at ¶ "d"). He concludes that the plaintiff "experienced no conscious pain or suffering" (*Id.* at ¶ "c").

In an action seeking recovery for wrongful death, as here, when moving for summary judgment the defendant bears the initial burden of demonstrating that the decedent did not endure conscious pain and suffering. *Dmytryszyn v. Herschman*, 98 AD3d 715 (2d Dept 2012). At bar, the defendant met his initial burden. Therefore, the burden shifts to plaintiff to raise a triable issue as to whether the plaintiff sustained conscious pain and suffering. *see generally, Phiri v. Joseph*, 32 AD3d 922 (2d Dept. 2006).

In opposition, the plaintiff asserts that the decedent suffered conscious pain and suffering. As evidence, the plaintiff relies on the testimony of Maria Rodriguez. Plaintiff argues that since Ms. Rodriguez personally witnessed the decedent moving his body following the accident, a triable issue of fact exists.

In addition, the plaintiff relies on a statement given by the defendant following the accident. Plaintiff provides the signed statement of the defendant dated February 6, 2013 which provides the defendant's version as to how the accident occurred. In his statement, the defendant states, "I asked him whether he was okay but he didn't answer. However, he looked conscious." (*See, Pltf's Opp.*, Exh. "1").

Further, plaintiff relies on the autopsy report of Dr. Gerard Catanese, Deputy Medical Examiner and his addendum report dated November 18, 2013. In his addendum report, Dr. Catanese opines that although the injuries sustained by the plaintiff were severe, they do not

Estevez v. Tam  
Index No.: 002912/13

necessarily cause unconsciousness (*Plif's Opp.*, Exh "2"). Dr. Catanese states that the movement of plaintiff's hand as observed by Maria Rodriguez indicates that he was conscious and unable to speak as the result of his fractured ribs and lung injuries (*Id.*). He also remarks that "at some point after the accident [the plaintiff] did become unconscious but after resuscitation he again regained some reactivity while at Nassau University Medical Center" (*Id.*).

Here, the plaintiff provided sufficient proof of consciousness following the accident. Specifically, the defendant's statement that the plaintiff decedent "looked conscious" following the accident as well as the testimony of Maria Rodriguez stating that the decedent was moving his hand following the accident, raises a question of fact as to whether decedent was, in fact, conscious. Additionally, the plaintiff provides the affirmation of the Deputy Medical Examiner, Dr. Catanese, which conflicts with the defendant's medical expert regarding the decedent's hand movement. Moreover, the record shows that there was a significant lapse of time between the accident and time of plaintiff's death. There is conflicting medical testimony as to whether the plaintiff's alleged "reactivity" during this lapse of time is evidence of the plaintiff's possible awareness.

Based upon the foregoing, the plaintiff has successfully raised an issue of fact precluding partial summary judgment on the claim for conscious pain and suffering.

With regards to the defendant's claim that the plaintiff decedent did not experience pre-impact terror, the defendant failed to provide sufficient evidence of same. Defendant's argument is based upon mere speculation and did not overcome as a matter of law that the decedent did not hear or see the defendant's vehicle prior to impact. *See Cadieux v. D.B. Interiors*, 214 AD2d 323 (1st Dept. 1995).

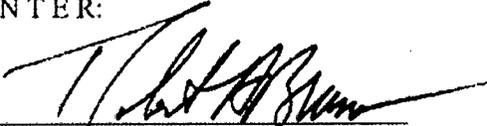
The parties remaining contentions have been considered by this Court and are without merit.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: March 7, 2013  
Mineola, New York

ENTER:

  
Hon. Robert A. Bruno, J.S.C.

**ENTERED**

MAR 13 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE