

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

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**CA 16-01347**

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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WILLIAM H. SHEEHAN AND MARCY A. SHEEHAN,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

THOMAS A. GILRAY, JR., ET AL., DEFENDANTS,  
AND CENTRAL TERMINAL RESTORATION CORPORATION,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY  
(SETH M. WEINBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (R. CHARLES MINER OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 14, 2016. The order, among other things, denied in part the motion of defendant Central Terminal Restoration Corporation for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: William H. Sheehan, a plaintiff in appeal No. 1, and Michael A. Serrano, the plaintiff in appeal No. 2, were passengers in a vehicle operated by Marcy A. Sheehan, the second plaintiff in appeal No. 1. Sometime between 10:30 p.m. and 11:00 p.m., Marcy Sheehan lost control of the vehicle and struck a concrete barrier, and the occupants exited the vehicle and walked to a grassy area off of the roadway. Shortly thereafter, the Sheehan vehicle was struck by a vehicle operated by a nonparty. Following that collision, William Sheehan and Serrano returned to the area where the two vehicles were situated, and the police arrived. Soon after the arrival of the police, a vehicle operated by defendant Thomas A. Gilray, Jr. collided with the Sheehan vehicle, which then struck William Sheehan and Serrano. Thereafter, Gilray failed three field sobriety tests and, at 1:35 a.m. on April 2, 2013, his blood alcohol level was recorded as .127%. Earlier in the evening, Gilray had attended an event at defendant Corpus Christi Church (CCC), where he consumed alcohol, and he thereafter consumed more alcohol at an event hosted by defendant Central Terminal Restoration Corporation (Central Terminal). Gilray left Central Terminal between 10:00 p.m. and 10:30 p.m., stopped at his place of employment, and then was involved in the subject motor

vehicle accident at 11:00 p.m. Plaintiffs commenced their respective actions against, inter alia, Central Terminal alleging, among other things, that Central Terminal was responsible for their injuries inasmuch as it sold and/or provided alcohol to Gilray while he was visibly intoxicated, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65.

We conclude that Supreme Court properly denied that part of the motion of Central Terminal for summary judgment with respect to the claims against it for violations of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65. Although Central Terminal met its initial burden on those parts of the motion by submitting the deposition testimony of individuals who had interacted with Gilray prior to the accident, none of whom had any recollection that Gilray was visibly intoxicated, plaintiffs raised a triable issue of fact in opposition thereto. It is well established that "visible intoxication may be established by circumstantial evidence, including expert and eyewitness testimony" (*Kish v Farley*, 24 AD3d 1198, 1200; see *McGilveary v Baron*, 4 AD3d 844, 845). "While proof of high blood alcohol count alone generally does not establish visible intoxication, in this case plaintiffs submitted the affidavit of [a forensic toxicologist with a Ph.D. in physical organic chemistry] who did not rely solely on the blood alcohol level of [Gilray]" in concluding that Gilray was likely showing signs of visible intoxication at Central Terminal (*Kish*, 24 AD3d at 1200). Rather, the expert relied on, inter alia, the deposition testimony of the police officer who arrested Gilray for driving while intoxicated and the police officer who spoke to Gilray at the police station. Those officers testified that Gilray failed every sobriety test administered, had bloodshot or glassy eyes and slurred speech, and smelled of alcohol (see *McGilveary*, 4 AD3d at 845; see also *Adamy v Ziriakus*, 92 NY2d 396, 402-403). The expert also relied on the testimony of an investigator for the New York State Police Collision Reconstruction Unit who reviewed the "black box" data and concluded that Gilray was traveling at a speed of 85 miles per hour within four seconds of the accident and 74 miles per hour at the time of impact, which was well above the speed limit (see generally *Kish*, 24 AD3d at 1200). We therefore conclude that plaintiffs raised a triable issue of fact whether Gilray exhibited signs of visible intoxication while he was present at Central Terminal " 'that should have alerted' " Central Terminal employees to his intoxication (*McGilveary*, 4 AD3d at 845).

Entered: July 7, 2017

Frances E. Cafarell  
Clerk of the Court