SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

Scan

JUSTIN AVELAR, an infant over the age of 14 years, by his mother and natural guardian, JUNE AVELAR and JUNE AVELAR, individually,

Plaintiffs,

-against-

CHRYSTABELLE MARIE CECLIA a/k/a CHRYSTABELLE LOBO, SANFORD E. LOBO, THE TOWN OF OYSTER BAY, THE TOWN OF OYSTER BAY DEPARTMENT OF PUBLIC WORKS, SYOSSET CENTRAL SCHOOL DISTRICT and COUNTY OF NASSAU,

Defendants.

Motion Sequence # 4, # 005, # 6
Submitted August 16, 2007

INDEX NO: 9032/05

The following papers were read on these motions:

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Requested Relief

Defendants, THE TOWN OF OYSTER BAY and THE TOWN OF OYSTER BAY DEPARTMENT OF PUBLIC WORKS (hereinafter referred to as the "TOWN"), move for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint as interposed against them. In a companion motion co-defendant, COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), moves for the same relief as does co-defendant, SYOSSET CENTRAL SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"). The motions are opposed by the plaintiffs, JUSTIN AVELAR, an infant over the age of fourteen, by his mother and natural guardian, JUNE AVELAR and JUNE AVELAR, individually, and by co-defendants, CHRYSTABELLE MARIE CECILIA a/k/a CHRYSTABELLE LOBO and SANFORD LOBO (hereinafter referred to as "LOBO"). The motions are determined as follows:

Background

On March 22, 2004, at approximately 2:45 pm, the 14-year old plaintiff, JUSTIN AVELAR, a ninth grade student at Syosset High School, was stuck by a car as he attempted to cross South Woods Road while walking home from school (J. Avelar 50-H at 31-31; Avelar [March 21] Dep., 6-8; Alicastro Statement; Town Exh., "P"). On that day, classes ended for JUSTIN around 2:20 pm, after which he walked to the school gym where he expected to attend junior varsity baseball practice (Avelar [March 21] Dep. at 8-10 June Avelar Dep., at 7). When he arrived at the gym, JUSTIN learned from other students that practice had been cancelled (Avelar [March 21] Dep. at 9-11; (Avelar [Aug 17] Dep., 14, 18). There was apparently no formal announcement made by school personnel informing

students that the practice had been cancelled (Avelar [July 3] Dep. at 11).

Although JUSTIN's mother usually drove him to and from school, after practice was cancelled, JUSTIN called her on his cell phone and informed her that he intended to walk home from school (Avelar [March 21] Dep. at 11-12; June Avelar [Aug 17] Dep., 7-9).

Mrs. Avelar, who was picking up her daughter from School at the time (June Avelar [Aug 17] Dep., at 7), initially objected and asked him to wait for her to pick him up. She was then some 7-10 minutes from the High School (June Avelar [Aug 17] Dep., at 7). However, JUSTIN insisted upon walking and she agreed, instructing him to be careful and to call her as soon as he crossed South Woods Road (June Avelar [Aug 17] Dep., at 9 *see also,* March 21] Dep., at 14-15). JUSTIN initially stated that he had never taken the bus home, but when pressed as to whether he had ever done so in the past, he added, "I don't know" and "maybe" (Avelar [Aug 17] Dep., at 26-27; March 21 Dep.,at 102; July Dep., at 11). At some point, he also suggested that he may have walked home from school – a five minute walk – perhaps "once," although he was not really sure (Avelar Dep., at 9; June Avelar Dep., at 29).

JUSTIN then exited the school grounds onto South Woods Road, a two-lane TOWN road on which the High School is located, and proceeded in a southerly direction on the west side of the road toward his home on Syosset-Woodbury Road (Schneider Dep., at 8; Tricarico Dep., 10; Pomeranz Aff., at 5). Notably, Syosset Woodbury Road intersects with South Woods Road approximately one-half mile south of the High School (Avelar [March 21] Dep. at 10; Alicastro Dep., 15-16). There is a traffic signal at the intersection which was installed and maintained by the COUNTY (Avelar Dep., at 32; Ribeiro Dep., 8-9; Pomeranz Aff., at 5). Traffic was relatively busy at the time on South Woods Road and

there were a number of students in the vicinity since school had just recently been dismissed (Alicastro Dep., 22-24; 31; Hospodar Dep., at 55).

JUSTIN continued walking down South Woods Roads past a Long Island Rail Road overpass. He then apparently decided to cross South Woods Road approximately 1/4 mile north of its intersection with Syosset Woodbury Road, at a location where there was no crosswalk, traffic light or cross street (Avelar [Aug 17] Dep., 32; [March 21] Dep at 15; Alicastro Dep., 13).

As JUSTIN prepared to cross the street, non-party witness John Alicastro was driving south-bound on South Woods Road and observed JUSTIN standing on the sidewalk to his right (Alicastro Dep., at 14, 23). Traffic at the time was generally moving at a slow pace (Alicastro Dep., at 14, 22-23). Alicastro observed JUSTIN step out from the curb into the southbound lane "literally three or four feet in front of" his car, where he "stood still" (Alicastro Dep., at 14-15; 19, 24, 28). Alicastro brought his vehicle to a complete stop in light of JUSTIN's presence directly in front of his car (Alicastro Dep., at 14-15; 36). At this juncture, JUSTIN began moving again and walked across the south-bound lane to the double-yellow dividing line and hesitated. He advanced perhaps a foot over the dividing line into the opposite, north-bound side of the road. Alicastro testified that JUSTIN looked at the cars approaching in the north-bound lane and then he hesitated again for a second (Alicastro Dep., at 14, 19, 32). After hesitating upon entering the northbound lane, JUSTIN then "decided to run" because – according to Alicastro – he thought he "could run across [the street] before the car came" (Alicastro Dep., at 17; 19, 29; 31-32, 40-41; 49-50).

When JUSTIN advanced some two-thirds across the north bound lane (Alicastro Dep., at 33), he was hit as he ran by a vehicle owned by co-defendant, SANFORD E.

LOBO and operated by his wife, co-defendant CHRYSTABELLE MARIE LOBO (Lobo Dep., 9; Alicastro Dep., at 42). LOBO's front grille struck JUSTIN first, propelling him into the windshield. He was then thrown backward as a result of the impact onto a nearby dirt-covered area (Alicastro Dep., at 34-3; Lobo Dep., 33-34, 48, 71; Bird Dep., at 12, 24-25; District Exh., "N"). Alicastro estimated that when JUSTIN hesitated in the vicinity of the double yellow line, LOBO's vehicle was between 10 and 20 feet from where he was standing (Alicastro Dep., at 42). When asked to briefly capsulize his observations, Alicastro recounted that,

> [f]or lack of a better word, initially he jumped out into the street, then completely stopped, then continued[,] and as he continued * * * I believe he saw the * * * [offending] car coming * * * and he hesitated whether or not he would able to make it before the car came and that's when he started to run across the street and * * * when the car hit him (Alicastro Dep., at 31, 50).

CHRSTABELLE MARIE LOBO testified that prior to the accident, she had entered upon South Woods Road by turning left from Syosset Woodbury Road. She then proceeded in a northerly direction towards South Woods Middle School, where she was going to pick up her son (Lobo Dep., 15-18; 39-40, 55; 63, 80). LOBO continued for about one block after she made the left onto South Woods Road and then first noticed JUSTIN as he stood in the middle of the road on the double-yellow line (Lobo Dep., 23-25, 29). She claimed that she kept JUSTIN under "constant observation" from the time she first noticed him and that approximately 15 second elapsed between that time and the moment of impact (Lobo Dep., 29). As JUSTIN stood on the double-yellow line he had his head down and seemed to be "engaged with something"– although she could not say what he was doing (Lobo Dep., 31, 64, 66, 74; Police Case Report, Town Exh., "O"). As she approached him, he "walked into her bumper" – and while she braked heavily, she could

not avoid hitting him (Lobo Dep., 32; 44, 67).

JUSTIN AVELAR testified that before he attempted to cross he looked both ways "many times" – maybe four or five times. Since there was "a lot of traffic" on South Woods Road at the time, he had to wait for the road to clear to his left and when it did, he decided across the south-bound lane (Avelar [Aug 17] Dep., 18-19; [Aug 17] Dep., 36-37). After doing so, he stopped in the middle of the road on the double yellow line because there were cars on the north-bound side of the road to his right at the time and he had to wait for these on-coming cars to pass (Avelar [March 21] Dep., 21-24; Avelar [Aug 17] Dep., 43). Eventually, JUSTIN saw that the nearest, approaching car was far enough away for him to proceed and he walked at an "average" pace into the north-bound lane. He stated that he knew he had time to cross because it looked like the driver "was letting * * * [him] go" (Avelar [March 21] Dep., 24-25; Avelar [Aug 17] Dep., 44-45, 49). He could not say, however, if the driver gestured or signaled to him in any specific way. Nor could he say for certain how far into the northbound lane he had gone when the impact took place. In fact, JUSTIN testified that he had a lot of "memory loss" regarding the incident, portions of which were "like a dream" to him (Avelar [Aug 17] Dep., 35, 46-47).

According to Syosset High School Assistant Principal, Alan Chipetine, when he spoke to JUSTIN's mother immediately after the accident, she informed him that the accident was her fault since she had "told him to walk home" (Chipetine Dep., at 58). Notably, the narrative, "accident description" portion of the police report refers to Mr. Alicastro and recounts that, "[i]nvestigation reveals that pedestrian stepped into lane of on coming traffic" and that LOBO was traveling 5 mph in excess of the posted speed limit (Town Exh.,"N", "O"). The MV-104 form similarly identifies LOBO's alleged excess speed

and/or "pedestrian error/confusion" as an apparent contributing factors in the occurrence of the accident (Town Exh.,"N"). The record indicates that there is a continuous sidewalk on the west side of South Woods Road where JUSTIN was walking, extending from the school to the intersection of South Woods and Syosset Woodbury Road (Alicastro Dep., at 44; Lobo Dep., 28; Bird Dep., at 42-43, 53; Pomeranz Aff., at 4). There is no sidewalk on the east side of South Woods Road at the approximate location of the accident (Town Reply, Exh., "G").

At some point in 2002, the DISTRICT contacted the Nassau County Police Department concerning traffic congestion in front of the high school circle on South Woods Road (Chipetine Dep., at 29, 42-44; Schneider Dep., at 14). The meetings focused primarily upon the morning drop-off of students (Chipetine Dep., at 42-43;45-46). The DISTRICT was apparently intent upon discouraging parents from dropping off students "in the morning between 7:00 and 7:30 [am]" (Chipetine Dep., at 47) Specifically, and as described by school principal Jorge Schneider, "parents weren't utilizing the bus transportation[,] causing congestion and preventing buses from arriving on time" in the morning on South Woods Road in front of the school (Chipetine Dep., at 47-48; District Exh., "Q"). According to Mr. Schneider, "[a]ll of a sudden * * * we were having lots and lots of parents dropping off students in private cars, and everybody was trying to make a left turn onto the front circle in the morning" reducing traffic to a "standstill" (Schneider Dep., at 15). Chipetine recalled that the police were summoned to the school some four or five times "to be a presence during the morning drop-off period" (Chipetine Dep., at 44).

The same issues did not exist at dismissal time, however, since students and personnel were effectively departing at staggered time periods (Chipetine Dep., at 48;

Schneider Dep., at 15, 21, 42). Nor were there any complaints made to the DISTRICT regarding after school traffic issues (Schneider Dep., at 41). Notably, the DISTRICT disseminated a series of notices to parents (dating from 2002 through 2004), advising, *inter alia*, of: (1) a potential health and safety issue flowing from the large number of parents dropping off students – primarily in the morning; and (2) that the foregoing practice had resulted in "significant" traffic congestion which prevented buses and teachers from arriving in a timely fashion. The notices further advised, among other things, that to ensure timely arrival of buses and faculty, the front circle would be closed from 7:00 to 7:30 am and that the Nassau County Police would assist in enforcing this policy (District Exh., "Q").

Significantly, the DISTRICT offered bus service to all students irrespective of where they resided (Chipetine Dep., at 12-13, 78; Schneider Dep., at 11-12). The bus schedule is mentioned in a "Student-Parent Handbook" which was provided to all students during the school year in question (Town Reply Aff., Exh., "B"; Chipetine Dep., at 78). The hand book provides, *inter alia*, that "student are strongly encouraged to use district transportation (Handbook at 7). The buses departed after school in several "waves." The first wave departed at 2:40 while the second left at 3:30 or 3:50 pm. Late buses were apparently available at around 4:15 and 5:00 pm (Bird Dep., at 37-38; Chipetine Dep., at 73; Schneider Dep., 27-28). There was no specific school policy with respect to allowing students to walk home (Chipetine Dep., at 16, 24).

By summons and verified complaint, dated August, 2005, the plaintiffs, JUNE AVELAR, individually, and as JUSTIN's natural guardian, commenced the within action against, *inter alia*, the LOBOS, the TOWN, the DISTRICT and the COUNTY.

With respect to the defendant DISTRICT, and as narrowed by their opposing submissions, the plaintiffs claim that: (1) the school breached a duty of care to JUSTIN when they improperly cancelled baseball practice and then "negligently" released him onto South Woods Road without proper supervision and guidance; and (2) that even if the DISTRICT properly relinquished custody over JUSTIN, they still breached a duty of care to him since the DISTRICT was aware of the purportedly dangerous traffic conditions which existed on South Woods Road at the time (Zervopoulos Aff., 5, 10, 16).

With respect to the COUNTY, the plaintiffs assert that the COUNTY entered into a "special relationship" with JUSTIN's mother since it had responded to the DISTRICT's prior requests that the police monitor and/or control traffic conditions on South Woods Road; and further, that the COUNTY was aware of the allegedly dangerous traffic conditions that existed on the road and breached its duty to act with respect to and/or alleviate those conditions (Zervopoulos Aff., at 4, 7).

Lastly, as to the TOWN defendants, the plaintiffs argue that the TOWN allegedly created a dangerous condition on South Woods Road, and/or had notice that it existed.

Notably, in its response to discovery demands, the TOWN has asserted that it has no accidents reports or records of complaints involving, *inter alia*, similar incidents, vehicular traffic, safety devices, or student safety records relating to the stretch of South Woods Road between the High School and Sysoset Woodbury Road. In response to a Court order directing it to produce records pertaining to dangerous conditions for a five-year period preceding the accident, the TOWN produced three notices of claim, which involved potholes in front of Syosset High School (Burkhoff Aff.,¶¶ 28-30). According to the TOWN, its "Sign Bureau" was not in possession of records or complaints concerning

pedestrian, vehicular, traffic device and/or student safety issues relating to the subject accident site. Nor did it have an engineering survey relating to the subject location (Burkhoff Aff., ¶¶ 27-30).

Similarly, the COUNTY's affiants and witnesses testified, *inter alia*, that (1) the COUNTY had not received any written notices of an unsafe or dangerous condition at the accident location (*see*, Nassau County Administrative Code § 12[e]); (2) that records maintained by the Nassau County Police Traffic Safety Unit for the three-year period preceding the accident revealed that there were no relevant pedestrian accidents on South Woods Road; and (3) that traffic signal surveys involving the subject intersection were conducted in 1999 and 2003 revealing, *inter alia*, that pedestrian counts were "extremely light" during after- school hours (Gray Aff., at 11-12; Pomeranz Aff., at 4-6 *see,* County Exh., "O").

Discovery is essentially complete and the defendants (with the exception of the LOBOS) each move for summary judgment dismissing the complaint. The defendants' motions should be granted.

Applicable Law

As to the DISTRICT

With respect to the DISTRICT, it is settled that while schools must "adequately supervise students in their charge" (*Mirand v City of New York*, 84 NY2d 44, 614 NYS2d 372, 637 NE2d 263 [C.A.1994]; *Swan v Town of Brookhaven*, 32 AD3d 1012, 821 NYS2d 265 [2nd Dept. 2006]) and "exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances" (*David v City of New*

York, 40 AD3d 572, 835 NYS2d 377 [2nd Dept. 2007]). However, schools "are not insurers of [their students'] safety * * * for they cannot reasonably be expected to continuously supervise and control all movements and activities of students* * *"(*Mirand v City of New York*, *supra,* at 49; *Williams v City of New York*, 41 AD3d 468, 837 NYS2d 300 [2nd Dept. 2007]).

The duty owed to its students "is strictly limited by time and space" and exists "only so long as a student is in its care and custody during school hours" (*Ramo v Serrano*, 301 AD2d 640, 754 NYS2d 336 [2nd Dept. 2003]; *see also*, *Morning v Riverhead Cent. School Dist.,* 27 AD3d 435, 811 NYS2d 747 [2nd Dept. 2006]; *see, Mirand v City of New York*, *supra*; *Harker v Rochester City School Dist.*, 241 AD2d 937, 661 NYS2d 332 [4th Dept. 1997]). Notably, "where a student is injured off school premises, there can generally be no actionable breach of a duty that extends only to the boundaries of school property" (*Tarnaras v Farmingdale School Dist.*, 264 AD2d 391, 694 NYS2d 413 [2nd Dept. 1999]; *see, Maldonado v Tuckahoe Union Free School Dist.*, 30 AD3d 567, 817 NYS2d 376 [2nd Dept. 2006]; *see also, Pratt v Robinson*, 39 NY2d 554, 384 NYS2d 749, 349 NE2d 849 [C.A. 1976]; *Chalen v Glen Cove School Dist.,* 29 AD3d 508, 814 NYS2d 254[2nd Dept.2006]; *Wenger v Goodell*, 220 AD2d 937, 632 NYS2d 865 [3rd Dept. 1995]). On the other hand, "a school district's duty of care requires continued exercise of control and supervision in the event that release of the child poses a foreseeable risk of harm" (*Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 551, 717 NE2d 690 [C.A. 1999]).

Upon applying these principles to the facts presented at bar, the Court finds that the DISTRICT has established its *prima facie* entitlement to judgment as a matter of law dismissing the plaintiffs' complaint insofar as interposed against it (*e.g.*, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]). Specifically, the DISTRICT has demonstrated, *inter alia,* that: (1) the accident occurred at time and place when it did not have physical custody and control over JUSTIN (*Mirand v City of New York*, *supra*; *Chalen v Glen Cove School Dist., supra; Rowe v Board of Educ. of City of New York*, 12 AD3d 494, 783 NYS2d 860 [2nd Dept. 2004]); (2) that JUSTIN, a 14-year old high school student, elected himself to walk home – with his mother's knowledge and assent; (3) that the purported traffic or safety issues identified by the plaintiff neither proximately caused the accident nor presented a foreseeable hazard to the plaintiff for which the DISTRICT can be held liable; (4) that the DISTRICT provided comprehensive bus service as a departure option and adequately apprised its students of its availability; and that (5) in any event, any risk or hazard which arose was not caused or created by the DISTRICT's conduct, but primarily by the conduct of LOBO and JUSTIN himself – which set in motion the precipitating circumstances which ultimately caused the accident (*see, Levi v Kratovac*, 35 AD3d 548, 827 NYS2d 196 [2nd Dept. 2006]; *Martinez v County of Suffolk,* 17 AD3d 643, 794 NYS2d 98 [2nd Dept. 2005]*; Hanley v East Moriches Union Free School Dist. II*, 275 AD2d 389, 712 NYS2d 617 [2nd Dept. 2000]; *DePietto v Letter*, 234 AD2d 258, 651 NYS2d 325 [2nd Dept. 1996]).

With respect to the last-named factor, it is settled that "where the record establishes that the alleged failure of duty could not have played a role in causing the alleged injury,

summary judgment is appropriate" (*Abair v Town of North Elba,* 35 AD3d 935, 827 NYS2d 300 [3rd Dept. 2006]; *see, Ronan v School Dist. of City of New Rochelle*, 35 AD3d 429, 825 NYS2d 249 [2nd Dept. 2006]; *cf., Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 746 NYS2d 120, 773 NE2d 485 [C.A.2002]; *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 [C.A. 1976]).

The Court also rejects the plaintiffs' assertion that the DISTRICT negligently relinquished custody over JUSTIN after school without providing proper supervision or adult guidance – and then released him into a dangerous situation (Pltffs' Opp., at 6-7), *i.e.*, the apparent theory being that because the DISTRICT did not provide guidance upon dismissal – or a formal announcement cancelling the baseball practice – it supposedly set in motion a chain of events which effectively compelled JUSTIN to walk home, thereby wrongfully exposing him to the alleged dangers posed by South Woods Road.

"Although a school district breaches a duty of care when it 'releases a child without further supervision into a foreseeable hazardous setting it had a hand in creating'" (*Chalen v Glen Cove School Dist., supra*, at 509, *quoting from, Ernest v Red Creek Cent. School Dist.*, *supra*, at 672), "to impose liability on the school, it must have sufficiently specific knowledge of the particular danger" (*Chalen v Glen Cove School Dist., supra, at* 509 *see, Mirand v City of New York*, *supra,* at 49; *Ronan v School Dist. of City of New Rochelle*, *supra; Siller v Mahopac Cent. School Dist.,* 18 AD3d 532, 795 NYS2d 605 [2nd Dept. 2005]). The record supports the DISTRICT's assertion that there is no proximate correlation or nexus between the traffic issues identified by the plaintiffs, and the hazard which actually caused JUSTIN's injury. More specifically, there is nothing of a probative

nature in the record which suggests that the DISTRICT exposed JUSTIN to any foreseeable hazard merely by dismissing him as it did after the practice had been cancelled – even if it had been aware that JUSTIN was intent upon walking home.

Indeed, to the extent traffic or safety issues existed which in any way involved the DISTRICT, they were limited both temporally and geographically to stated periods in the morning and then primarily confined to the school entrance area – not the location where the accident occurred. The record plainly establishes that the traffic issue which existed, primarily involved excessive, early morning congestion which brought traffic to a standstill and prevented buses and faculty from accessing school premises in a timely fashion. Here, however, the accident took place south of the school entrance, after schools hours, and occurred only when JUSTIN himself elected to cross in the middle of the street, away from an available, signalized intersection at Syosset-Woodbury Road en route to his home (Vehicle and Traffic Law, § 1152[a]).

Further, and even assuming *arguendo*, that terminating an on-site baseball practice after school without advanced notice could be viewed as improper – the record demonstrates that immediately after the practice was cancelled, JUSTIN did, in fact, notify his mother, who was thereby afforded the opportunity to select whatever course of action she deemed best with respect to his departure from school grounds. In any event, it is undisputed that bus service was provided by the DISTRICT and was available as a departure option that afternoon– whether JUSTIN had utilized this service in the past or not (Pltffs' Opp., at 8). Nor was the DISTRICT negligent because, after the practice was cancelled, it did not affirmatively chaperone JUSTIN to a particular bus or explain to him which of the available buses he could or should have taken home (*see, Silver v Cooper*,

199 AD2d 255, 604 NYS2d 968 [2nd Dept. 11993]; *cf., Gross v Bezek,* 39 AD3d 1234, 833 NYS2d 798 [4th Dept. 2007]; *Woodworth v Hink*, 34 AD3d 1192, 824 NYS2d 545 [4th Dept. 2006]) (Pltffs' Opp., at 8).

Lastly, the record does not support the plaintiffs' claims that the DISTRICT assumed a special duty to either JUSTIN or his parents (see generally, *Cuffy v City of New York,* 69 NY2d 255, 513 NYS2d 372, 505 NE2d 937 [C.A.1987]; *Curcio v Watervliet City School Dist.,* 21 AD3d 666, 800 NYS2d 466 [3rd Dept. 2005]). The Court finds that none of the plaintiffs' remaining contentions is sufficient to defeat the DISTRICT's motion for summary judgment.

As to the TOWN

It is clear that, "[a] municipality has a legal duty to construct and maintain its highways in a reasonably safe condition" and to "guard against contemplated and foreseeable risks to motorists" (*Gutelle v City of New York*, 55 NY2d 794, 447 NYS2d 422, 432 NE2d 124 [C.A. 1981]; *Sweet v Town of Wirt*, 23 AD3d 1097, 803 NYS2d 867 [4th Dept. 2005]; *see also, Stiuso v. City of New York,* 87 NY2d 889, 639 NYS2d 1009, 663 NE2d 321 [C.A.1995]; *Gomez v New York State Thruway Authority*, 73 NY2d 724, 200 NYS2d 409, 167 NE2d 63 [C.A.1988]; *Weiss v Fote,* 7 NY2d 579, 200 NYS2d 409, 167 NE2d 63 [C.A.1960]). Specifically, "[t]he design, construction, and maintenance of public highways is entrusted to the sound discretion of municipal authorities * * *" (*Levi v Kratovac*, *supra*, at 549).

Notably,"[o]nce the State is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger" (*Friedman*

v State, 67 NY2d 271, 502 NYS2d 669, 493 NE2d 893 [C.A. 1986]). Additionally, "[o]ne who is injured in a traffic accident can recover against a municipality if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that this omission was a contributing cause of the mishap, and that there was no reasonable basis for the municipality's inaction" (*Alexander v Eldred,* 63 NY2d 460, 483 NYS2d 168, 472 NE2d 996 [C.A. 1984]; *see also*, *Ernest v Red Creek Cent. School Dist.*, *supra*, at 673). However, "as long as a highway is reasonably safe for those who obey the rules of the road, the duty of the municipality is satisfied" *(Levi v Kratovac*, *supra*, at 549). Of course, "[n]o liability will attach unless the alleged negligence of the municipality in maintaining its roads is a proximate cause of the accident" (*Levi v Kratovac, supra; see, Schmidt v Policella,*__AD3d__, 842 NYS2d 539 [2nd Dept. 2007]), unless it is established "'that the defendant's negligence was a substantial cause of the events which produced the injury'" (*Maheshwari v City of New York,* 2 NY3d 288, 778 NYS2d 442, 810 NE2d 894 [C.A. 2004], *quoting from, Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [C.A.1980];*Vega v State*, 37 AD3d 825, 831 NYS2d 246 [2nd Dept. 2007]).

The record supports the TOWN's assertion that there were no incidents, occurrences, reports or prior complaints that the area where the accident occurred was hazardous, unsafe or in any respect unreasonably dangerous "for those who obey the rules of the road" (*Levi v Kratovac, supra,* at 550). It follows, similarly, that the TOWN had no actual or constructive notice of any alleged dangerous or defective condition (*see e.g.*, *Berlowitz v Town of Brighton*, 259 AD2d 983, 983; *White v Town of Islip*, 249 AD2d 464; Town Law § 65-a [1]; Town of Oyster Bay Code of Ordinances, § 160-1[A]).

The plaintiffs' claim that, *inter alia*, the TOWN failed to conduct a traffic safety survey and/or failed to place speed bumps, stop signs, school cross walks, guards or warning devices on South Woods Roads, is unpersuasive and unavailing (Zervopoulus Opp Aff.,¶¶ 8-9, 13-17, 34). There is no foundational evidence demonstrating that the accident location itself was dangerous in the first place and, therefore, that a traffic study or other remedial intervention was required (*cf., Friedman v State, supra,* at 283; *Carlo v Town of East Fishkill*, 19 AD3d 442, 798 NYS2d 64 [2nd Dept. 2005]). Nor does the evidence otherwise establish that any particular or relevant feature of South Woods Road was a proximate cause of the accident (*Levi v Kratovac, supra,* at 550). The Court notes that the plaintiffs have not submitted expert evidence supporting the assertion that the subject location was dangerous or defectively designed.

To the contrary, the record is persuasive that the actions of LOBO, in the operation of her vehicle, taken together with the manner in which – and where – the plaintiff elected to cross the road, were the cumulative and effective causes of the ensuing injury (*see generally*, *Vega v State, supra*; *Sinski v State of New York*, 2 AD3d 517, 767 NYS2d 874 [2ndDept. 2003]; *see also,* Vehicle and Traffic Law § 1152[a]; *see*, *Levi v Kratovac, supra; Lastuvka v Pearson,* 32 AD3d 500, 820 NYS2d 630 [2nd Dept. 2006]). The plaintiffs' reliance upon *Ernest v Red Creek Cent. School Dist., supra.* – where a trial was conducted – is misplaced since there, a second grade "walker" who was hit by a bus, was dismissed from school in violation of school policy to hold students until all buses had departed. Although liability was also affirmed as against the defendant County of Wayne, there were numerous verbal communications and letters written by the School district to the County

expressly warning that the failure to extend a sidewalk from directly across the school driveway posed a specific and particular risk to students walking home from school (see, *Affleck v Buckley*, 96 NY2d 553, 732 NYS2d 625, 758 NE2d 651 [C.A. 2001]). There are no such circumstances presented at bar.

As to the COUNTY

In support of its application, the COUNTY asserts, *inter alia*, that since South Woods Road is a TOWN road, the COUNTY's involvement is limited solely to issues, if any, involving the traffic signal device located further south of the accident site at the intersection of South Woods and Syosset Woodbury Roads (Gray Aff., at 9-10).

In opposition to the motion, the plaintiff principally claims that the COUNTY voluntarily assumed a special relationship and ensuing duty to JUSTIN, by responding to the DISRICT's request for police intervention to monitor traffic on Southwoods Road (Zervopoulos Aff.,¶ 13). The Court disagrees.

In order to establish the existence of a special duty, it is necessary to demonstrate, *inter alia,* an assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured, and that party's justifiable reliance on the municipality's undertaking (*Laratro v City of New York*, 8 NY3d 79, 828 NYS2d 280, 861 NE2d 95 [C.A.2006]; *Cuffy v City of New York, supra*; *Hynes v Town of Cornwall*, 234 AD2d 423, 651 NYS2d 147 [2nd Dept. 1996]; *see also*, *Jerideau v Huntington Union Free School Dist.*, 21 AD3d 992, 801 NYS2d 394 [2nd Dept. 2005]; Goga v. *Binghamton City School Dist.*, 302 AD2d 650, 754 NYS2d 734 [3rd Dept. 2003]).

The Court finds that the COUNTY has made a *prima facie* showing of its entitlement to summary judgment by demonstrating that it owed no special duty to the plaintiffs. In response, the plaintiffs have failed to raise a triable issue of fact (*Jerideau v Huntington Union Free School Dist.*, *supra*). As noted previously by the Court, and as established by the parties' submissions, the COUNTY and/or police intervention relative to South Woods Roads was primarily based upon early morning congestion generated by the large number of parents who regularly dropped off students in front of the school. The relevant school notices and additional evidence submitted plainly support this inference, since they indicate that the police were summoned for a relatively narrow, discrete and particular purpose, *i.e.,* to enforce the school's new policy which entailed, *inter alia*: (1) closing the front of the building to private traffic between 7:00 and 7:30 am – including the visitor's parking area; (2) allowing only school buses to enter school grounds during this discrete time period; and (3) redirecting student drivers to the student parking lot on Pell Lane (District's Exh., "Q"). There is nothing in the record supporting the claim that the COUNTY assumed a special duty – or any duty – to monitor traffic conditions and/or supervise student walkers during after-school hours along the length of South Woods Road to its intersection with Syosset Woodbury Road (*see, Norton v Canandaigua City School Dist.*, 208 AD2d 282, 624 NYS2d 695 [4th Dept. 1995]).

Nor has there been proof adduced that the plaintiffs relied on any promise or conduct of the COUNTY that it would provide protection to JUSTIN as he crossed the street where he did (*Norton v Canandaigua City School Dist.*, *supra see, Woodworth v Hink*, *supra*, at 1193;*Wenger v Goodell*, *supra*). The Court notes further that Mrs. Avelar

stated that she did not make any complaints to the COUNTY regarding traffic conditions on South Woods Road and was not aware if anyone else had (June Avelar (March 21 Dep] at 93-94; P. Avelar Dep., at 24-25).

In any event, it is settled that "[a] municipality will not be held responsible for negligent design or maintenance of a highway it does not own or control" (*Ernest v Red Cr. Cent. School Dist., supra*, at 675, *Flynn v Hanken*, 17 AD3d 523, 793 NYS2d 162 [2nd Dept. 2005]). Here, the COUNTY did not own or maintain South Woods Road and absent proof of a dangerous condition for which it could be held responsible – not submitted here – there can be no liability imposed upon this defendant.

Summary Judgment

It is settled that "[n]egligence cannot be presumed from the mere happening of an accident" (*Mochen v State*, 57 AD2d 719, 396 NYS2d 113 [4th Dept. 1977]; *see also*, *Levinstim v Parker*, 27 AD3d 698, 815 NYS2d 596 [2nd Dept. 2006]; *Drivas v Breger*, 273 AD2d 151, 709 NYS2d 187 [1st Dept. 2000]). Although summary judgment is a drastic remedy (*Andre v Pomeroy*, *supra*), nevertheless a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590, 511 NYS2d 31 [2nd Dept. 1987]; see, *Rotuba Extruders Ceppos*, 46 NY2d 223, 413 NYS2d 141, 385 NE2d 1068 [C.A. 1978]), and where there is nothing left to be resolved at trial, the case should be summarily decided (*Andre v Pomeroy, supra*, at 364). Further,"'[a]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment'" (*Banco Popular North America v Victory Taxi Management, Inc.,* 1 NY3d 381, 774 NYS2d 480, 806 NE2d 488 [C.A.2004],

quoting from, Mallad Constr.Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 [C.A.1973]).

Conclusion

The Court has considered the plaintiffs' remaining contentions and concludes that none is sufficient to defeat the defendants' motions for summary judgment. Accordingly, it is hereby

ORDERED that the motions by the defendants, SYOSSET CENTRAL SCHOOL DISTRICT, the COUNTY OF NASSAU, the TOWN OF OYSTER BAY and the TOWN OF OYSTER BAY DEPARTMENT OF PUBLIC WORKS, for summary judgment dismissing the complaint are granted and the complaint is dismissed insofar as asserted against them; and it is further

ORDERED, that the action is severed and continued against the defendants, CHRYSTABELLE LOBO and SANFORD LOBO; and it is further

ORDERED, that the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

JUSTIN AVELAR, an infant over the age of 14 years, by his mother and natural guardian, JUNE AVELAR and JUNE AVELAR, individually,

Plaintiffs,

-against- **INDEX NO: 9032/05**

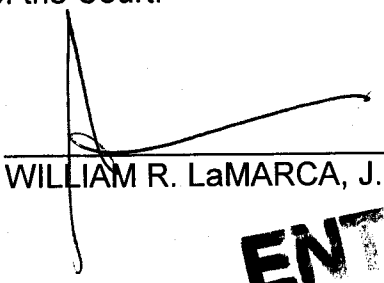
CHRYSTABELLE MARIE CECLIA a/k/a CHRYSTABELLE LOBO and SANFORD E. LOBO,

Defendants.

All further relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: November 1, 2007



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