SHORT FORM ORDER

INDEX No. 04-18474
CAL. No. 07-01098-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

***PRESENT:***

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-14-07 (007)
MOTION DATE 7-26-07 (009, 010, 011)
MOTION DATE 9-6-07 (012, 013, 015, 016, 017)
MOTION DATE 9-11-07 (014)
MOTION DATE 10-5-07 (018, 019)
ADJ. DATE 9-6-07 (007, 010, 011)
ADJ. DATE 10-25-07(009,012,013,015,016,017,019)
ADJ. DATE 9-11-07 (014)
ADJ. DATE 10-5-07 (018)

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| Mot. Seq. # 007 - MG | Mot. Seq. #014 - MG |
| Mot. Seq. # 009 - MotD | Mot. Seq. #015 - XMG |
| Mot. Seq. #010 - XMD | Mot. Seq. #016 - XMD |
| Mot. Seq. #011 - XMotD | Mot. Seq. #017 - XMG |
| Mot. Seq. #012 - MG | Mot. Seq. #018 - MD |
| Mot. Seq. #013 - XMG | Mot. Seq. #019 - XMD |

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GINA RUDDEN, individually, and as mother and natural guardian of BRYAN RUDDEN, an infant,

Plaintiff,

- against -

FRANCINE BERNSTEIN, ROBERT CLAVIN, DENNIS AVETA, DEBRA AVETA, KAITLIN SMIRALDO, ANDREA WESTRACK, LAKE SHORE WINE & LIQUOR, INC., RONALD OWSENEK and the TOWN OF ISLIP,

Defendants.

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Upon the following papers numbered 1 to 189 read on these motions for, *inter alia*, summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-31; 46-51; 58-71; 98-103 ; Notice of Cross Motion and supporting papers 32-40; 41-45; 52-57; 72-86; 87-92; 93-97; 104-112 ; Answering Affidavits and supporting papers 113-125; 126-143; 144-155; 146-148; 149-151; 152-154; 155-157; 158-161; 162-166; 167-171 ; Replying Affidavits and supporting papers 172-174; 175-177; 178-181; 182-184 ; Other memoranda of law 185-186; 187-188; 189 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (007) by the Town of Islip for summary judgment dismissing all claims in this action against it is granted, and the cross motion (010) by plaintiffs for partial summary judgment against the Town on the issue of liability is denied; and it is

***ORDERED*** that the motion (009) by defendant Westrack and the cross motion (011) by defendant Kaitlin Smiraldo for summary judgment dismissing all claims against them in this action are determined as set forth below; and it is

***ORDERED*** that the motion (014) by defendants Lake Shore and Owsenek for summary judgment dismissing all cross claims for contribution and indemnification asserted against them is granted; and it is

***ORDERED*** that the cross motion (015) by defendants Aveta for summary judgment dismissing all claims against them on the basis that they bear no liability for the accident is granted, and that the cross motion (016) by defendants Aveta to amend their answer to add an affirmative defense under the General Obligations Law § 15-108 is denied; and it is

***ORDERED*** that the motion (012) by defendant Smiraldo, the cross motion (013) by defendants Bernstein/Clavin, and the cross motion (017) by defendant Westrack for an order permitting them to amend their answers to add an affirmative defense under the General Obligations Law § 15-108 are granted; and it is

***ORDERED*** that the motion (018) by plaintiffs for an order pursuant to CPLR 5003-a (e) compelling defendants Lake Shore and Owsenek to pay the judicially approved settlement sum of $20,000 is denied without prejudice, subject to renewal as set forth below; and it is further

***ORDERED*** that the cross motion (019) by plaintiffs for an order permitting them to amend their complaint to add a claim against defendant Dennis Aveta, individually, as parent and natural guardian of Danielle Aveta, an infant, or in the alternative, to strike the affirmative defense of culpable conduct asserted in each of the defendants' answers is denied in its entirety.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by infant plaintiff when he was struck by a motor vehicle operated by defendant Robert Clavin or defendant Francine Bernstein and owned by Bernstein in the vicinity of 10 Parkway Boulevard, Town of Islip, New York on January 31, 2004 at about 10:55 p.m. At the time of the accident, plaintiff was allegedly walking home on Parkway Boulevard after he attended Danielle Aveta's birthday party at the home of her parents, defendants Dennis and Debra Aveta.

By their amended verified complaint, plaintiffs assert nine causes of action. The first cause of action alleges that defendant Bernstein was negligent in the use and operation of her vehicle, and that her actions proximately caused plaintiff's injuries. The first cause of action alleges, in the alternative, that Bernstein is

vicariously liable to plaintiffs as she negligently entrusted her vehicle to Clavin, while he was intoxicated and/or under the influence of alcohol, and that Clavin's actions proximately caused plaintiff's injuries. The second cause of action alleges that defendant Clavin was grossly negligent and reckless in the use and operation of Bernstein's vehicle, as he was driving while intoxicated and/or under the influence of alcohol, and that his actions proximately caused plaintiff's injuries. The third cause of action alleges that defendants Aveta failed to maintain their premises in a safe manner for plaintiff and other underage guests/invitees, who consumed alcohol in and around the Aveta premises, and that defendants Aveta negligently permitted plaintiff to walk home despite the fact that he was intoxicated. The fourth cause of action alleges that defendants Smiraldo and Westrack violated General Obligations Law § 11-100 by furnishing alcoholic beverages to or unlawfully assisting in the procuring of alcoholic beverages for plaintiff with the knowledge that he and other guests/invitees at their residence were under the age of 21 years, and that plaintiff's injuries occurred while he was intoxicated. The fifth cause of action, which sounds in common law negligence, alleges that defendants Smiraldo and Westrack violated the Beverage Control Law § 65 and Penal Law § 260.10 in that they purchased, sold and/or provided alcohol to minors including plaintiff, and thereby created a foreseeable risk of harm to the plaintiff, who became intoxicated and sustained serious personal injuries. The sixth cause of action alleges that defendants Lake Shore and Owsenek knowingly caused the intoxication or impairment of plaintiff by unlawfully furnishing to or unlawfully assisting in the procuring of alcoholic beverages for him, with the knowledge that he and other guests/invitees were under the age of 21 years, and that plaintiff was injured by reason of his own intoxication or impairment. The seventh cause of action alleges that defendants Lake Shore and Owsenek violated the Beverage Control Law § 65 and Penal Law § 260.10 in that they sold alcohol to guests/invitees at the Aveta party and that plaintiff, who consumed the same, became intoxicated and sustained serious personal injuries as a result of his own intoxication. The eighth cause of action alleges that defendant Town failed to provide sidewalks and adequate roadway lighting, and that it failed to properly plow the roadway where plaintiff was struck, and that as a result of its "foregoing negligence," plaintiff sustained serious personal injuries. The ninth cause of action alleges that plaintiff Gina Rudden sustained damages in her individual capacity in that she was deprived of the services and support of infant plaintiff, and that she expended sums of money for his medical expenses, due to injuries which were caused by defendants' negligence and recklessness.

In its answer to the amended complaint, the Town asserts, inter alia, affirmative defenses that the risks and dangers, if any, were open and obvious, and that, in any event, the Town was not given prior notice of the purported condition. The Town also asserts as affirmative defenses, among other things, plaintiff's assumption of the risk, plaintiff's contributory negligence and co-defendants' contributory negligence. In their answers to the amended complaint, co-defendants Town, Westrack, and Aveta assert cross claims against co-defendants sounding in contribution and indemnification. In her answer to the amended complaint, co-defendant Smiraldo asserts a cross claim against co-defendants sounding in contribution. Defendants Bernstein and Clavin, however, did not assert cross claims in their respective answers. Defendants Lake Shore and Owsenek interposed an answer to the original complaint along with cross claims sounding in contribution and indemnification against co-defendants. Thereafter, defendants Lake Shore/Owsenek and plaintiffs entered into a written stipulation of settlement dated July, 2005 in which the sum of $20,000 was to be paid in consideration of the discontinuance of this action by plaintiffs against Lake Shore and Owsenek, subject to Court approval. By order dated June 5, 2006 (Loughlin, J.), a prior motion by plaintiffs to amend the pleadings to add, inter alia, a claim pursuant to General Obligations Law § 11-101

against defendants Smiraldo and Westrack was denied. Then, by order dated March 20, 2006 (Loughlin, J.), a prior motion by defendants Lake Shore and Owsenek for summary judgment dismissing co-defendants' cross claims asserted against them was denied with leave to renew, subject to judicial approval of the proposed settlement. Thereafter, by order dated June 11, 2007 (Kerins, J.), Mrs. Rudden was authorized to accept the sum of $20,000 in full settlement of plaintiffs' claims against Lake Shore and its owner Owsenek, and to execute and deliver a general release and any other instruments necessary to effectuate the settlement. The note of issue was subsequently filed in this action on May 4, 2007.

Defendant Town now moves for summary judgment dismissing all claims against it on the basis that there is no evidence that there was a defective condition of the subject roadway, and that, in any event, it was not furnished with prior written notice of any defect. Plaintiffs oppose the Town's motion and cross move for partial summary judgment against the Town on the issue of liability arguing that an issue of fact exists as to whether the Town created the alleged defective condition.

Pursuant to Town Law § 65-a and the Town of Islip Code § 47A-3, no civil action for injuries sustained as a result of a highway or sidewalk defect may be maintained unless prior written notice of the defect was given to the Town Clerk or the Commissioner of Public Works, and the Town failed to correct such condition within a reasonable time after receipt of such notice. The prior written notice law, which insulates the Town against liability for defects that are the result of nonfeasance, must be read to refer to physical defects in the surface of the streets or sidewalks, like holes or cracks, which do not immediately come to the attention of town officers unless they are given notice thereof (*see*, ***Hughes v Jahoda***, 75 NY2d 881, 554 NYS2d 467 [1990]; ***Doremus v Incorporated Vil. of Lynbrook***, 18 NY2d 362, 275 NYS2d 505 [1966]). The lack of prior written notice, however, will not bar a claim to recover damages for injuries resulting from a defective condition on a municipal street or sidewalk if the municipality created the hazardous condition through an affirmative act of negligence (*see*, ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Demant v Town of Oyster Bay***, 23 AD333, 804 NYS2d 107 [2005]).

Where a defendant has satisfied its burden of showing the absence of actual or constructive notice of an allegedly dangerous condition, the plaintiff is required to show by specific factual references that the defendant had knowledge of the alleged condition, or that it created or exacerbated the alleged dangerous condition through its affirmative negligent acts (*see*, ***Shannon v Village of Rockville Ctr.***, 39 AD3d 528, 834 NYS2d 537 [2007]; ***Manzione v Wal-Mart Stores, Inc.***, 295 AD2d 484, 744 NYS2d 466 [2002]). Even an expert's affidavit can fail when it is based upon hearsay or conclusory assertions devoid of evidentiary facts (*see*, ***Amatulli v Delhi Construction Corp.***, 77 NY2d 525, 569 NYS2d 337 [1991]; ***Doherty v County of Albany***, 25 AD3d 855, 807 NYS2d 200 [2006]; ***Grullon v City of New York***, 297 AD2d 261, 747 NYS2d 426 [2002]). Furthermore, a municipality's mere nonfeasance such as the failure to remove ice and snow, as opposed to affirmative negligence, does not invoke the exception (*see*, ***Gorman v Ravesi***, 256 AD2d 1134, 684 NYS2d 386 [1998]).

In support of its motion, the Town submits, inter alia, the plaintiffs' amended verified complaint; the Town's answer to the amended complaint; plaintiffs' verified bill of particulars in response to the Town's demand; the personal affidavit of Peter Kletcka, Deputy Commissioner of Public Works for the Town of Islip; and the personal affidavit of Penny Schmidt, Executive Assistant to the Town Clerk for the Town of Islip. With respect to the Town, plaintiffs claim, in their bill of particulars, that the Town of Islip was

negligent in the design, construction and maintenance of the roadway and surrounding environment in and around the accident site, including the failure to provide adequate roadway lighting; the failure to provide sidewalks; the careless removal of snow; and the failure to warn the general public of a hazard.

In his affidavit, Mr. Kletchka avers that his record search for the three year period ending on January 31, 2004 showed a telephone complaint on January 23, 2004, regarding a non-functioning street light on Parkway Boulevard near Apache Boulevard in Ronkonkoma. The records of his office further also showed that the light had been replaced on January 27, 2004. Furthermore, these records showed no written notice of any complaints regarding the lighting or snow removal conditions on that roadway for the subject period. In her affidavit, Ms. Schmidt avers that her record search for Parkway Boulevard, Ronkonkoma for the three year period ending on January 31, 2004 showed no written notice of any complaints regarding the lighting or snow removal conditions for the relevant period.

In support of their cross motion for partial summary judgment and in opposition to the Town's motion, plaintiffs submit, among other things, the deposition testimony of Michael Guarino as well as the personal affidavit and sworn report of plaintiff's expert, Michael Kravitz, P.E. Mr. Guarino testified to the effect that he has been employed by the Town of Islip as a highway crew leader and labor foreman for the past six years. According to Mr. Guarino, documents which he reviewed show that the last day it had snowed prior to the date of the accident was January 27, 2004. The Town routinely directs its employees and vendors to plow when at least three inches or more of snow has fallen. There were no written materials that he was aware of that provided guidance as to how or when roadways could be plowed in the Town of Islip. He also testified that Michael Anthony, a Town employee plowed "Sector 4," a school bus route, which includes Parkway Boulevard and the Cherokee Elementary School, in January 2004. Standard protocol was for Sector 4 to be plowed from "mailbox to mailbox" to "open" the roadway. The time frame in which the Town had to clear streets depended on how much snow had fallen. During the last week of January 2004, he supervised snow plowing on Parkway Boulevard by meeting up with employees and vendors every three hours. Mr. Guarino further testified that there were no complaints registered in his foreman's logbook concerning the roadway conditions on Parkway Boulevard after January 27 and prior to February 1, 2004.

In his personal affidavit, Mr. Kravitz avers that it is his opinion that the Town breached its standard, the standard of care of the American Association of State Highway and Transportation Officials ("AASHTO"), and the New York State Department of Transportation Highway Maintenance Guidelines for Snow and Ice Removal, and that this was a proximate cause of plaintiff's injuries. In his report dated June 2, 2007, Mr. Kravitz opines, among other things, that his inspection and measurements show that the roadway in front of 10 Parkway Boulevard was improperly plowed prior to the subject incident in that the pavement was not cleared, and that this created a narrow, fourteen foot passage which was hazardous for pedestrians. In opposition to plaintiff's motion, the Town submits the affidavit of Donald F. Caputo, Commissioner of Public Works for the Town of Islip. Mr. Caputo avers that the Town is not required to follow the standard of care of AASHTO or the New York State Department of Transportation Highway Maintenance Guidelines for Snow and Ice Removal, and that, in any event, no directive has been issued by the New York State to the Town in this regard.

By its submissions, the Town made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that it had no prior notice of an icy or snowy condition or of any improper plowing on the subject roadway prior to the accident (*see*, Town Law § 65-a; Town of Islip Code § 47A-3; ***Akcelik v Town of Islip***, 38 AD3d 483, 831 NYS2d 491 [2d Dept 2007]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). In opposition, plaintiffs failed to submit competent evidence that the Town had the required notice prior to the accident or that it affirmatively created the defect (*see*, ***Adams v City of Poughkeepsie***, 296 AD2d 468, 745 NYS2d 203 [2002]; ***Gianna v Town of Islip***, 230 AD2d 824, 646 NYS2d 707 [1996]). The speculative affidavit of plaintiffs' expert, which is largely based upon photographs of the scene, is insufficient to raise a triable issue of fact (*see*, ***Myrow v City of Poughkeepsie***, 3 AD3d 480, 769 NYS2d 604 [2004]; ***Leggio v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2002]). Further, even if the Town had failed to properly clear snow and/or ice from the subject roadway, this fact alone, even if established, would not invoke the exception to the notice requirement (*see*, ***Gorman v Ravesi***, *supra*; ***Palkovic v Town of Brookhaven***, 166 AD2d 566, 560 NYS2d 850 [1990]; ***Radicello v Village of Spring Valley***, 115 AD2d 466, 495 NYS2d 702 [1985]). In any event, even if a hazardous condition existed on the subject roadway, a fact which has not been established, the condition of the roadway, at most, merely provided one of several conditions for the ensuing pedestrian knockdown and was not one of the proximate causes (*see*, ***Schmidt v Policella***, 43 AD3d 1141, 842 NYS2d 537 [2007]; ***Bacon v Mussaw***, 167 AD2d 741, 563 NYS2d 854 [1990]). Plaintiff was not compelled to walk home the night of the accident; rather the decision was his independent choice, and that he selected his route of travel (*cf.*, ***Raimon v Ithaca***, 157 AD2d 999, 550 NYS2d 479 [1990]).

Defendant Westrack now moves, and defendant Kaitlin Smiraldo cross moves, for summary judgment dismissing all claims against them on the basis that plaintiffs are, as a matter of law, without a right to recover under General Obligations Law § 11-100 or common law negligence, due to infant plaintiff's alleged voluntary intoxication. Defendants also assert that they are not liable to plaintiff Gina Rudden individually, as she allegedly caused and/or contributed to infant plaintiff's intoxication by allowing him to consume alcohol on the day of the accident. Defendants further argue that General Obligations Law § 11-100, in any event, limits recovery to actual damages. Defendants Aveta cross move for summary judgment on the basis that they bear no liability for the accident, alleging that it did not occur anywhere on their premises. In this regard, defendants Aveta allege that alcohol was not served to plaintiff or any other underage guests on their premises and that, in any event, they did not observe the consumption of alcohol by plaintiff or any other underage guests while they were at their home.

In support of her motion, defendant Westrack submits, inter alia, the deposition testimony of nonparty witness Stan Hartnett, Kevin Booraf, Katelyn O'Brien, and James Tripodi. In support of her cross motion, defendant Kaitlin Smiraldo submits, among other things, the affirmation of counsel which adopts the factual and legal arguments set forth in the affirmation of counsel in support of the main motion as well as excepts of the deposition testimony of infant plaintiff. In support of their cross motion, defendants Aveta submit, inter alia, the plaintiff's verified bill of particulars in response to their demand; the deposition testimony of nonparty witnesses, Alexis Trupia and Kathleen Walsh; and their own deposition testimony. Plaintiffs allege, in their verified bill of particulars, that defendants Aveta were negligent in that they failed to supervise the party at their house; in allowing alcohol to be available and consumed at the party; in failing to maintain their premises in a safe and orderly manner for guests/invitees; in "failing to ascertain how and

with whom Bryan Rudden would get home safely"; and in acting in a reckless and/or careless manner in that they disregarded the well-being of their guests/invitees. Plaintiffs also allege that alcohol was consumed in and "around" the Aveta residence, including the basement.

Stan Hartnett testified to the effect that he went to Bryan Rudden's house with his friend Ron Becker on January 31, 2004. When he arrived at about 6 to 7 p.m., Kevin Booraf was already there, but Bryan's parents were not home. While outside, he was able to see through a window and observed Kevin and Bryan, who were inside, drinking beer. He had also seen Bryan consume alcohol about four or five prior occasions. When Bryan and Kevin came out, he noticed that Bryan's eyes were glassy and that he appeared to be "pretty bad[ly]" drunk. About one half-hour later, they walked for fifteen minutes to the Aveta residence. When they arrived, Mrs. Aveta briefly greeted them and told them that the party was downstairs. While at the party for the first hour or two, Bryan was a little loud, but he was not slurring his words. At some point thereafter, a group consisting of Bryan, Kevin, Ron, James and Stan went to the Cherokee Street school, and everyone except Stan consumed alcohol. He and a few others came back to the party sooner than Ron and Kevin. After Stan returned, he noticed that Kathleen Walsh seemed drunk. At no time, however, did he observe anyone inside the Aveta house consuming or providing alcohol to anyone else. At some point thereafter, Stan overheard Mrs. Aveta tell Ron, who appeared to be drunk, to remain inside, but Ron disregarded her direction and left. Kevin's parents arrived about five to ten minutes later and took Kevin home. Then, when Mrs. Aveta was in a different part of the house, he and Bryan "just left" by walking out the front door without saying "goodbye." It was his opinion that Bryan had sobered up when they finally left. As they were walking in the roadway, Bryan stopped to remove his headband. At this point a car, which was going "pretty fast," brushed by him and hit Bryan. He then saw a man who was loud, obnoxious and unsteady exit his vehicle. A woman remained inside the vehicle sitting in the passenger seat. Stan further testified that the man used foul language and blamed Bryan, who was unconscious, for the accident.

Kevin Booraf testified to the effect that he had been personally invited by Danielle to her birthday party. About one hour beforehand, Kevin had gone to Bryan's house and drank some beer with Bryan. Kevin drank about four cans of beer, however, he did not remember how many Bryan had consumed. When Kevin was about to leave, he felt lightheaded and "buzzed." After walking about ten to twenty minutes, they arrived at Danielle's party at about 7 p.m. As they entered, they said hello to Mrs. Aveta and then walked down to the basement. While at the party, he did not see any alcohol being served or consumed by those present. While at the party, Kevin and Bryan gave Katelyn O'Brien money to purchase alcohol from someone. Sometime later, a car stopped outside of the Aveta residence where liquor, which had been placed in a bag, was dropped off and then brought to the school. After about an hour, Kevin and his friends went to the Cherokee Street school. While at the school, Kevin and Ron began drinking rum and vodka before the others had arrived. Kevin and Ron were also the last ones remaining at the school after everyone else had already returned to the party. On his way back, Kevin fell into a snowbank about thirty feet from the school and could not get back up. Kevin further testified that he did not remember anything else that had subsequently transpired that evening.

Katelyn O'Brien testified to the effect that she arrived at Danielle's birthday party at about 7:45 p.m. About one-half hour later, while she and Doug were in the basement, she made some calls on her cell phone to purchase alcohol from Ms. Westrack. While Danielle and her parents were upstairs, she and James

Tripodi then collected money from Kevin, Ralph, Joe Smiraldo and Kathleen, telling them that they were "going to drink at Cherokee." When Ms. Westrack arrived by car, Ms. O'Brien and James went outside and gave her the money, telling her to get the "strongest stuff." Upon Westrack's return, Bryan and Doug "ran out" to the passenger side of the car, took a brown paper bag that was handed to them, and then ran towards Cherokee. The rest of the guys then ran from the Aveta residence to Cherokee. While Ms. O'Brien had intended on going to the school to drink, she changed her mind and remained at the party after having a conversation with Danielle. During the party, Ms. O'Brien did not see any alcohol being brought into or consumed at the Aveta house. Ms. O'Brien further testified that Bryan admitted to her that he had been drinking at his own house prior to his arrival.

James Tripodi testified that he attended Danielle Aveta's birthday party on the day of the accident. He was in the basement of the Aveta house when Bryan, Stan and Kevin arrived. Bryan and Kevin admitted to him that they consumed alcohol at Bryan's house prior to the party and, in his opinion, they appeared to be drunk. At some point during the party, Ms. O'Brien, Doug, Ron, Kevin, Kathleen and he discussed purchasing alcohol. James told the others that he wanted to get liquor instead of beer because it "would take too long" to "drink ten beers." After money was pooled together and a phone call was made by Ms. O'Brien to an outside person, he and a few others waited on the front porch. A short while later, Ms. Westrack pulled up in her car with Ms. Smiraldo. James went up to the vehicle and took a bag containing liquor that was inside, bringing it with him to the Cherokee school. Bryan, Kathleen and a few others also came to the school. While there, Kathleen consumed some partial cups of liquor. He did not know if Bryan had anything to drink, but remembered that Bryan kept demanding that the others let him drink. When James returned to the party, he stayed upstairs for only about ten seconds in order to keep his drinking inconspicious. In his opinion, Bryan was sobering up at this time because he was no longer slurring his words. Later on, after Kathleen's intoxication became apparent, Mrs. Aveta persistently questioned him about what happened, and he initially lied to her. Although Mrs. Aveta told him to stay in the house, James went outside with Doug, Stan and Bryan, telling her that he needed to get some air. In response, she told him not to leave the porch. Kevin, who was intoxicated, then came back to the house and was taken home by his own father. Thereafter, Doug's father came and offered them a ride, but Bryan and Stan replied that they wanted to walk. A few minutes later, he received a phone call that Bryan had been hit by a car. James further testified that he did not see anyone drinking alcohol while they were on the Aveta premises.

Bryan Rudden testified to the effect that he was in the eighth grade at the time of the accident. He did not remember if he had gone to the Cherokee School or if he had been drinking alcoholic beverages the night of the accident. He took health classes in the seventh grade and received a passing grade, but did not remember what he was taught. He also did not remember how old he was at the time of the accident. Bryan further testified that he knew that it was unlawful for him to consume alcohol at the time of the accident as he was under the age of twenty-one years.

Alexis Trupia testified that she arrived at Danielle Aveta's party at about 8:30 p.m. and left at about 10:30 p.m. While she was at the party, she did not see alcohol being served to any minors and she did not observe anyone consuming alcohol. Bryan told her, however, that he had been drinking prior to the party and she noticed that he was "a little tipsy." Bryan was also laughing a lot and repeating himself, but he was not slurring his words. She also noticed that Kathleen was not acting herself. At about 9:00 p.m., Bryan told

her that he was going to the school to drink alcohol. He asked her if she wanted to come, but she declined. To her recollection, Bryan left and then returned to the party about ten minutes later. Later in the evening, she noticed that Bryan was a little worse than when he arrived at the party. Specifically, he stumbled a little and his breath smelled of alcohol. As she was about to leave, Bryan told her that his mother would be coming to drive him home. Alexis further testified that her father then drove her and three of her friends home.

Kathleen Walsh testified to the effect that she attended Danielle Aveta's birthday party on the night of the accident. When she arrived, she went downstairs into the basement where she stayed for about an hour. At some point, she had given Ms. O'Brien about five dollars for the purchase of alcohol which was to be consumed at the Cherokee Elementary School. She did not, however, observe anyone drinking alcohol at the Aveta residence. She did not tell Mrs. Aveta, who was talking with someone at the time, that she was going outside. While Kathleen was at the school for a few minutes, she drank some liquor and soda. As a result, she became inebriated, but she did not think that she was so intoxicated that she had to disguise it. Bryan told Kathleen that he had been drinking beer at his home earlier in the day, but she did not know if he had consumed any alcohol at the school. At some point, after returning from the school, Kathleen fell into the bathtub of the upstairs bathroom, but was not injured. Instead, she started laughing. At some point, Danielle spoke to Kathleen about her drinking. Subsequently, Mrs. Aveta, who was visibly upset, also confronted Kathleen, at which point she admitted that she had been drinking. Kathleen further testified that Mrs. Aveta then arranged for her to get a ride home.

Mrs. Aveta testified to the effect that her daughter Danielle's birthday party was held at the family residence on Saturday, January 31, 2004. In preparation, Mrs. Aveta's brother and sister came over and watched her three younger children. Mrs. Aveta's friend Pam Klatt, who also came over at about 9:50 p.m., stayed until early the next morning. When Bryan and Kevin arrived at about 8 p.m., Mrs. Aveta told them that they were late, but no other initial conversations took place between them. In her opinion, neither Bryan nor Kevin appeared to be under the influence of alcohol when they arrived. Pam sat in the kitchen area while Mrs. Aveta cooked and brought food to the guests at various times during the party. At about 10:30 p.m., Matt Kelly brought Kevin, who appeared to be very intoxicated, back to the Aveta house along with Ron. In response, Mrs. Aveta and Matt made phone calls to Kevin's parents alerting them to the situation. Kevin's father, a police officer, then came and took Kevin home. Mr. Trupia also arrived and brought his daughter Alexis home. At about this time, Danielle came upstairs and informed her that Kathleen was drunk. Although Mrs. Aveta saw that Kathleen was "giddy" and laughing, she did not realize that Kathleen was drunk until after her daughter told her. According to Mrs. Aveta, she never expected this type of behavior by 13 and 14 year olds. Mrs. Aveta also did not know that anyone else had been drinking until she returned upstairs and saw Matt, Kevin and Ron. Then, at about 10:45 p.m., she saw Bryan leave her house with Stan, Doug, James and Ralph. When they opened the front door, she asked them where they were going, and Doug and Ralph told her that their ride had arrived. As a result, she thought that Doug's parents would be driving all of the five boys home. Mrs. Aveta further testified that she did not see Bryan or Kevin enter or exit her house other than when they first had arrived and when they had finally left.

Dennis Aveta testified to the effect that he spent most of the time during the party sitting in his kitchen area. He observed Bryan sitting with his girlfriend between 6:30 p.m. and 8:30 p.m., and it was his

opinion, that Bryan did not appear to be under the influence of alcohol. Mr. Aveta retired at about 8:30 p.m. because he was scheduled to work an very early morning shift the next day. He further testified that no alcohol was stored in the basement portion of his house on the day of the party.

In opposition to the motions of defendants Westrack and Smiraldo, defendants Bernstein and Clavin submit the affirmation of counsel. Defendants argue, among other things, that defendant Westrack admits that she illegally furnished alcohol to minors on the day of the accident, and that infant plaintiff consumed some of this alcohol prior to the accident. In opposition to the motions of defendants Westrack and Smiraldo, plaintiffs submit, inter alia, the deposition testimony of Danielle Aveta; Douglas M. Smiraldo; defendant Westrack, and defendant Smiraldo. Danielle Aveta testified to the effect that she sent out preprinted invitations to her birthday party, to approximately 28 people, including Bryan Rudden and Ms. O'Brien. She did not see or hear Kevin or Bryan arrive at the party. At some point, she saw Ms. O'Brien receiving money from James. After Ms. O'Brien told her that she wanted to purchase alcohol, she yelled at Ms. O'Brien and told her not to do so. Since Ms. O'Brien then joined her in dancing, she thought that the matter had been put to rest. After the cake had been served, however, someone at the party told her that Kathleen was drunk. At this point, Danielle asked Ms. O'Brien what to do because she had never observed anyone in an intoxicated condition. Upon Ms. O'Brien's advice, Danielle asked her mother for bread and orange juice to give to Kathleen. After inquiry by her mother, Danielle informed Mrs. Aveta that Kathleen had been drinking at the school. In response, Mrs. Aveta confronted Kathleen. Danielle then saw Kevin, who appeared to be intoxicated, being assisted by Matt Kelly onto her stoop. As party goers left, she watched them get rides home. Danielle further testified that she did not know that Bryan had left her parents' house after Kevin's father had arrived.

Douglas M. Smiraldo testified to the effect that his father drove him to the Aveta house between 7 and 8 p.m. the night of the party. Bryan and Kevin seemed "pretty drunk" when he saw them arrive. Bryan, in particular, stumbled, but did not actually fall down the stairs to the basement. Sometime later, he went outside and saw someone give a bag to James, which James then took to the school. Douglas joined James at the school along with other children from the party. Although he saw Bryan at the school, he did not know if Bryan had anything to drink. After he left the schoolyard, James went back to Danielle's party. Approximately one hour later, he saw Kevin, who was appeared to be visibly intoxicated, being brought back into the Aveta house. At this point, those who had consumed alcohol at the school started to leave the party. According to Douglas, some of the children who had been drinking wanted to avoid detection by their parents. When Douglas' father arrived, Bryan and Stan were offered a ride, but they declined. Mr. Smiraldo further testified that he did not see any children consume alcohol while on the Aveta premises.

Ms. Westrack testified to the effect that, on the evening of January 31, 2004, she received a call from Ms. O'Brien asking if Ms. Smiraldo could purchase alcoholic beverages for her and the other teenagers. After Ms. Westrack and her boyfriend Anthony picked up Ms. Smiraldo by car, they proceeded to the Aveta house stopping nearby in the roadway at about 8 or 9 p.m. They received some money from Ms. O'Brien who met them in the street, and then they proceeded directly to Lake Shore. While Westrack admitted that she and Ms. Smiraldo both walked up to the cash register, she also testified that the actual purchase of two bottles of liquor was made by Ms. Smiraldo. When they arrived back, Ms. Westrack stopped the car a little way back from the side of the Aveta house. After phoning Ms. O'Brien, Ms. O'Brien and Douglas Smiraldo came up to the car with some other kids. Anthony then lifted up the front seat where he was sitting and Ms. Smiraldo handed the liquor, which was in a brown paper bag, out the open window to her brother Douglas. Ms. Westrack admitted that she assisted in the purchase of alcoholic beverages for children she knew to be

13 or 14 years of age and that the legal drinking age in New York was 21 years. Ms. Westrack further testified that, after the accident, Ms. Smiraldo called her and asked her to give a false alibi concerning the events that transpired during the subject evening.

Ms. Smiraldo testified to the effect that she was with Ms. Westrack in Ms. Westrack's house on January 31, 2004. At approximately 6:00 p.m., they drove near the Aveta premises to pick up money for liquor on behalf of Ms. O'Brien. When they got there, Ms. O'Brien came out with a boy. Ms. Smiraldo's brother Douglas also came out and asked her to pick up beer, but she declined. Ms. Smiraldo admitted, however, that she went into the liquor store with Ms. Westrack for the purpose of purchasing liquor for Ms. O'Brien and the other children. Ms. Smiraldo also admitted that she waited in the store with Ms. Westrack until the transaction, which involved the purchase of two bottles of liquor, was completed. When they dropped off the liquor, Ms. Westrack pulled her car near the Aveta residence. Ms. Smiraldo further testified that, after Ms. Westrack handed a brown paper bag containing the liquor bottles to one child who was waiting in the street, they then drove away.

To establish a prima facie case of negligence, a plaintiff must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting therefrom (*see*, ***Solomon v New York***, 66 NY2d 1026,1027, 499 NYS2d 392 [1985]; *see also*, ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]; ***Palsgraf v Long Is. R.R. Co.***, 248 NY 339, 344, 248 NYS 339 [1928]). "Foreseeability of injury does not determine the existence of duty" (***Eiseman v State***, 70 NY2d 175,187, 518 NYS2d 608 [1987]), and, unlike foreseeability and causation, which are factual issues to be resolved on a case-by-case basis by the fact finder, whether a duty exists is a question of law for the court to decide (*see*, ***Eiseman v State***, *supra* at 187). "Foreseeability is used to determine the scope of duty, only after it has been determined that there is a duty" (***Ingenito v Rosen***, 187 AD2d 487, 488, 589 NYS2d 574; *lv denied*, 81 NY2d 705, 595 NYS2d 400 [1993]). Moreover, a defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control (*see*, ***Pulka v Edelman***, *supra* at 783-785).

At common law, one who provided liquor was not liable for injuries caused by the drinker, who was held solely responsible; instead, excessive alcohol consumption was deemed to be the proximate cause of injuries produced by those intoxicated (***D'Amico v Christie***, 71 NY2d 76, 83, 524 NYS2d 1 [1987]). By the Dram Shop Act, the Legislature created an exception to the common-law rule (*Id.* at 83). To sustain a claim under General Obligations Law §11-101, plaintiff must demonstrate that the defendant vendor unlawfully sold or assisted in procuring alcoholic beverages to or for a patron who acted or appeared to be intoxicated at the time of the sale and knowingly caused or contributed to such intoxication when said patron's intoxication caused plaintiff's injury (*see*, General Obligations Law §11-101; Alcoholic Beverage Control Law § 65; ***Sherman by Sherman v Robinson***, 80 NY2d 483, 487, 591 NYS2d 974 [1992]; ***Nehme v Joseph***, 160 AD2d 915, 554 NYS2d 642 [1990]). Liability under General Obligations Law §11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage (*see*, General Obligations Law §11-100; ***Sherman by Sherman v Robinson***, *supra* at 487-488). The term "procure" includes using one's own money to purchase alcohol for another, contributing money to the purchase of alcohol and giving away alcohol to another after purchasing it with one's own money (***Fox v Clare Rose Bev., Inc.***, 262 AD2d 526, 527, 692 NYS2d 658, *lv denied*, 94 NY2d 755, 701 NYS2d 711 [1999]; ***Slocum v D's & Jayes Val. Rest. & Café, Inc.***,182 AD2d 981, 982, 582 NYS2d 544 [1992]). General Obligations Law §11-100 requires a showing that the very minor to whom the intoxicant was sold or furnished became intoxicated, and in his or her

intoxicated state injured a third party (***Dodge v Victory Markets Inc.***, 199 AD2d 917, 919, 606 NYS2d 345 [1993]). Moreover, it is well-settled that General Obligations Law §§ 11-100 and 11-101 do not create a cause of action in favor of one injured as a result of his own intoxication (***Searley v Wegman's Food Markets, Inc.***, 24 AD3d 1202, 1202, 807 NYS2d 768 [2005]). It is equally well-established that New York courts have declined to impose common-law negligence liability upon dispensers and providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication (*see, e.g.*, ***Sheehy v Big Flats Community Day, Inc.***, 73 NY2d 629, 636, 543 NYS2d 18 [1989]; ***Searley v Wegman's Food Markets, Inc.***, *supra*; ***Reuter v Flobo Enterprises, Ltd.***, 120 AD2d 722, 503 NYS2d 67 [1986]). Additionally, mere infancy of the injured person does not constitute an exception to the voluntary intoxication rule (*see*, ***Sheehy v Big Flats Community Day, Inc.***, *supra*; ***Searley v Wegman's Food Markets, Inc.***, *supra*). The infant's parents, however, may sue individually under the Dram Shop Act for the loss of future support and medical expenses (*see*, ***Ray v Galloway's Café***, 221 AD2d 612, 634 NYS2d 495 [1995]; ***Schradeer v Carney***, 198 AD2d 779, 604 NYS2d 376 [1993]; *compare*, ***Reickert v Misciagna***, 183 AD2d 151, 590 NYS2d 100 [1992]). Further, exemplary damages awarded pursuant to General Obligations Law §11-101 are in the nature of a penalty and are not subject to the principle of contribution (*see*, ***Smith v Guli***, 106 AD2d 120, 122, 484 NYS2d 740 [1985]). Unlike §11-101 of the General Obligations Law, §11-100 provides for the recovery of actual damages but does not contain language permitting recovery of exemplary damages (*see*, ***McCauley v Carmel Lines, Inc.***, 178 AD2d 835, 577 NYS2d 546 [1991]; ***Lee v Holloway***, 146 Misc2d 455, 550 NYS2d 977 [1989]). Moreover, unlike the Dram Shop Act, the Alcoholic Beverage Control Law § 65 does not create an private right of action (*see*, ***Sherman by Sherman v Robinson***, *supra*; ***Wellcome v Student Cooperative of Stony Brook***, 125 AD2d 393, 509 NYS2d 816 [1986]). Similarly, Penal Law 260.20 (4), which makes it a crime for anyone but a parent or guardian to furnish alcoholic beverages to a person who is under the legal purchase age, does not give rise to an implied private right of action in favor of such a person who has been injured as a result of his or her own consumption of alcohol (*see*, ***Sheehy v Big Flats Community Day, Inc.***, *supra*; ***Stambach v Pierce***, 162 AD2d 1054, 557 NYS2d 823 [1990]).

A landowner may be held liable under the common law for injuries caused by an intoxicated guest when the landowner has the opportunity to control the guest's conduct, and is aware of the need for such control (*see*, ***D'Amico v Christie***, *supra*; ***Nelson v Neng***, 297 AD2d 313, 746 NYS2d 177 [2002]). Liability, however, may be imposed only for injuries that occurred on the defendant's property, or in an area under the defendant's control, where defendant had the opportunity to supervise the intoxicated guest who harms another guest (*see*, ***Place v Cooper***, 35 AD3d 1260, 1261, 827 NYS2d 396 [2006]). Further, a person not a parent who undertakes a duty to care for or supervise a child is required to use reasonable care to protect the child from harm and may be liable for injury proximately caused by his or her negligence in doing so (***Mary Z.Z. v Blasen***, 284 AD2d 773, 775, 726 NYS2d 767 [2001]; ***Adolph E. v Lori M.***, 166 AD2d 906, 906-907, 560 NYS2d 567 [1990]; ***Pitkewicz v Kane***, 227 AD2d 113, 114, 641 NYS2d 664 [1996]). A person caring for children, however, is "not cast in the role of an insurer" (***Appell v Mandel***, 296 AD2d 514, 514, 745 NYS2d 491 [2002]). As to potential contributory negligence, an underage plaintiff should only be charged with the standard of care that is usual and common to children his age (*see*, ***Carmen v PS & S Realty Corp.***, 259 AD2d 386, 388, 687 NYS2d 96 [1999]). Whether a child has exercised reasonable care for a person of his age, experience, intelligence, and developmental level is typically a jury question (*see*, ***Gonzalez v Medina***, 69 AD2d 14, 18, 417 NYS2d 953 [1979]; ***Carmen v PS & S Realty, Corp.***, *supra* at 388). Where the child's actions, though perhaps negligent, were a foreseeable consequence of a circumstance created by defendants, liability will not be precluded (*see*, ***Carmen v PS & S Realty, Corp.***, *supra* at 388).

Defendants Westrack and Smiraldo failed to make a prima facie showing that they are entitled to summary judgment as the record reflects that there are issues of fact and credibility, and from which conflicting inferences could be drawn with respect to each defendant's participation in infant plaintiff's intoxication (*see*, ***Tunison v D. J. Stapleton, Inc.***, __AD3d__, 841 NYS2d 615 [2007]; ***Baker v D. J. Stapleton, Inc.***, 43 AD3d 893, 841 NYS2d 382 [2007]; ***Bregartner v Southland Corp.***, 257 AD2d 554, 683 NYS2d 286 [1999]; ***French v Cliff's Place, Ltd.***, 125 AD2d 292, 508 NYS2d 577 [1986]). Specifically, the record shows, and defendant Westrack concedes, that there is an issue of fact as to whether or not plaintiff consumed any of the liquor which was illegally purchased and furnished by Westrack and/or Smiraldo prior to the accident, and if so, whether this contributed to his intoxication. While it is uncontroverted that plaintiff consumed beer stored in his own home prior to the Aveta party, and that he contributed money for the purchase of liquor by Westrack and/or Smiraldo, there are questions as to his mental and physical condition, before the party, during the party, and after leaving the party. There is also conflicting testimony on the part of Ms. Westrack and Ms. Smiraldo as to their participation in the illegal procurement of liquor for plaintiff and the other children the night of the party, as well as conflicting testimony as to the identity of the child who was handed the bag with the liquor. Moreover, based upon the unique facts and circumstances herein, including plaintiff's age at the time of the incident, it is for a jury to decide whether plaintiff's actions were "voluntary" and whether to reduce or deny recovery (*see, e.g.*, ***Oja v Grand Chapter of Theta Chi Fraternity, Inc.***, 257 AD2d 924, 684 NYS2d 344 [1999]; ***Carmen v PS & S Realty, Corp.***, *supra*). Defendants Westrack's and Smiraldo's assertions to the contrary are unpersuasive, as the cases cited by them pertaining to the issue of "voluntary" intoxication involved minors who were 17 years of age or older at the time of their intoxication (*see*, *e.g.*, ***Sheehy v Big Flats Community Day, Inc.***, *supra* [plaintiff was 17 years of age]; ***Searley v Wegman's Food Markets, Inc.***, *supra* [plaintiff was 17 years of age]; ***Livelli v Teakettle Steak House, Inc.***, 212 AD2d 513, 622 NYS2d 109 [1995] [plaintiff was 18 years of age]; ***McCulloch v Standish***, 167 AD2d 723, 563 NYS2d 294 [1990] [plaintiff was 19 years of age]; ***Reuter v Flobo Enterprises, Ltd.***, *supra* [infant plaintiff was 17 years of age]). In the instant case, plaintiff, who was only 13 years old at the time of the accident, is clearly entitled to more protection than a child of 17 years of age. The claims set forth in the fourth cause of action for punitive damages under General Obligations Law § 11-100, however, are dismissed as a matter of law (*see*, ***McCauley v Carmel Lines, Inc.***, *supra*; ***Lee v Holloway***, *supra*).

Defendants Aveta established their prima facie entitlement to judgment dismissing the claims against them under General Obligations Law §11-100 as it is undisputed that they neither furnished nor procured alcoholic beverages for infant plaintiff or anyone else at the party (*see*, ***McNeil v Rugby Joe's Inc.***, 298 AD2d 369, 751 NYS2d 241 [2002]; ***Fantuzzo v Attridge***, 291 AD2d 871, 737 NYS2d 192 [2002]; ***Guercia v Carter***, 274 AD2d 553, 712 NYS2d 143 [2000]; *see also*, ***Rust v Reyer***, 91 NY2d 355, 670 NYS2d 822 [1998]). It is also uncontroverted that no alcoholic beverages were consumed by plaintiff or any underage guests at the Aveta premises on the day of the accident. Defendants Aveta also established that they did not breach their duty to adequately supervise plaintiff (*see, **Moreno v Weiner***, 39 AD3d 830, 834 NYS2d 323, *lv denied*, 9 NY3d 807, 843 NYS2d 536 [2007]). In this case, the duty of defendants Aveta to supervise Bryan Rudden extended to him only while he was on their property as this was not a "sleep over" (*see*, *e.g.*, ***Moreno v Weiner***, *supra*; *see also*, ***Place v Cooper***, *supra*; ***Lombart v Chambrey***, 19 AD3d 1110, 797 NYS2d 216 [2005]; ***Joly v Northway Motor Car Corp.***, 132 AD2d 790, 517 NYS2d 595 [1987]). It is uncontroverted that the accident occurred off the Aveta premises and on an intersecting public roadway while plaintiff was walking home. It is also uncontroverted that plaintiff voluntarily chose to leave the Aveta premises with several of his friends even though he had been offered a ride by home by Douglas Smiraldo and/or Mr. Smiraldo. Additionally, the record reflects plaintiff had already walked, unsupervised

by his own parents, to the Aveta home, and that he had walked this route on prior occasions. In opposition, plaintiffs failed to raise a triable issue of fact as to whether defendants Aveta, who were not insurers of infant plaintiff's safety, breached their duty of supervision (*see*, ***Moreno v Weiner***, *supra*). There is no proof that either defendants Aveta were aware that several guests had actually consumed alcoholic beverages at the Cherokee school until Kathleen and Kevin later returned to Danielle's party in an intoxicated condition. There is also no proof that either defendants Aveta, or any other adults present at the Aveta home, failed properly observe or supervise the children who were present at the party, or that this alleged breach was the proximate cause of plaintiff's injuries (*see,* ***Kelly v Great Neck Union Free School District***, 192 AD2d 696, 597 NYS2d 136; *appeal denied,* 82 NY2d 658, 604 NYS2d 557 [1993]; *compare*, ***Oakley v State***, 38 AD2d 998, 329 NYS2d 537, *affd*, 32 NY2d 773, 344 NYS2d 958 [1973]). Additionally, neither defendants Aveta, nor Danielle Aveta, had a duty to try to prevent plaintiff from drinking alcoholic beverages after he had left their premises and gone to the school (*see*, ***Lombart v Chambrey***, *supra*). Plaintiffs' contentions to the contrary, which are rejected as entirely speculative and unreasonable, would have required that Mrs. Aveta and the other adults constantly observe and supervise the teenagers at the party, as well as those who had left and walked to the school, for any possible suspicion of illegal activity. Furthermore, there is no proof that defendants Aveta, Danielle Aveta, or any adults at the Aveta house had the opportunity to control the plaintiff by preventing him from suddenly leaving their residence, nor were they reasonably aware of the need for such control (*see,* ***Guercia v Carter***, *supra*). In any event, even if defendants Aveta breached their duty to supervise the plaintiff, this breach was not the proximate cause of the ensuing pedestrian and motor vehicle accident (*see, e.g.,* ***Swan v Town of Brookhaven***, 32 AD3d 1012, 821 NYS2d 265 [2006]; ***Marchetti v East Rochester Cent. School Dist.***, 26 AD3d 881, 808 NYS2d 877 [2006]; ***Gustin v Finger Lakes Camp Farthest Out***, 267 AD2d 1001, 700 NYS2d 327 [1999]). Accordingly, defendants Aveta are granted summary judgment dismissing all claims against them in this action.

General Obligations Law § 15-108 (b), provides, in relevant part, that a release given in good faith by the injured person to one tort-feasor relieves him from liability to any other person for contribution (*see*, ***Glaser v M. Fortunoff of Westbury Corp.***, 71 NY2d 643, 529 NYS2d 59 [1988]). The effect of General Obligations Law § 15-108 is "to permit a joint tort-feasor to buy his peace by terminating, completely, his rights and liabilities in the action" (***McDermott v City of New York***, 50 NY2d 211, 220, 428 NYS2d 643 [1980]). This statutory scheme applies only where the tort-feasors share, in some degree, responsibility for the wrong (***McDermott v City of New York***, *supra*). Where a party is held liable at least partially because of his or her own negligence, contribution against all other culpable tort-feasors is the only available remedy (***Glaser v M. Fortunoff of Westbury Corp.***, *supra*). Conversely, "the predicate for common law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (***Kagan v Jacobs***, 260 AD2d 442, 442, 687 NYS2d 732 [1999]). Where indemnity is at issue, one party is alleging that the other party should bear complete responsibility for the tort (*see*, ***McDermott v City of New York***, *supra* at 220), and that he or she is not responsible in any way for the injuries to the plaintiff (*see*, ***Barry v Hildreth***, 9 AD3d 341, 342, 780 NYS2d 159 [2004]). The right to indemnity "springs from a contract, express or implied, and full, not partial, reimbursement is sought" (***McDermott v City of New York***, *supra* at 216). Thus, the indemnitor is either totally responsible or not (*see*, ***McDermott v City of New York***, *supra* at 220).

All cross claims for contribution asserted against defendants Lake Shore and Owsenek are dismissed in light of the general release in their favor in exchange for substantial consideration (*see*, ***Tereshchenko v Lynn***, 36 AD3d 684, 828 NYS2d 185 [2007]; ***Barry v Hildreth***, *supra*; ***Kelly v New York Telephone Co.***, *supra*). Any verdict, however, in favor of plaintiffs and against the remaining defendants will be reduced in

the amount of settling defendants' equitable share of the damages, if any (*see*, General Obligations Law § 15-108 [a]; ***Tereshchenko v Lynn***, *supra*). Further, all cross claims sounding in contractual and common law indemnification as against defendants Lake Shore and Owsenek are dismissed as a matter of law (*see*, ***Tereshchenko v Lynn***, *supra*). Under the facts herein, defendants Lake Shore and Owsenek cannot be held vicariously liable as they had no contractual relationship with the other co-defendants (*see*, ***Tereshchenko v Lynn***, *supra*; ***Tully v Straus***, 265 AD2d 399, 696 NYS2d 503 [1999]). Moreover, the potential liability of defendants Bernstein, Clavin, Smiraldo, Westrack, if any, would be as a joint tortfeasor precluding them from recovering common-law indemnification from Lake Shore and Owsenek (*see*, ***Tereshchenko v Lynn***, *supra*; ***Barry v Hildreth***, *supra*). In any event, the record reflects that the non-settling co-defendants participated to some degree in the wrongdoing or the accident, and that Bernstein is potentially vicariously liable for the accident itself (*see*, ***Tully v Strauss***, *supra*; ***Kagan v Jacobs***, *supra*; ***Bregartner v Southland Corp***., 257 AD2d 554, 683 NYS2d 286 [1999]). Parenthetically, the Court notes there is conflicting testimony on the part of defendants Clavin and Bernstein as to which of them was driving at the time of the accident.

Motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see*, ***Glaser v County of Orange***, 20 AD3d 506, 799 NYS2d 120 [2005]). The movant, however, must make some evidentiary showing that the proposed amendment has merit or a proposed amendment will not be permitted (*see*, ***Buckholz v Maple Garden Apts., LLC***, 38 AD3d 584, 832 NYS2d 255 [2007]; ***Curran v Auto Lab Serv. Cetr.***, 280 AD2d 636, 721 NYS2d 662 [2001]). As an affirmative defense, General Obligations Law § 15-108 (a) must be plead by a tortfeasor seeking its protection (*see*, CPLR 3018 [b]; ***Whalen v Kawasaki Motors Corp. U.S.A.***, 92 NY2d 288, 293, 680 NYS2d 435 [1998]). Unlike the CPLR's liberal pleadings practice, a party may amend its pleadings to raise General Obligations Law §15-108 (a) as a defense at any time, even after trial, provided that the late amendment does not prejudice the other party (*see*, CPLR 3025 [b]; ***Whalen v Kawasaki Motors Corp. U.S.A.***, *supra* at 293).

The motion by defendant Smiraldo, and the cross motions by defendants Bernstein, Clavin, and Westrack to amend their answers to add an affirmative defense under General Obligations Law § 15-108 are granted in light of the judicially approved settlement between plaintiffs and defendants Lake Shore and Owsenek (*see*, CPLR 3025 [b]; ***Whalen v Kawasaki Motors Corp. U.S.A.***, *supra*). As a plaintiffs have already irretrievably set their course for trial by releasing Lake Shore and Owsenek, there is no prejudice to the plaintiffs who cannot, under the circumstances, seek apportionment of fault as against Lake Shore and Owsenek (*see*, ***Whalen v Kawasaki Motors Corp. U.S.A.***, *supra*). Defendants shall serve their proposed answers upon plaintiffs within 30 days of the entry date of this order. The amended answers shall be deemed served as of the date of actual service.

Plaintiffs' cross motion to amend their complaint to add a claim against defendant Dennis Aveta, individually, as a parent and natural guardian of Danielle Aveta, an infant, or in the alternative, to strike the culpable conduct affirmative defense asserted in each of the defendants answers is denied as academic and as entirely without merit (*see*, ***McNeil v Rugby Joe's Inc.***, *supra*; ***Fantuzzo v Attridge***, *supra*; *see also*, ***Toscano v Toscano***, 302 AD2d 453, 754 NYS2d 888 [2003]). In any event, plaintiffs' application to amend the complaint to add a new theory of liability, which lacks a reasonable excuse for the three-year delay (*see*, ***Pergament v Roach***, 41 AD3d 569, 838 NYS2d 591 [2007]), is procedurally deficient as the cross motion is unsupported by an affidavit of the plaintiffs (*see*, ***Boyd v Trent***, 297 AD2d 301, 746 NYS2d 191 [2002]; ***Citarelli v Am. Ins. Co***., 282 AD2d 494, 722 NYS2d 895 [2001]; ***Clark v Foley***, 240 AD2d 458, 658 NYS2d 429 [1997]; *see also*, ***S. B. Schwartz Co. v G. & H. Real Estate Holding Corp***., 265 AD2d 316, 695 NYS2d

613 [1999]).

Plaintiffs' cross motion for an order pursuant to CPLR 5003-a (e) compelling defendants Lake Shore and Owsenek to pay the settlement sum of $20,000 to them is denied without prejudice, subject to renewal upon the submission of a stipulation of discontinuance executed by *all* parties appearing in this action (*see*, CPLR 3217 [b]; CPLR 5003-a [e]). The submitted stipulation of partial discontinuance dated September 27, 2007, has been executed *solely* by plaintiffs' office. As the judicial settlement has already been approved, co-defendants Bernstein, Clavin, Smiraldo and Westrack, may, if they be so advised, execute a stipulation discontinuing this action as against Lake Shore and Owsenek (*see*, CPLR 3217 [b]). While defendant Smiraldo has already counter-signed a letter agreement dated March 21, 2005 by which she has "agreed" to discontinue the cross claim against Lake Shore and Owsenek, the stipulation itself has not been executed by her as required by the applicable rules of Court (*see*, CPLR 3217 [b]).

Dated: JAN 0 2 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**