

**Matter of Bravo v Elmont Soccer League, Inc.**

2008 NY Slip Op 33474(U)

December 18, 2008

Supreme Court, Nassau County

Docket Number: 16760/05

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**The Estate of FEMIN BRAVO by MARCARIO BRAVO, as Administrator of the goods, chattels and credits of FERMIN BRAVO and MACARIO BRAVO, individually, and MARIA deBRAVO, and the Estate of JOSE HERNANDEZ by RAMON HERNANDEZ as Administrator of the goods, chattels and credits of JOSE HERNANDEZ and RAMON HERNANDEZ, individually and MARIA ISABEL MORENO HENANDEZ,**

**Plaintiffs,**

**-against-**

**ELMONT SOCCER LEAGUE, INC., EASTERN NEW YORK YOUTH SOCCER ASSOCIATION, INC., JOHNNIE SINGH and the Estate of VERNON E. KETCHER,**

**Defendants.**

**Motion Sequence #6 in  
in Action #1 Submitted  
September 16, 2008  
Motion Sequence #7 in  
Action #1 Submitted  
October 23, 2008**

**INDEX NO: 16760/05  
Action #1**

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**CYNTHIA APONTE, KELLY APONTE, an infant under the age of fourteen (14) years by her parent and natural guardian, ROBERT J. APONTE, and ROBERT J. APONTE, Individually,**

**Plaintiffs,**

**-against-**

**MICHELLE LIPPA GARTNER, as Administrator of the Estate of VERNON E. KETCHER and JOHNNIE A. SINGH,**

**Defendants.**

**INDEX NO: 16019/06  
Action #2**

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**JOHNNIE SINGH,**

**Plaintiff,**

**-against-  
MICHELLE LIPPA GARTNER, as Administrator  
of the Estate of VERNON E. KETCHER,  
Defendant.**

**INDEX NO: 20323/06  
Action #3**

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**EDUARDO LUNA, an infant under the age of  
eighteen by his mother and natural guardian  
VIDAL LUNA, VIDAL LUNA, individually, JUAN  
LOPEZ, an infant under the age of eighteen by  
his mother and natural guardian OLGA GARIBAY,  
OLGA GARIBAY, individually, and RYAN SINGH,  
an infant under the age of eighteen by his mother  
and natural guardian HARDAI SINGH, and  
HARDAI SINGH, individually,**

**Plaintiffs,**

**-against-  
MICHELLE LIPPA GARTNER, as Administrator  
of the Estate of VERNON E. KETCHER, JOHNNIE  
SINGH, ELMONT SOCCER LEAGUE, INC. and  
EASTERN NEW YORK YOUTH SOCCER  
ASSOCIATION, INC.,**

**Defendants.**

**INDEX NO: 20325/06  
Action No. 4**

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**The following papers were read on this motion:**

<b>SOCCER LEAGUE Notice of Motion (#6).....</b>	<b>1</b>
<b>Memorandum of Law in Support of Motion.....</b>	<b>2</b>
<b>Plaintiffs Affirmation in Opposition.....</b>	<b>3</b>
<b>SOCCER LEAGUE Affirmation in Reply to Plaintiffs.....</b>	<b>4</b>
<b>KETCHER Affirmation in Opposition.....</b>	<b>5</b>
<b>SOCCER LEAGUE Affirmation in Opposition to KETCHER.....</b>	<b>6</b>
<b>APONTE Affirmation in Opposition.....</b>	<b>7</b>
<b>Defendant SINGH Notice of Motion (#7).....</b>	<b>8</b>
<b>Plaintiffs Affirmation in Opposition.....</b>	<b>9</b>
<b>SOCCER LEAGUE Reply Affirmation to Plaintiffs.....</b>	<b>10</b>

**LUNA Affirmation in Opposition to SINGH Motion.....11**  
**Plaintiff SINGH Affirmation in Opposition.....12**  
**Defendant SINGH Reply Affirmation.....13**  
**KETCHER Amended Affirmation in Opposition.....14**

**Requested Relief**

Defendants, ELMONT SOCCER LEAGUE, INC. (hereinafter referred to as the "SOCCER LEAGUE"), and the EASTERN NEW YORK YOUTH SOCCER ASSOCIATION (hereinafter referred to as the "ASSOCIATION"), move for an order, pursuant to CPLR §3212, granting summary judgment dismissing all claims and cross-claims against them. Subsequently, defendant, JOHNNIE SINGH (hereinafter referred to as "SINGH"), moves for the same relief. The motions are determined as follows:

**Background**

This matter involves a chain reaction collision involving three (3) vehicles. The first vehicle was driven by plaintiff, CYNTHIA APONTE, whose passenger was plaintiff, KELLY APONTE. They were stopped at a red traffic control signal. Behind them was the minivan driven by SINGH, whose passengers were members of a soccer league – FERMIN (s/h/a FEMIN) BRAVO, JOSE HERNANDEZ, JUAN LOPEZ, EDWARD LUNA and SINGH's son, RYAN SINGH. The record indicates that the rear of SINGH's vehicle was struck by a vehicle driven by VERNON KETCHER (hereinafter referred to as "KETCHER"), which caused the SINGH vehicle to move forward and collide with the APONTE vehicle. As a result of the collision, KETCHER was killed, as were two (2) of the soccer players sitting in the rear of the SINGH vehicle, JOSE HERNANDEZ and FERMIN BRAVO. The collision occurred on April 20, 2004, at approximately 4:50 P.M., on Hempstead Turnpike at or near Hill Avenue, in Elmont, New York.

All of the above four (4) captioned actions have been consolidated for the purpose of a joint trial by order of the Court. Plaintiffs in action #1 and #4, allege that the SOCCER LEAGUE and the ASSOCIATION are responsible for the actions of SINGH, who was a volunteer coach of the Elmont Rangers Soccer Team (hereinafter referred to as the "Rangers"). The Rangers are part of the Long Island Junior Soccer League which belongs to the ASSOCIATION. While SINGH testified at his deposition that he had not received any training in transporting children, he stated that he picked up various players at various times and brought them to soccer practice or games along with his son, a soccer player on the Rangers' team. SINGH testified that he was either completely stopped at a red traffic signal or was slowly rolling to a stop when his vehicle was struck from behind by the KETCHER vehicle. The record reflects that KETCHER, who was killed in the collision, struck the SINGH vehicle at a high rate of speed (60-70 mph), while the SINGH vehicle was stopped or almost stopped. The record also reflects that KETCHER had, as per a post mortem autopsy, an alcohol blood level of .017, well above the legal limit of .08, and, therefore, was intoxicated.

A statement of an eyewitness to the incident, Jen Senatus, given under knowledge that false statements are punishable under Penal Law § 210.45, indicated that what was later identified as KETHCER's red Jeep hit the stopped SINGH vehicle at 60-70 MPH. Moreover, it appears that the SOCCER LEAGUE and the ASSOCIATION had no idea that SINGH was transporting soccer players to soccer practice or to the games. Testimony reflects that neither the SOCCER LEAGUE nor the ASSOCIATION arranged for SINGH to transport the children; that neither the SOCCER LEAGUE nor the ASSOCIATION had any degree of direction and control over SINGH; and that neither the SOCCER LEAGUE

nor the ASSOCIATION owned the vehicle in which the soccer players were driven. It is claimed that they had no idea that SINGH volunteered to take some children to the practice.

Both the SOCCER LEAGUE and the ASSOCIATION contend that SINGH acted as a coach only on the soccer field and in the locker room. It is undisputed that SINGH was a volunteer "coach". SINGH claims that when the accident occurred, he was a father driving his son to the soccer practice and, as a good neighbor, providing a source of transportation for the young men who were on the same soccer team as SINGH's son, the Rangers. As occurs thousands of times each day throughout the country, SINGH contends that he was the "soccer dad" or "soccer person" transporting the children but, when the young men arrived at their destination, SINGH would become the "coach".

The evidence presented shows that the SOCCER LEAGUE and the ASSOCIATION are loose organizations that provide rules and regulations for soccer events and recognize the achievements of the players by providing awards. They provide no input with respect to transportation to or from soccer practice or games. The evidence reflects that transportation is totally up to the individual players and/or their parents – players can walk, be driven by friends, relatives or by other parents.

The record is devoid of any information that the SOCCER LEAGUE or the ASSOCIATION trained, instructed, supervised hired or assigned SINGH to be a transporter of the players. Raphael Bailey, an officer of the SOCCER LEAGUE, testified that the SOCCER LEAGUE never encouraged coaches to transport children to soccer practice or to the games. He stated that, while it never forbade coaches from transporting the children, it did caution the coaches against doing so. He testified that the SOCCER

LEAGUE was not aware that SINGH transported the children. Also, while the ASSOCIATION had rules, the rules did not address the transportation of players.

In opposition to the motions to dismiss, counsel for plaintiffs, LUNA, LOPEZ and RYAN SINGH, asserts that because SINGH solicited players for the soccer team, which required at least (13) players to be registered as a team, he was an agent for the SOCCER LEAGUE, which benefitted by collection of membership fees. Moreover, counsel claims that SINGH was negligent in the care and safety of the children because his passengers, JUAN HERNANDEZ and FERMIN BRAVO died because they were not wearing seatbelts and were thrown about inside the SINGH van causing fatal injuries. The plaintiffs argue that the SOCCER LEAGUE are vicariously liable for the negligent actions or inaction of SINGH and that issues of fact need to be resolved about whether SINGH can be considered a servant of the SOCCER LEAGUE and whether SINGH was acting within the scope of his duties. Counsel for plaintiff argues that the question of agency must be resolved by the Court as well as whether SINGH, as the coach, exercised reasonable care to protect the players from unreasonable risk of harm.

In reply, counsel for defendants points out that both LUNA and LOPEZ testified at their deposition that they were wearing their seatbelts on the day of the accident, and both SINGH and his son, RYAN SINGH testified that as a matter of certainty that everyone in the van did in fact have their seatbelts on the day of the accident. Counsel for defendant states that said testimony is uncontradicted by any admissible evidence, certainly not the affirmation of counsel who has no personal knowledge of the facts, nor the police accident report which is entirely inadmissible and consists of facts that are from an unknown source, citing *Noakes v Rosa*, 54 AD3d 317, 862 NYS2d 573 (2<sup>nd</sup> Dept. 2008) and *Hanly v Quaker*

*Chemical Co.*, 29 AD3d 860, 818 NYS2d 96 (2<sup>nd</sup> Dept. 2006). Moreover, counsel for defendant SINGH points out that the sworn testimony of all the parties establishes that each of the passengers was wearing three point seatbelts and that SINGH never moved his van until all of the passengers were "buckled up". Additionally, the record reflects that SINGH was stopped or stopping at a red light when it was struck in the rear by a drunk driver. Counsel argues that there is absolutely no liability on the part of SINGH in the instant action and there is no triable issue of fact with respect SINGH's alleged negligence.

### The Law

As between principal and agent, an agency is created and authority is actually conferred very much as a contract is made, to the extent that the creation results from the agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency, Otherwise stated, consent of both principal and agent is necessary to create an agency. The principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them. (2 *Am. Jur. Agency*, §21.) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. (*Am. Law Inst. Restatement Agency* §1, p.7.) The distinction between principal and agent and master and servant is very difficult to define; the two relations are essentially similar and the real difference between them may be said to be one of degree only. While the terms may be and are sometimes used interchangeably in a general sense applying to all persons in the service of another, and the principles governing the rights, duties and liabilities growing out of the two relations are, for the most part, the same, the agent, it has been said, is employed in a capacity superior to that of the servant, being entitled, in general, to use his discretion as to the means to accomplish the end for which he is employed, while the servant is directed by the master, not only as to what is to be done, but how it shall be done. (2 *C.J.S Agency* §2.) Where no control is given the relationship of principal and agent cannot exist. (*Am. Law Inst. Restatement Agency* §14, p.47; *Adams Inc. v. Thayer* 85 N.H. 177; 156 A. 697; *Harmount & Woolf Tie Co. v. Baker*, 251 Ky 795, 66 S.W. [2d] 45).

*Barnes v Royer et al dissent*, 249 AD877, 292 NYS 469 (3<sup>rd</sup> Dept. 1937).

“Under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency . . . A principal-agent relationship may be established by evidence of the ‘consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act. . . .’ (citations omitted). *Fils-Aime v Ryder TRS, Inc., et al*, 40 AD3d 917, 837 NYS2d 199 (2nd Dept. 2007). Generally, to succeed against a principal on a claim of apparent agency, the plaintiff must establish the opponent agent’s negligence. *Ashkenazi v Hertz Rent A Car*, 18 AD3d 584, 795 NYS2d 624 (2<sup>nd</sup> Dept. 2005). A duty to prevent negligence should not be imposed on one who does not control the tort-feasor. *Fessler v Brunza*, 89 AD2d 640, 453 NYS2d 81 (3<sup>rd</sup> Dept. 1982).

Vehicle and Traffic Law §1129(a) directs that an operator of a vehicle is “under a duty to maintain a safe distance between his vehicle and the vehicle in front of him and his failure to do so, in the absence of an adequate, non-negligent explanation, constitutes negligence as a matter of law”. Summary judgment is appropriate for “hit-in-the-rear” accidents because Vehicle and Traffic Law of the State of New York, § 1129(a) requires a driver to maintain a safe distance between vehicles and to “not follow another vehicle more closely that is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway”. Moreover, a rear end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rear most vehicle, imposing a duty of explanation on the operator to excuse the collision. *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 (2<sup>nd</sup> Dept. 1999); *Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 (2<sup>nd</sup> Dept. 2000); and

*Santapia, et al v First Fidelity Leasing Group, Inc. et al*, 275 AD2d 315, 712 NYS2d 57(2<sup>nd</sup> Dept. 2000). Court's have held that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. (See, *National Interstate v A.J. Murphy Co.*, 9 AD3d 714, 780 NYS2d 430 [3<sup>rd</sup> Dept. 2004]).

### Discussion

Applying these principles of law to the facts at bar, it is clear to the Court that neither the relation of master servant nor principal agent existed between SINGH and the SOCCER LEAGUE and the ASSOCIATION. SINGH was performing a gratuitous service for the children by transporting them to soccer practice and to the games. No evidence has been presented that the SOCCER LEAGUE or the ASSOCIATION agreed that SINGH was to perform said service or that the SOCCER LEAGUE or the ASSOCIATION had any control of the vehicle or of the driver in its management. The Court finds that the SOCCER LEAGUE and the ASSOCIATION were not responsible for the driver's acts, had no authority to direct them and, as a matter of law, that no principal/agency relationship existed. *Barnes v Royer, supra*.

Moreover, there is nothing in the record that indicates that SINGH performed the task of driving the soccer players in anything but a careful and prudent manner. The record herein indicates that KETCHER was negligent, as a matter of law, when his vehicle hit a stopped or stopping vehicle in the rear. *DeAngelis v Kirschner*, 171 AD2d 593, 567 NYS2d 457 (1<sup>st</sup> Dept. 1991). No non-negligent explanation has been offered. A defendant who establishes that he was not negligent in the operation of his vehicle is entitled to summary judgment. *Dinham v Wagner*, 48 AD3d 349, 851 NYS2d 535 (1<sup>st</sup> Dept. 2008).

There is no conduct of SINGH that can be pointed to impose liability upon him for the fatal injuries suffered by the two (2) young soccer players.

The SINGH vehicle was simply in the wrong place at the wrong time. SINGH was stopped or stopping at a red traffic signal, when his van was struck by the KETCHER vehicle and propelled into the APONTE vehicle by the force of the impact. The APONTE plaintiffs offer nothing that would indicate the SINGH vehicle was in any way negligent and merely adopt the theories of the other plaintiffs in opposition to the summary judgment motions. Contrary to the statements of counsel, who has no personal knowledge of the facts (*see, Dinham v Wagner, supra*), that JUAN HERNANDEZ and FERMIN BRAVO died because they were not wearing seatbelts, the sworn deposition of the parties reflect that SINGH and his son made sure the children in the van buckled their seat belts before the SINGH vehicle moved. The record herein clearly indicates that liability cannot be imposed upon defendants, SINGH, the SOCCER LEAGUE and the ASSOCIATION. It is therefore


**ORDERED**, that the motion by defendants, ELMONT SOCCER LEAGUE, INC. and the EASTERN NEW YORK YOUTH SOCCER ASSOCIATION, for an order granting summary judgment dismissing all claims and cross-claims against them is granted; and it is further

**ORDERED**, that the motion by defendant, JOHNNIE SINGH, for an order granting summary judgment dismissing all claims and cross-claims against him is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 18, 2008

  
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WILLIAM R. LaMARCA, J.S.C.

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**ENTERED**  
DEC 24 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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