SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

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Present: HON. UTE WOLFF LALLY
Justice

CHRISTOPHER CORTESELLI,

Plaintiff,

-against-

INDEX NO: 21165/08

TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, DORA ISRAEL, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,

Defendant.

ERIC M. PARCHMENT, an infant under the age of 18, by his mother and natural guardian, DANITZA PARCHMENT and DANITZA PARCHMENT, individually,

Plaintiffs,

-against-

Motion Sequence #7, #8, #9
#10, #11, #12
Submitted July 12, 2010

INDEX NO: 21643/08

TIMOTHY WOLFE, DIANE WOLFE, JOHN SQUIRES, VIVIAN BARKAI, TALIA BARKAI, LESLIE WATNIK, NEIL WATNIK and SIDNEY STEIN,

Defendants.

STEFAN TESSLER, individually, and as parent and natural guardian of plaintiff CLARA TESSLER,

Plaintiffs,

-against- **INDEX NO: 1863/08**

DIANE WOLFE, JOHN SQUIRES and TIMOTHY WOLFE,

Defendants.

The following motions were read:

Motion by defendants, Timothy Wolfe, Diane J, Wolfe, and John Squires for an Order pursuant to CPLR 2221 granting leave to reargue the prior order of this Court dated March 17, 2010 granting plaintiffs', Eric Parchment and Danitza Parchment motion dismissing the second affirmative defense of failure to state a cause of action and upon reargument reversing said order is granted only as to the cause of action sounding in

negligence per se against defendants, Diane Wolfe and John Squires.

Motion by plaintiffs Eric Parchment and Danitza Parchment, for an Order pursuant to CPLR 3212 awarding Summary Judgment in their favor as to the first, third and fourth causes of action sounding in negligence against Diane Wolfe and John Squires is denied, and for an Order pursuant to CPLR 3211(b) granting so much of their motion to dismiss the defendants' fifth affirmative defense that plaintiffs failed to mitigate their damages is granted.

Motion by defendants, Vivian Barkai, and her daughter, Talia Barkai for Order pursuant to CPLR 3212 granting Summary Judgment in their favor dismissing the Complaint against them is granted as to Vivian Barkai and denied as to Talia Barkai.

Motion by defendants, Timothy Wolfe, Diane Wolfe and John Squires, for Order pursuant to 22 NYCRR § 202.21(e) vacating the plaintiffs' Note of Issue and Certificate of Readiness, and striking this action from the trial calendar is denied. The plaintiffs shall comply with the outstanding discovery demands pursuant to the defendants' Notice for Discovery and Inspection, dated April 19, 2010 and plaintiffs shall schedule further discovery only as to the plaintiffs' claim of additional damages and out of pocket expenses as alleged in the supplemental bills of particulars by way of further examination before trial of both plaintiffs, Danitza Parchment and Eric Parchment, and an updated IME of Eric. This Court further orders the exchange of authorizations with respect to Eric's updated medical condition. The foregoing discovery and examinations are to be completed within 30 days from the date of this Order.

Motion by plaintiffs, Eric Parchment and Danitza Parchment, for an Order precluding defendants from offering evidence at the time of trial regarding Eric Parchment's alcohol

and/or drug use and cross Motion by defendants, Timothy Wolfe, Diane Wolfe and John Squires, for an Order precluding plaintiffs from offering evidence at the time of trial regarding Timothy Wolfe's use of alcohol/and or drugs are respectfully referred to the trial court.

FACTS

On or about September 27, 2008 at about 2:30 a.m, plaintiff Eric Parchment (hereinafter "Eric"), was a rear seat passenger in a vehicle operated by Timothy Wolfe (hereinafter "Timothy") and owned by his mother, Diane Wolfe and her husband, John Squires, sustained injuries when Timothy lost control of his vehicle and struck a tree head on. At the time of the accident, Timothy only possessed a junior's drivers license. Prior to the accident, between the hours of 8:30 p.m. and 10:30 p.m., Timothy and Eric were a guests at a party held in the home of defendant, Vivian Barkai located in Port Washington, New York, and hosted by teen-aged defendant and her daughter, Talia Barkai. Defendant, Vivian Barkai was at her place of employment in New York City and was not on site during the party. All guests were under the age of twenty-one (21) and alcohol and drugs were consumed on the premises. Timothy is alleged to have consumed alcohol and drugs at the party and to have left the party in an intoxicated and/or impaired state. Eric has admitted during his pre-trial deposition, that he consumed drugs and alcohol during the hours preceding the accident. Timothy is alleged to have operated his vehicle while under the influence of controlled substances and the subject accident was a direct consequence.

Eric and his mother, "plaintiffs", commenced the underlying personal injury action against all defendants on or about December 9, 2008.

MOTION BY DEFENDANTS, TIMOTHY WOLFE, DIANE J. WOLFE AND JOHN SQUIRES

The plaintiffs allege liability against Timothy Wolfe under the theory of negligence and against Diane Wolfe and John Squires, vicarious liability as owners of the vehicle. In addition they plead causes of action against Diane Wolfe and John Squires in negligence per se, and negligent entrustment of a vehicle. The plaintiffs also allege that Eric sustained a serious injury pursuant to the no fault statutory provisions. The defendants set forth five affirmative defenses in its answer: Eric's damages were caused by his culpable conduct; the complaint failed to state a cause of action; Eric failed to use or misused his seatbelt; Eric did not sustain a serious injury; and Eric was obligated to mitigate his damages and he failed to do so.

Upon the plaintiffs' motion on or about May, 2009, this Court granted summary judgment as to the first cause of action against the defendants, while denying the defendants' motion for an Order consolidating the three pending related causes of action against them, instead joining the three actions for a joint trial. The plaintiffs then moved this Court on or about December 21, 2009 pursuant to CPLR 3212, for an Order granting Summary Judgment as to the second cause of action alleging that Eric sustained a serious injury, and for an Order pursuant to CPLR 3211 dismissing the defendants' first, second, third, and fifth affirmative defenses. The Court granted the plaintiff's motion as to the first, second and third affirmative defenses while reserving its decision on the fifth pending completion of discovery. The defendants' concession that Eric sustained a serious injury, obviated striking of the fourth affirmative defense.

The defendants, in the instant motion, argue that the Court misinterpreted or overlooked pertinent facts in reaching its decision regarding the striking of the second affirmative defense that said affirmative defense failed to state a cause of action. The defendants contend that the plaintiffs' entire motion was brought under the Summary Judgment provisions of CPLR 3212 and no part of the motion was brought under CPLR 3211. In addition, as the plaintiffs did not bring a cause of action against Timothy in negligence per se, there could be no viable cause of action against his parents, Diane Wolfe and John Squires, under that theory. Further, the defendants aver that if there is no cognizable cause of action in negligence per se, a cause of action in negligent entrustment of a vehicle cannot be sustained.

The defendants are incorrect regarding the mechanism under which the plaintiffs sought relief. It is clear that the language in their papers clearly set forth the relief sought and the plaintiffs' Reply Affirmation specifically cited CPLR 3211(b) as the procedural mechanism by which they sought dismissal of certain affirmative defenses (see Notice of Motion, Exhibit H, Exhibit J).

Contrary to the defendants' position, the standards for Summary Judgment and a Motion to Dismiss are distinguishable (*Star-Brite Services, Inc. v Sutton,* 17 AD3d 570). The fact that defendants devote several paragraphs to argue that plaintiffs' entire motion was one of Summary Judgment, underscores that very point.

It is apparent to this Court that the plaintiffs' references to Summary Judgment regarding the second, third and fifth affirmative defenses were most likely due to a drafting error. Plaintiffs moved pursuant to CPLR 3211 and the Court ruled pursuant to CPLR 3211. As stated in its previous decision, this Court cannot *sua sponte* convert this motion

to dismiss to a motion for Summary Judgment absent giving adequate notice to both parties [CPLR 3211(c); *Mihlovan v Grozavu*, 72 NY2d 506]. Accordingly, the defendants' motion to reargue as to this issue is denied.

While the defendants seek a reversal of the determination that Court's decision to strike the affirmative defense of failure to state a cause of action, they refer only to two causes of action in which they seek this remedy; negligent entrustment of a vehicle, and negligence per se with regard to defendants, Diane Wolfe and John Squires. The Court grants the motion and reverses its determination only with respect to the cause of action sounding in negligence per se.

It is undisputed that Timothy was driving with a junior's driver's license at about 2:30 a.m. which was violative of Vehicular and Traffic Law §501(3)(a) (ii) which states in part: "...[A] class DJ...license shall permit the holder to operate a vehicle in accordance with the following restrictions...from five o'clock in the morning to nine o'clock in the evening, to and from a place of business where the holder is regularly employed, or when accompanied by a duly licensed parent, guardian, a person in a position of loco parentis, driver education teacher or driving school instructor." However, the statute speaks only to the driver of the vehicle, not those who entrust the vehicle to the driver. Therefore, the allegation of negligence per se is attributable only to Timothy Wolfe (*Dalal v City of New York*, 262 AD2d 596). As the defendants, John Squires and Diane Wolfe, were not driving the vehicle, they were not in violation of the statute. Accordingly, there is no cognizable cause of action in negligent per se against them.

However, the Court affirms its prior determination that the plaintiffs have set forth a cognizable cause of action in negligent entrustment of a vehicle as to Diane Wolfe and John Squires (*Nolechek v Gesuale*, 46 NY2d 332; *Costa v Hicks*, 98 AD2d 137; *Hummel v County of Nassau*, 57 AD2d 485). Contrary to the defendants' contention, the cause of action of negligent entrustment is pled as a separate and distinct cause of action and is no way reliant on the cause of action in negligence per se.

The defendants' motion to reargue is granted to the extent that the Court's Order granting the plaintiffs' underlying motion to dismiss the affirmative defense of failure to state a cause of action as to the second cause of action sounding in negligence per se against John Squires and Diane Wolfe, is reversed.

MOTION BY PLAINTIFFS, ERIC PARCHMENT AND DANITZA PARCHMENT

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404; *Miller v Journal-News*, 211 AD2d 626).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062). If

this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, *supra*; *Miceli v. Purex*, 84 AD2d 562).

Once the this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562) even if alleged by an expert (*Alvarez v Prospect Hospital*, *supra*; *Aghabi v. Serbo*, 256 AD2d 287).

Defendants, Diane Wolfe and John Squires, can only be directly liable in negligence to Eric Parchment if the facts indicate that they negligently entrusted their vehicle to Timothy and/or that they were negligent per se in negligently entrusting their vehicle to Timothy. It is not disputed that at the time of the accident, Timothy was driving with a junior's driver's license at about 2:30 a.m., violative of Vehicular and Traffic Law §501(3)(a)(ii) which states in part:

> "...[A] class DJ...license shall permit the holder to operate a vehicle in accordance with the following restrictions...from five o'clock in the morning to nine o'clock in the evening, to and from a place of business where the holder is regularly employed, or when accompanied by a duly licensed parent, guardian, a person in a position of loco parentis, driver education teacher or driving school instructor."

Timothy was also in violation of Vehicular and Traffic Law § 501-b which provides in part:

> "no holder of a class DJ or class MJ learner's permit shall...operate a motor vehicle with any front seat occupants other than the supervising driver;...operate a motor vehicle with more than one passenger who is under the age of twenty-one and who is not a member of such holder's immediate family, provided, however, that the provisions of this paragraph shall not apply when such holder is accompanied by a duly licensed parent, guardian, person in a position of loco parentis, driver education teacher or driving school instructor..."

Generally, a parent owes a duty to a third person for negligent entrustment of a dangerous instrument to his child when he is aware of and capable of controlling the instrument's use (*Penning v Agri Business Brokerge Corporation*, 124 AD2d 1013). In addition, a parent's failure to supervise a minor child may entail legal consequence where injury to a third party results, such as under circumstances where a parents negligently entrusts to his or her child a dangerous instrument, or an instrument potentially dangerous in the child's hands, as to create an unreasonable risk to others (*Rios v Smith*, 95 NY2d 647).

The facts of the instant case indicate that defendants, Diane Wolfe and John Squires did indeed have control of and dominion over the subject motor vehicle, which is arguably a dangerous instrument in the hands of a minor, if misused (*Allstate Ins. Co. v Reliance Ins. Co.*, 85 Misc.2d 734 [Sup. Court, Nassau County, 1976]). It is clear from the record that the defendants, particularly Diane Wolfe, sanctioned the use of the vehicle and permitted its use by Timothy on September 26, 2008, and on September 27, 2008 the eve of the accident, although he was not legally eligible to drive unless accompanied by a statutorily designated adult:

"...Q. How many times during the day of September 27...did you speak with him [Timothy] on the phone, if at all?[1]

A. I did speak to him that day...
Q. Do you remember the reason you spoke with him?
A. Yes
Q. What was that?
A. He called me and asked me if he could use the car to take it to the gym...

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[1]The record indicates the actual date of the conversation was September 26, 2008, on Friday. This was clarified on p. 38, ln. 7-9 of the transcript of Diane Wolfe's testimony.

Q. What did you tell him? Did you give him permission to go to the gym?
A. Yes, I did...
Q. Did you ask him whether he going with an adult?
A. No, I did not...
Q. When you gave him permission to take the car to the gym, did you consider that a violation of the terms of his junior license?...
A. I knew it was outside..."(see Notice of Motion, Exhibit H, Tr. Diane Wolfe, p. 33, ln, 7-20; p.35, ln. 4-21).

On the eve of the accident, Diane Wolfe again permitted her son to use the vehicle in violation of the terms set forth in the aforementioned statutory provisions (see Notice of Motion, Exhibit H, Tr. Diane Wolfe, p. 41, ln, 18-25). Further, Diane Wolfe testified that when she arrived home at 11:30 p.m. on the eve of accident and observed that the subject vehicle was not in her driveway, she assumed that Timothy took the vehicle which arguably implies that she was aware of Timothy's custom of driving the vehicle when he was not permitted by law to do so (see Notice of Motion, Exhibit H, Tr. Diane Wolfe, p. 120, ln, 15-17, 21-25). She also testified regarding her practice of routinely leaving her car keys in an open area which was known to and accessible by Timothy (*Acquaviva v Piazzolla,* 100 AD2d 502). Diane Wolfe's testimony of Timothy being involved in alcohol-related incidents and being suspended from school arising from his conduct with a female peer, supports an argument that she was aware of his immaturity and lack of judgment (see Notice of Motion, Exhibit H, Tr. Diane Wolfe, p. 66, ln, 15; p. 67, ln. 8 - 19; p. 68, ln.8-22; p. 72, ln. 9 -16; p. 75).

Based on the foregoing, the plaintiffs contend that: Timothy's parents and/or guardians were aware of his lack of judgment; they permitted him to use the car in violation of the New York State statutes; they left the car keys in an area accessible to Timothy; and Diane Wolfe's response when she discovered that the vehicle was missing from the

driveway the morning of the accident, supports a pattern of conduct in that Timothy routinely drove the vehicle in contravention of the relevant New York State statutes, or alternately, her allowing him to drive without the proper credentials on the days immediately preceding the accident indicates that he could readily drive in violation of the New York State statutes. As such, all facts and circumstances taken together should support a finding that Diane Wolfe and John Squires negligently entrusted their vehicle to Timothy.

However, the defendants argue that Timothy was allowed to drive outside the parameters set forth in the statutory restrictions only on the two dates, September 26, 2008 and September 27, 2008 and it was during daylight hours. Further, Timothy had never taken the vehicle without permission at any prior instance, he never drove in violation of the restrictions of his license prior to those two dates, and they did not give him permission to drive the vehicle on the eve of the accident. In fact, Diane Wolfe testified that she and John Squires were not even home when Timothy took the car. Further, Diane Wolfe testified that she observed her son's driving while she was a passenger and she determined that his driving skills were "very good" (see Notice of Motion, Exhibit H, Tr. Diane Wolfe, p. 77, ln, 22-25). As such, there was no foreseeable harm to third parties, which is a legal criteria to sustain a cause of action in negligent entrustment (*Hamilton v Beretta* U.S.A. Corp., 96 NY2d 222*; Nolechek v Gesuale*, 46 NY2d 332).

Viewing the evidence in the light most favorable to the parties opposing the motion for summary judgment, the defendants in this instance, the Court finds that the defendants sufficiently created a triable issue of fact as to whether Diane Wolfe and John Squires negligently entrusted their vehicle to Timothy, thereby breaching their duty to third parties (*Zuckerman v City of New York, supra*; *Santiago v Frito-Lay, Inc*, 235 AD2d 528). Although

Timothy and Diane Wolfe's deposition testimony regarding telephone contact on the morning of the accident is arguably contradictory, "any discrepancies merely go to the weight of the evidence, a matter properly addressed to the trier of fact which is in the foremost position to assess a witness's credibility" (*Santiago v Frito-Lay, Inc.*, *supra*; see also *Wilson v Rojas* 63 AD3d 1048). Accordingly, the plaintiffs' motion for Summary Judgment regarding negligent entrustment, is denied.

In view of the foregoing discussion regarding said motion, a cause of action in negligence per se cannot obtain against John Squires and Diane Wolfe.

Accordingly, the plaintiffs have not met their burden to establish a prima facie case in negligence per se and there is no need to consider any counter argument by the defendants. In sum, Summary Judgment is denied as to the direct negligence of Diane Wolfe and John Squires.

The third cause of action of the underlying Complaint sets forth allegations against Diane Wolfe and John Squires in negligence per se. In light of the foregoing, the motion for Summary Judgment is denied.

The fourth cause of action in the underlying Complaint sets forth allegations against Diane Wolfe and John Squires in negligent entrustment of their vehicle. In light of the foregoing, the motion for Summary Judgment is denied.

The defendants argue that the plaintiffs must set forth evidence in admissible form or establish a *prima facie* entitlement to dismissal of their affirmative defense that plaintiffs have failed to mitigate their damages. It is noted that the defendants are using Summary Judgment language to oppose the plaintiffs motion under CPLR 3211; "..there are still

questions of fact requiring denial of that portion of **plaintiff's motion or summary judgment** (emphasis added) which seeks dismissal of the defendant's fifth affirmative defense of plaintiff's[sic] failure to mitigate damages" (see Affirmation in Opposition ¶60) and"...[p]laintiffs have not set forth evidence in admissible form, nor have they established a prima facie entitlement to dismissal under CPLR 3211."(see Affirmation in Opposition ¶57).

This branch of plaintiffs' motion is made under CPLR 3211. As stated previously, this Court cannot treat the instant motion as a Summary Judgment motion absent notice to the parties (see *Mihlovan v Grozavu*, *supra*). Further, the record does not establish that defendant " deliberately charted a summary judgment course". Thus, this court will apply the standards applicable to a motion to dismiss pursuant to CPLR 3211. (*Sta-Brite Services, Inc. v Sutton, supra*). The scope of review on the two motions differs in that the motion to dismiss examines the sufficiency of the pleadings, whereas Summary Judgment examines the sufficiency of the evidence underlying the pleadings. (*Friedman v Connecticut General Life Ins. Co.,* 30 AD3d 349). As such, the plaintiffs in support of a CPLR 3211 motion are not required to submit evidence in admissible form. (*Kempf v Magida*, 37 AD3d 763).

Notwithstanding the foregoing, a party seeking to avail itself of this affirmative defense of failure to mitigate damages must establish that the injured party failed to make diligent efforts to mitigate its damages, and the extent to which such efforts would have diminished those damages (*Eskenazi v Mackoul* 72 AD3d 1012). In the instant action, the defendants failed, in their verified answer, to give more than mere conclusory statements

as to this affiramtive defense. Affirmative defenses plead as conclusions of law that are not supported by any facts are insufficient and should be dismissed. (*Falk v Gallo*, 18 Misc.3d 1146A, [Sup. Court, Nassau County, 2008], quoting *Plemmenou v Arvanitakis,* 39 AD3d 612; see also *Petracca v Petracca,* 305 AD2d 566; *Bentivegna v Meenan Oil Co.,* 126 AD2d 506). Further, CPLR 3211(b) allows for dismissal of one or more defenses when that defense "is not stated or has no merit." Here, the defendants' contentions are no more than conclusory statements which contain opinions and not facts (*Seiler v Ricci's Towing Service,* 210 AD2d 972). Accordingly, the plaintiffs' motion to strike this affirmative defense is granted.

The branch of the plaintiffs' motion seeking Summary Judgment is denied, and the motion to dismiss the fifth affiramtive defense, is granted.

MOTION BY DEFENDANTS VIVIAN BARKAI AND TALIA BARKAI

The plaintiffs allege liability against both defendants in common law negligence and negligence per se in that in that they violated the New York General Obligations Law §11-100 by providing alcohol to Timothy who was underage, procuring, furnishing, and allowing Timothy to consume alcohol on their premises when they knew him to be underage, permitting Timothy to become intoxicated while he was at their residence, and allowing Timothy to leave their home in an intoxicated state. They are also alleged to have violated the Nassau County Social Host Law by permitting knowingly permitting the underage Timothy Wolfe to consume alcoholic beverages at their home.

The defendants filed the instant motion contending that Timothy was not intoxicated, which is a perquisite for them to be found liable to Eric. Further, defendant Vivian Barkai

argues that she was at work and she did not permit her daughter to host any such gathering in their home. Defendant, Talia Barkai, argues that she did not host a party nor did she provide alcohol to her guests.

With respect to underage drinking, there can be statutory liability under General Obligations Law § 11-100 which creates a cause of action in favor of a person injured as a result of the acts of an intoxicated minor if the injured party can demonstrate that he/she was injured by reason of the intoxication of a party who was under the age of 21, and that the host knowingly caused such intoxication by unlawfully furnishing or procuring alcoholic beverages for the underage person with the knowledge or reasonable cause to believe that such person was under 21. As such, violation of the state statute would sustain a cause of action in negligence per se. Section 64-4(a) of Nassau County's Local Law-commonly referred to as the "Social Host Law" predicates liability upon a host permitting the consumption of alcohol by minors, not upon a showing of harm to persons or property.[2]

Nassau County's "Social Host Law" provides that:

> "[i]t shall be unlawful for any person over the age of eighteen who owns, rents, or otherwise controls a private residence, to knowingly allow the consumption of alcohol or alcoholic beverages by any minor on such premises or to fail to take reasonable corrective action upon learning of the consumption of alcohol or alcoholic beverages by any minor on such premises. Reasonable corrective action shall include, but not be limited to: 1) making a prompt demand that such minor either forfeit and refrain from further consumption of the alcoholic beverages or

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[2]Distinction is recognized between state statutes and local ordinances or administrative rules and regulations for purposes of establishing negligence; as a rule, violation of a state statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability, but violation of a municipal ordinance constitutes only evidence of negligence.

> depart from the premises; and 2) if such minor does not comply with such request, either promptly reporting such underage consumption of alcohol i) to the local law enforcement agency or ii) to any other person having a greater degree of authority over the conduct of such minor."

As defendant Talia Barkai was under the age of eighteen at the time of the events referred to herein, the foregoing provision is applicable only as to Vivan Barkai. The evidence in the record, which includes Vivian Barkai's testimony at deposition and the testimony of other deponents including Talia Barkai, indicates that she was at her place of employment for the entire duration of the party and she had no knowledge of any party and/or drinking, particularly underage drinking, occurring at her home. Therefore, she cannot be held liable under the local law and as to this issue, Summary Judgment is granted as to both defendants regarding this specific cause of action in violation of the Social Host Law.

General Obligations Law § 11-100 provides in pertinent part that:

> "Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of 21 years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of 21 years."

Moreover, General Obligations Law §11-100 requires a showing that the very minor to whom the intoxicant was furnished actually became intoxicated and in his or her intoxicated state injured a third party. The defendants contend that the submitted toxicology report arising from tests conducted on Timothy Wolfe upon his admission to North Shore University Hospital, and annexed to their papers as Exhibit F, indicates that

he was not intoxicated or impaired at the time of the accident. However, defendants, for some reason, did not highlight the report nor did they provide specific reference as to where the report was located in their voluminous medical exhibit. It is not for the Court to search through voluminous reports attached as exhibits to identify portions therein that may support a Summary Judgment movant's position. Consequently, the record is devoid of any conclusive evidence regarding this specific issue and defendants' Summary Judgment entitlement cannot obtain based upon this argument. (*Czyz v Murray Hill Mews Owners Corp.*, 21 Misc3d 1146(A), [Sup. Court, Kings County, Dec. 17, 2008]).

While the statute does not limit liability to those who physically provide alcohol to a minor, it requires a showing that defendant was more than an unknowing bystander, or an innocent dupe whose premises was used by underage people (*Guerica v Carter*, 274 AD2d 553, 554). The statute has been strictly interpreted and does not apply to a homeowner or any person who has neither supplied alcohol to, nor procured alcohol for consumption by an underage person who causes injury to another. (*Nelson v Neng*, 297 AD2d 313, 314). Here, as previously stated, defendant Vivian Barkai was at work in New York City on the night of the party and she was unaware that a party was being held at the premises at which alcohol was being consumed. Further, she had not given permission for her daughter to host an unsupervised party and there is no evidence that she either supplied, procured or assisted in supplying or procuring the alcohol/drugs which were allegedly consumed by defendant Timothy Wolfe at the party (*Fantuzzo v Attridge*, 291 AD2d 871, 872).

Accordingly, defendant Vivian Barkai has sustained her entitlement to Summary Judgement under the cause of action in negligence per se under General Obligations Law § 11-100. The Court, however, reaches a different conclusion as to defendant, Talia Barkai.

Significantly, beyond the explicit acts of purchasing for, or directly giving alcohol to, a minor, one who chooses to "participate in a scheme to furnish alcohol to underage individuals" may be considered to have furnished or assisted in procuring alcohol pursuant to the statute (*Rust v Reyer,* 91 NY2d 355). This is particularly so if that person played an "indispensable role" in making the alcohol available (*Rust v Reyer, Id.* at 361; *O'Neill v Ithaca College* 56 AD3d 869).

It is noted that the record is devoid of evidence that Talia Barkai actually purchased the alcohol consumed by Timothy. The key issue is whether the facts that: each of the 30 "guests" brought a six-pack of beer to the residence; the guests consumed beer on the premises; guests, particularly Timothy Wolfe, played drinking games such as "flip the cup" –a game that Talia testified that Timothy was winning; beer was "everywhere" and readily accessible to guests; and Talia took no steps to curtail the activity at her home, constitutes "furnishing" alcohol under the statute. (See Notice of Motion, Exhibit, H, Tr. Eric Parchment, p. 26, ln. 13-22, p. 27, ln. 4-13, Exhibit G, Tr. Timothy Wolfe, p. 59, ln. 4-9). This evidence, when viewed in the light most favorable to defendant, discloses a question of fact as to whether Talia Barkai assisted in furnishing alcohol to Timothy Wolfe (*O'Neill v Ithaca College, supra*).

The record sets forth facts demonstrating that Talia Barkai was more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink (*Rust v Reyer,* 91 NY2d 355 quoting *Dodge v Victory Mkts.,* 199 AD2d 917; *Reickert v Misciagna,* 183 AD2d 151). Similarly, she was more than a passive participant who merely knew of the underage drinking and did nothing else to encourage it (see *Rust v Reyer, supra*; Notice of Motion, Exhibit J, Tr. Taliah Barkai, p. 73, ln. 6-12, p.75, ln. 10 -17, p. 76, ln. 1-25, p. 77, ln. 1-25, p. 79, ln. 3-17). Accordingly, defendant, Talia Barkai, has not established an entitlement to Summary Judgment as to a cause of action in negligence per se.

In order for the plaintiffs to prevail on a claim of common law negligence, there must first be a legal duty owed by the defendants to the plaintiffs and such breach of duty by a party must have caused the injury (see *Raquet v Braun,* 90 NY2d 177, quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599). Here, plaintiffs maintain that the defendants are liable because they breached a duty owed to Timothy Wolfe and ultimately to Eric Parchment in that the defendants failed to control or supervise the activities of guests at their home (*D'Amico v Christie,* 71 NY2d 76).

However, while social hosts may be found liable where a factual issue has been presented regarding "whether it was foreseeable 'that someone would get drunk at [a] party, ...and cause injury to a third party' " (*Lane v Barker,* 241 AD2d 739, quoting *Comeau v Lucas,* 90 AD2d 674); in this case, there was no proof of any uncontrolled party guests that may have led to a dangerous situation. Furthermore, despite the evidence in the record that Timothy Wolfe drank alcohol at the party, there is no proof in this record that

his consumption was anything other than voluntary or that his actions needed to be controlled because he was exhibiting obvious signs of intoxication (*Dollar v O'Hearn,* 248 AD2d 230).[3]

Further, since the accident did not occur at the Barkai home, or in an area within the Barkai defendants' control, liability cannot be predicated on the common law duty of a landowner to control the conduct of third persons on their premises where they have the opportunity to control such persons and are reasonably aware of the need for such control. (see *D'Amico v Christie*, 71 NY2d 76, 85). As such, summary judgment is awarded to both Barkai defendants regarding a cause of action in negligence is granted.

In opposition, the plaintiffs submitted affidavits from plaintiff, Danitza Parchment, who asserted nothing more than wholly conclusory allegations devoid of evidentiary value (*Denenberg v North Shore University Hosp.* 292 AD2d 493). No other evidence has been introduced in opposition to the instant Summary Judgment motion to raise a triable issue of fact as to whether the defendants' failed to exercise reasonable care or breached a duty, if owed, to Timothy Wolfe and Eric Parchment in common law negligence or, in the case of Vivian Barkai, as to whether she violated the General Obligations Law § 11-100 and the Nassau County Social Host Law.

Accordingly, defendant Vivian Barkai has met her burden of establishing *prima facie* entitlement to Summary Judgment dismissing the complaint as to said defendant, and

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[3]It is noted that the foregoing criteria must be present to sustain a cause of action under common law negligence. Such criteria need not be present to sustain a cause of action pursuant to General Obligations Law Section 11-100 and Nassau County's Social Host law.

defendant Talia Barkai has met her burden establishing entitlement to Summary Judgment dismissing the complaint only as to the cause of action against her in common law negligence and negligence in violation of the Nassau County Social Host Law. The complaint as to Vivian Barkai is dismissed in its entirety; the complaint as to Talia Barkai regarding the causes of action in negligence, is dismissed.

MOTION BY DEFENDANTS TIMOTHY WOLFE, DIANE WOLFE AND JOHN SQUIRES

The plaintiffs' Bill of Particulars, served on all defendants on or about January 30, 2009, set forth various injuries and prognosis which included but was not limited to: shattered right femur in multiple pieces which required hardware repair including wires, bolts, screws and a rod; right femur midshaft commuted fracture; limitations and restrictions of motion; loss of function and use of the injured parts of the body; and loss of quality and enjoyment of life. In addition, the Bill of Particulars provided in relevant part; "...[a]ll of the ...injuries and their sequelae are of a chronic protracted nature which will have permanent residual effects and which have manifested or will manifest permanent sequelae and to the extent the plaintiff expressly reserves the right to prove upon trial hereof any and all sequele and/or residuals which have manifested themselves prior to the time of trial herein including exacerbation of pre-existing injuries if any."(see Affirmation in Opposition, Exhibit A). Further, the bill states that Eric was a high school senior and a varsity football player at the time of the accident and his injuries caused him to be confined to his home and also limited his ability to freely ambulate where he incurred costs associated with home care and other out of pocket expenses. His injuries also precluded his continued participation on the school's varsity football team and he incurred damages

in fees and expenses prepaid in anticipation of playing football.

The matter was certified as ready for trial on February 25, 2010 and the stipulation was executed by all parties. The plaintiffs served a Supplemental Bill of Particulars on April 1, 2010 which set forth additional injuries including but not limited to, a shortening of Eric's right leg by 1/8 of inch while alleging additional damages in that Eric was unable to participate in football activities where he would have secured a football scholarship. Specific costs for travel expenses in transporting Eric to college, replacement footwear, and college tuition for four years were also cited. In response to the Supplemental Bill of Particulars, defendants served a Notice for Discovery and Inspection on plaintiffs on or about April 19, 2010.

Plaintiffs filed a Note of Issue on or about April 15, 2010 and a Second Supplemental Bill of Particulars on or about May 1, 2010 which set forth additional treatment and injuries including but not limited to, "recommended secondary surgery to remove right thigh hardware to reduce the trochanteric bursitis and IT band syndrome". Prior to the filing of the Note of Issue, all pre trial discovery and examination of the parties had been conducted.

On or about May 11, 2010, defendants filed the instant motion alleging that the plaintiffs have claimed additional damages and injuries after the matter was certified for trial and after the filing service of the Note of Issue, specifically citing the claims of Eric's right leg shortening and the costs of Eric's airfare to travel to college, college tuition arising from Eric's inability to procure a college scholarship; and replacement footwear. The plaintiffs included their response to the defendants' Notice for Discovery and Inspection in

their opposition papers to the instant motion filed on or about June 2, 2010 (see Affirmation in Opposition, Exhibit E).

The defendants argue that they are prejudiced by the additional claims in the supplemental bills of particulars and the matter remaining on the Court's calendar for trial precludes their ability to prepare a timely and appropriate defense. In alternative to the relief sought, the defendants seek an Order compelling plaintiffs to fully respond to the Notice for Discovery and Inspection and to compel the plaintiffs to testify regarding the new allegations set forth in the supplemental bills.

The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial" (*Twiddy v Standard Mar. Transp. Servs.*, 162 AD2d 264, 265, quoting *Palazzo v Abbate*, 45 AD2d 760). CPLR 3043 [b] provides in part:

> "...[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities...."

Here, the plaintiffs do not seek to allege a new theory of liability; overall, the plaintiffs are basically elaborating on injuries cited in previous bills of particulars, purporting only to set forth the extent of plaintiffs' continuing disabilities as they become more apparent over time, specifically in infant plaintiff's, Eric's, case, with increased age and development (*Tate by McMahon v Colabello*, 58 NY2d 84). The original bill of particulars gave notice of the injuries complained of and it specifically stated, as cited herein, that the injuries and damages were continuing while reserving plaintiffs right to append or supplement their bill

accordingly (*Cossart v Fredenburgh*, 50 AD2d 993).

While supplemental bills cited Eric's medical condition and prognoses arising from the original injuries set forth in the Bill of Particulars, specifically the recommended additional surgeries to Eric's right leg, the original bill clearly referred to injuries, fractures and treatment of the same leg which included screws, wires and various hardware. In light of the nature of Eric's injuries and the healing process relating to the maturing injuries, the more definitive, statements in the supplemental bills regarding essentially the same injuries recited in the earlier bill could not have come as a surprise to the defendants (*Tate by McMahon v Colabello, supra*).

The Court acknowledges that the shortening of a right leg can be viewed as a new and/or additional injury; which certainly warrants further discovery (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389). However, the plaintiffs alleged this shortening on the leg in its supplemental bill which was filed prior to the filing of their Note of Issue. As such, this supplemental bill would be considered an amended bill of particulars which was properly filed in view of the pre-note of issue posture of the case and the rule that the plaintiffs may amend their bill of particulars once as of right prior to the filing of the Note of Issue (*see* CPLR 3042[b], *Vargas v Villa Josefa Realty Corp, supra, quoting Wolfer v 184 Fifth Ave., LLC,* 27 AD3d 280; *Bartkus v New York Methodist Hosp.,* 294 AD2d 455; *Villalona v Bronx-Lebanon Hosp. Ctr.*, 261 AD2d 185).

Regarding the claims of college tuition costs, it is duly noted that Eric did not testify affirmatively that he was awarded a scholarship or that he was being considered for a scholarship. The Court is certainly aware that costs associated with the loss of scholarship

opportunities may be speculative. However, plaintiffs set up the foundation in the following testimony:

> "...Q Before this accident happened, had you spoken to any schools about playing football, either coaching staff or other recruiters come down and speak to you about playing football, either coaching staff or any recruiters come down and speak to you about playing for their schools?
>
> A No. Well, this was supposed to be my break out year because I was on varsity since freshmen year. My coaches were expecting a lot from me and then the accident..." (See Affirmation in Opposition, Exhibit I, Tr. Eric Parchment, p. 174, ln. 17 - 25).

It is noted that defendants limited their examination of Eric's scholarship potential by only inquiring if he had been awarded a scholarship, to which he answered in the negative (see Affirmation in Opposition, Exhibit I, Tr. Eric Parchment, p. 205, ln. 15 - 17).

In regards to out of pocket expenses for traveling from his home to Buffalo State University where he is presently enrolled, the plaintiff offered testimony about his inability to drive and/or sit in a car for an extended period of time and the fact that he had to travel to the school by airplane (see Affirmation in Opposition, Exhibit I, Tr. Eric Parchment, p. 180 ln. 23 - 25, p. 181 ln. 1-6).

Also, at issue here is whether the plaintiffs may serve a second supplemental bill of particulars alleging additional damages and costs after the filing of the Note of Issue. Contrary to the defendants' contention, the recommendation that plaintiff have a secondary surgery to remove right thigh hardware did not constitute a new cause of action or new injury. Rather, that allegation constituted a claim of "continuing special damages and disabilities" (CPLR 3043 [b]) which can be asserted, as of right, pursuant to CPLR 3043(b) (*Fortunato v Personal Woman's Care, P.C.*, 31 AD3d 370; *Berman v Wheels, Inc.*, 207

AD2d 704; *Pines v Muss Dev. Co.,* 172 AD2d 600). While a supplemental bill of particulars may not be used to claim a wholly new category of special damages not previously asserted, the plaintiffs' original bill and evidence contained in the record fully set forth the elements supporting the recommended surgery resulting from the fracture of the right femur (*Pearce v Booth Mem. Hosp.*, 152 AD2d 553).

In light of the foregoing, there was no showing of prejudice by the defendants. Further, it is within the Court's discretion to deny defendants' motion to strike the Certificate of Readiness for Trial and Note of Issue, notwithstanding a claim of prejudice, where all pretrial discovery had been completed, including a physical and oral examination of plaintiffs and sufficient particulars had been given in response to original demands (*Karlitz v Midtown Hospital,* 50 AD2d 756). Although the defendants were put on notice of plaintiff's claim for such damages in plaintiffs' original bill of particulars, and the supplemental bill of particulars did not change the nature of the claim, but only the amount sought, the court notes that plaintiffs have not demonstrated that they will be unduly burdened or prejudiced by further examination.

It is well settled that the supervision of discovery and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court. The determinative factor is whether the discovery is material and necessary to facilitate a proper defense; whether the effect of the examination is overly burdensome to the affected party; and whether, in allowing the examination, the fact finder will receive sufficient information to ensure a fair trial to all parties (*Perasevic v Nouveau Elevator Industries, Inc.* 2 Misc.3d 1006(A), [Sup. Court, Kings County, 2004]).

Here, the granting of the alternative relief sought by the defendants' relief to compel the examination of the plaintiffs will likely yield information which is material and necessary to a proper defense and sufficient to ensure a fair trial to all parties (*Perasevic v Nouveau Elevator Industries, Inc., supra*). Given plaintiff's claim that he now has a more serious and permanent injury of a shortened leg, that he has been denied an opportunity to compete for scholarships thus incurring college costs, that he is incurring costs for replacement footwear, and costs for out of pocket expenses in travel, the court finds that any information garnered in regards to these supplemental claims, will be material and necessary to the defendants' defense.

Further, the supplemental bill of particulars was served after the Note of Issue was filed, and additional discovery has also continued subsequent to the filing of the Note of Issue. Accordingly, the court considers defendant's request to compel plaintiffs' examination as to foregoing supplemental issues to be appropriate (*Perasevic v Nouveau Elevator Industries, supra*).

The motion to strike the Certificate of Readiness for Trial and Note of Issue is denied and further discovery and examinations before trial are to be conducted in the time and manner as set forth herein.

MOTION BY PLAINTIFFS ERIC PARCHMENT AND DANITZA PARCHMENT, CROSS MOTION BY DEFENDANTS, TIMOTHY WOLFE, DIANE WOLFE AND JOHN SQUIRES

With respect to the *in limine* motion brought by plaintiffs Eric Parchment and Danzita Parchment and cross motion by defendants, Timothy Wolfe, Diane Wolfe and John Squires, the court notes the function of such a motion is to permit a party to obtain a

preliminary order before or during trial to exclude the introduction of anticipated inadmissible, immaterial or prejudicial evidence or to limit its use. (*State v Metz*, 241 AD2d 192, 198). Such a motion aids the trial process by enabling the court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of trial. (*Palmieri v Defaria*, 88 F3d 136, 141). Because a ruling on a motion *in limine* is subject to change as the case unfolds, the ruling constitutes a preliminary determination in preparation for trial. (*Palmieri v Defaria, supra* at p. 139). Generally, a decision on a motion *in limine*, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission. (*Citlak v Nassau County Medical Center*, 37 AD3d 640; *Winograd v Price*, 21 AD3d 956).

Under the circumstances extant, the court refers the *in limine* motions at bar to the trail judge, so that the issues raised by the motions, including the relevance of the evidence sought to be excluded, might be decided in the appropriate factual context. (*National Union Fire Ins. Co. v L.E. Meyers Co. Group*, 937 F. Supp. 276, 287 [S.D.N.Y. 1996]).

Dated: September 27, 2010

UTE WOLFF LALLY, J.S.C.

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