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| Calagiovanni v Carello |
| 2019 NY Slip Op 34270(U) |
| January 7, 2019 |
| Supreme Court, Onondaga County |
| Docket Number: Index No. 2016EF2787 |
| Judge: Gregory R. Gilbert |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

ALICIA S. CALAGIOVANNI, Public Administrator
of Onondaga County, as Administrator of the Estate
of SUMMER A. RUPERT-WOZNICZKA a/k/a
SUMMER A. RUPERT,

Plaintiff,

vs.

VINCENT T. CARELLO, HAYLEE E. COVELL,
JAKE HAFNER'S TAVERNS, INC., and
JAKE HAFNER'S RESTAURANT & TAVERN,

Defendants.

DECISION & ORDER

Index # 2016EF2787

RJI # 33-16-3837

HON. G. GILBERT, JSC

BACKGROUND

This matter involves a motor vehicle accident which took place on October 30, 2014 at approximately 6:45 am. The action was commenced by the filing of a summons and complaint on July 8, 2016.

Summer A. Rupert (Rupert) was killed in the accident when she was struck by a vehicle owned by Haylee E. Covell (Covell) driven by her then boyfriend Vincent T. Carello (Carello). Causes of action are asserted against Covell and Carello and a wrongful death/dram shop action is stated against defendants Jake Hafner's Taverns, Inc. and Jake Hafner's Restaurant & Tavern (Hafner's).

Disclosure in the matter has been completed and a trial note of issue was filed on July 23, 2018. The Court has before it a motion for summary judgment brought by Hafner's which seeks to dismiss all claims and cross claims against it on the basis there is no proof of dram shop liability, no

proof of proximate causation, the wrongful death action may not be maintained against Hafner's and there is no proof of conscious pain and suffering. Hafner's asserts that the cross claim by Covell should be dismissed because she failed to appear for depositions in addition to there being no basis for liability against it in the first instance.

STANDARD

Summary judgment may be granted only where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980). The motion needs to be supported by sufficient evidence in admissible form to show the material and undisputed facts based on which judgment as a matter of law must be granted. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985); Viviane Etienne Medical Care v. Country-Wide Insurance Company, 25 NY3d 498 (2015). In the absence of such a showing, the motion must be denied regardless of the sufficiency of the responding papers. Vega v. Restani Construction Corp., 18 NY3d 499 (2012); Smalls v. AJI Industries, Inc., 10 NY3d 733 (2008).

Once the burden on the motion has passed to the responding party, it is incumbent on that party to demonstrate by admissible evidence the questions of fact which may preclude summary judgment. Alvarez, 68 NY2d at 324; Zuckerman, 49 NY2d at 562. A responding burden is not met by conclusory or unsubstantiated allegations or the expression of hope. Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124 (2000); Zuckerman, 49 NY2d at 562.

On a motion, the Court is charged to view evidence and inferences arising therefrom in a light most favorable to the responding party. Haymon v. Pettit, 9 NY3d 324 (2007); Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., LP, 7 NY3d 96 (2006). Once all the papers have been reviewed, with the foregoing principles in mind, the motion should be granted unless a material triable issue of fact has been identified. Panepinto

v. New York Life Insurance Co., 90 NY2d 717 (1997); Rotuba Extruders v. Ceppos, 46 NY2d 223 (1978). The function of the Court on the motion is the determination of whether there a triable issue of fact exists and not one determining material fact or credibility issues. Vega, 18 NY3d at 505 and Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957).

FACTS

The facts as set forth by this Decision are stated through the lens of summary judgment. The evidence and inferences arising therefrom are seen in a light most favorable to plaintiff. The question is whether there are material triable issues of fact that will remain to be determined by a jury upon the trial of this matter.

Rupert was wearing a reflective vest and flashing lights on her upper body while running east along the north shoulder of Lakeshore Road in the Town of Cicero. By all accounts, she was facing traffic, including Carello who was driving westbound on Lakeshore Road when he left the road onto the shoulder and off the shoulder striking Rupert and then left the scene.

According to the detailed police reconstruction, the point of impact of Rupert's body with the Covell/Carello vehicle was the right rear quarter panel where a transfer of Rupert's DNA was found. The police concluded that Carello lost control on a curve exiting the roadway sideways and striking Rupert on the right side of her body throwing her roughly 67 feet from the estimated point of impact.

Carello was subsequently located and taken into custody. He registered at 0.05% BAC by breath test taken at 9:27 am confirmed by a blood test taken at 10:10 am. The investigation shows that Carello left his employment at the Copper Top Tavern shortly before midnight and proceeded to Buffalo Wild Wings where he met up with Richard Remillard and Joshua Sill. Carello had smoked some marijuana at around 5:00 pm at Copper Top Tavern.

Carello consumed a shot of Jagermeister mixed with Red Bull energy drink and a bottle of beer. He then accompanied Remillard and Sill to the

parking lot where he smoked some quantity of marijuana and returned to Buffalo Wild Wings. Carello, Remillard and Sill joined Samantha Farwell, Matthew Foley, Jane McLaughlin and Kristin LaMontage at a table where Carello finished his first beer. He then consumed a second bottle of beer.

The group, including Carello, left Buffalo Wild Wings and drove to Hafner's arriving at roughly 1:00 am. At Hafner's, Carello split a pitcher of beer with Sill. A second pitcher of beer was split by Carello and Sill while Carello played darts with LaMontage. After Carello and Sill finished the second pitcher, Carello consumed a shot of Jager with Red Bull. He admitted that following this, at around 2:00 am, that he felt "slightly intoxicated" and "buzzed". Remillard states that he was intoxicated and stumbling and that Farwell was also intoxicated. LaMontage and Foley were also intoxicated. Sill has little recollection of the events at issue. Surveillance video from Hafner's shows Carello consuming another beer and another shot at 2:10 am.

The Hafner bartender, Gina Scarsciotti (Scarsciotti) has testified that there wasn't any alcohol served after 2:00 am. Shortly before 2:00 am she did not notice any sign of intoxication in Carello, Remillard or Sill. Scarsciotti's instructions for cutting off alcohol consumption by a patron is that she observes that they are slurring their words and stumbling. She stated to the police that she did not observe anyone throwing up or stumbling around nor anyone that she thought was "extremely intoxicated". She offered no testimony of her observations of Carello who admits that he was intoxicated and buzzed when served his final beer and shot at 2:10 am.

Carello exited Hafner's at 2:22 am according to the Hafner surveillance video to smoke a cigarette and felt sick to his stomach before re-entering the bar. He exited to the Hafner parking lot at 2:27 am as shown by surveillance video. A short time later he vomited and was observed to have slurred speech, droopy eyes and was unable to stand. Carello attempted to call his mother on his cell phone but passed out in his vehicle before the call connected. Carello refused several offers of a ride home but admits that he was intoxicated before leaving Hafner's and while he was in the parking lot. The last thing he remembers before passing out is that

Remillard took his car keys out of car ignition.

Scarsciotti testified that when she exited Hafner's to the parking lot that she encountered three males and two girls sitting in a bench area. She did not observe any of them to be intoxicated and invited them to leave the premises. She had no specific observation of Carello or Carello's vehicle but there were still vehicles in the parking lot.

Carello testified that he was later told that Covell came to the parking lot and yelled at him for not being home with his child and grandmother and told him to come home with her. He was told that he refused and told her to "f*** off". Carello does not recall this himself but only recalls waking up in his car in the Hafner's parking lot just before dawn. He recalls starting the car but does not recall actually driving home. The next thing that Carello does recall is sitting in the car parked on the lawn of the Ellis residence being woken up by Carl and Andrea Ellis (Covell's parents). He believes that he passed out again and awoke to Carl Ellis knocking on the car window and that he yelled at them to "f*** off" and drove off. Carello recalls driving away from the Ellis residence but nothing of the accident or his trip until reaching the intersection of South Bay Road and Route 31 where he pulled into a gas station and purchased \$3.00 worth of gasoline and noticed new damage to the rear passenger side quarter panel of the car.

Testimony has been taken from Andrea Ellis (Ellis) who is Covell's mother and is employed as an RN at University Hospital in Syracuse. She saw Carello sitting in the car as she was preparing to leave for work. Ellis and her husband knocked on the car window and Carello opened the car door. They asked him what he was doing and tried to speak with him but his response was "I don't need this s***, f*** off". Ellis attempted to reach in to grab the car keys and Carello shut the door, started the car and took off. Ellis testified that she smelled alcohol on Carello and that his speech was slurred. She stated that Carello drove fast and unsafely away from the house skidding into a ditch in front of the house and then onto the road. After a brief discussion with her husband, Ellis then left for work traveling down Lakeshore Drive.

As Ellis drove around the bend on Lakeshore Drive she "saw a lot of

debris in the road including a mailbox” and stopped because she had a “feeling” that she was going to find Carello “hurt really bad”. She pulled into a driveway next to a driveway where Mindy Blondin (Blondin) had been preparing to leave for work in her own vehicle. Blondin had noticed what she thought was a “kid “ in her front yard and pointed this out to Ellis. The two women, now accompanied by a couple of unidentified gentlemen went over and discovered Rupert lying facedown and her legs twisted and broken. According to Ellis, Rupert was still warm and pink and her eyes were open but she had no pulse and wasn’t breathing. They performed a logroll of Rupert and Ellis started CPR noticing that Rupert also had broken ribs.

Someone called 911 and the police and ambulance arrived and Rupert was taken to University Hospital. She was pronounced dead never having regained consciousness. The cause of death is indicated as multiple blunt force injuries to the right torso and lower extremities.

At the time of his initial questioning by the police, Carello was noted be disoriented and smelled of alcohol. His speech was slurred and his responses to questioned slowed. He had glassy eyes and impaired motor coordination. He failed two field sobriety tests that were administered. On questioning, Carello admitted to consuming nine alcoholic drinks between midnight and 2:27 am when he left Hafner’s to go to his car. As noted previously, Carello’s BAC was determined by breath test at 9:27 am and confirmed by blood etst taken at 10:10am. He also failed two sobriety tests taken at the time of the breath test.

In opposition to the motion, plaintiff produces the affidavit of Dr. Leon M. Gussow. Dr Gussow is an emergency room physician, Fellow of the American College of Medical Toxicology and a Member of the American College of Medical Toxicology and American Academy of Clinical Toxicology. Dr. Gussow has reviewed all of the pleadings, police reports and deposition transcripts.

It is Dr. Gussow’s opinion within reasonable medical certainty that based on all of the evidence presented, that Carello had to be visibly intoxicated when he was served his last drink at Hafner’s. He opines that

Carello would have had a BAC of at least .14% at the time he was last served at Hafner's - not counting the last two drinks which had not absorbed into his system - and that would have produced the same effects observed in Hafner's parking lot of slurred speech and droopy eyes at the time he was served. The display of intoxication by Carello as witnessed upon his leaving Hafner's for his car would not have appeared suddenly as he left the bar but would have been readily observable when he was in the bar.

DISCUSSION

The motion seeks summary judgment to dismiss the second cause of action alleging liability against Hafner's under General Obligations Law §11-101; the third cause of action for wrongful death as to Hafner's and all claims of conscious pain and suffering asserted against Hafner's.

General Obligations Law §11-101.

General Obligations Law §11-101, otherwise known as the Dram Shop Law, requires proof that, Carello, presented to the barkeeper as "visibly intoxicated". A claim for wrongful death as part of the Dram Shop case is undeniable under GOL §11-101(2) even if there is no separate wrongful death claim based on negligence.. There is no negligence claim at all against Hafner's under the facts presented. See Murphy v. Cominsky, 100 AD3d 1493 (4th Dept 2012). The case, Adamy v. Ziriakus, 92 NY2d 396 (1998) is instructive as to the handling of the motion for summary judgment involving General Obligations Law §11-101.

There are statements as to how much Cavello had to drink over a short period of time on an empty stomach, what he had to drink, that there was marijuana use in addition to the drinking and that Cavello was served by Hafner's after closing. In addition, and as in Adamy, there were observations of Carello very soon after he was last served alcohol that he had vomitted, had droopy eyes and slurred speech, and was unable to stand.

These conditions would not suddenly appear simply because Carello crossed the threshold of Hafner's tavern for the parking lot.

The measured BAC by breath and by blood allows for a calculation of Carello's BAC at 2:10 am of .14% particularly when it is supported by the observations of Carello in the parking lot at Hafner's. There is also Carello's own account of throwing up, being intoxicated and then passing out in his car shortly after exiting Hafner's and having very little recollection of anything happening at that time.

The proof submitted in this matter is not relegated to the observations of Carello immediately prior to the accident and at the time of his arrest. Proof of his repeated passing out, demeanor and lack of recollection as to the operation of his vehicle coupled with the observations made by Ellis and the police merely confirm that Carello was still heavily impaired some five hours after he was last served alcohol and allow a reasonable inference of intoxication at the time of the accident.

There are numerous questions of credibility surrounding the testimony of Scarsciotti, Hafner's bartender. There was no switch that suddenly flipped as he exited Hafner's that rendered Carello so drunk that he repeatedly vomited, was unable to stand, slurred his speech and exhibited droopy eyes before passing out in his car while trying to call his mother. The cut off point for service of alcoholic beverages is open to question when Scarsciotti testified that she would need to observe that a patron is slurring their words and stumbling or as she put it to the police that they are "extremely intoxicated". That she later attempted to expand the considerations that she would use to determine a cut off of service only deepen questions of her credibility and the self serving nature of her testimony.

Her testimony is inconsistent when she speaks of a fixed 2:00 am closing time after which no alcohol is served but Hafner's own surveillance video shows Carello and others being served at 2:10 am. Scarsciotti's testimony is also inconsistent with that of Remillard and other witness that they were intoxicated. Remillard testified that he was so drunk that he was stumbling but Scarsciotti insists that Remillard and the other members of

the group were showing no signs of intoxication at all. If a stumbling Remillard was not “visibly intoxicated”, then no one by Scarsciotti’s broad definition would be intoxicated and General Obligations Law §11-101 has little meaning or effect. Her statement to the police was that she had no recollection of serving any of them, including Carello, shots while she testified that she served a shot to Samantha Farwell and she couldn’t recall who else while Carello testified that he was served one shot just before 2:00 am and another at 2:10 am is shown by the video.

Even if one assumes that the affidavit of Scarsciotti is sufficient to pass the burden on the motion for summary judgment to plaintiff, plaintiff has met that burden. Plaintiff has amply demonstrated Carello’s condition immediately after leaving the bar as providing circumstantial evidence of his condition when last served alcohol. Plaintiff has also provided an expert affidavit of a forensic toxicologist that shows a question of fact to exist as to whether Carello was visibly intoxicated when served his last drink. See Romano v. Stanley, 90 NY2d 444 (1997); Sheehan v. Gilray, 152 AD3d 1179 (4th Dept 2017); Kish v. Farley, 24 AD3d 1198 (4th Dept 2005); Trigoso v. Correa, 150 AD3d 1041 (2nd Dept 2017); Sherwood v. Otto Jazz, Inc., 142 ADd3d 1160 (2nd Dept 2016); Marconi v. Reilly, 254 AD2d 463 (2nd Dept 1998). A dispute as to the number of drinks consumed by Carello is not any more determinative on the summary judgment motion of the issue of visible intoxication than is the denial of visible intoxication asserted by the seller. Martinez v. Camardella, 161 AD2d 1107 (3rd Dept 1990).

As to the opinions of Dr. Gussow, Hafner’s offers no expert opinion of its own. The observations of Carello immediately after exiting Hafner’s and not counting the alcohol from the last two drinks served at 2:10 am is more than sufficient basis for Dr. Gussow’s opinion when coupled with the post arrest BAC measured by breath and blood and the calculation of the BAC excluding the last two drinks showing a .14% level of intoxication sufficient to substantiate the observations that Carello had slurred speech, droopy eyes and was unable to stand and that this was his condition when he was last served alcohol at 2:10 am.

Hafner's proposes that Dr. Gussow's opinion is rendered useless by reference to Carello's admission of having had nine drinks. Hafner's asserts that this admission is being inadmissible hearsay that is not supported by the record. Hafner's offers no authority to support this proposition.

Carello's statement that he had nine drinks is not hearsay as it is an admission made by a party. It was a statement made against his interests as well and as stated by Hafner's may also constitute a prior inconsistent statement. The fact is that the statement was made and Carello is free to adopt it or explain it as he chooses at trial.

The statement, contrary to Hafner's assertion, is also supported by the record. There were two beers and a shot at Buffalo Wild Wings. Added to that are two half pitchers of beer for at least three beers at Hafner's plus a shot. Then there is the beer and the shot served at 2:10 am according to Hafner's own video. The total is nine alcoholic drinks just as stated by Carello to the police and reflected by the supporting deposition and DWI bill of particulars' CPL 710.30 Notice.

Dr. Gussow's opinions are not speculative or without foundation. The relative strength or weakness of the expert opinion by Dr. Gussow is for the jury to decide.

Proximate Causation.

Hafner's argument as to proximate causation is likewise without merit. Oursler v. Brennan, 67 Ad3d 36 (4th Dept 2009), shows that the causation issue does not need to be resolved in a conventional negligence manner as long as there is a reasonable and practical connection between the unlawful sale and the injury/death. See also Bartkowiak v. St. Adalbert's Roman Catholic Church Society, 40 AD2d 306 (4th Dept 1973). Despite the lapse of time from 2:27 am when Carello exited to Hafner's parking lot to pass out and the approximate time of the accident at 6:45 am, there remain questions of fact to be resolved as to causation.

The record contains no indication that Carello consumed any additional alcohol or took any drugs of any kind after leaving Hafner's

tavern and going to his car. See Meizinger v. Akin, 192 Ad2d 1011 appeal denied 82 NY2d 661; Donato v. McLaughlin, 195 AD2d 685 (3rd Dept 1993). That he smoked some unknown quantity of marijuana before arriving at Hafner's does nothing to break the chain of causation as detailed by the recitation of the facts as stated above. If anything, the consumption of marijuana is a pre-existing element of intoxication that should be considered by the bartender rather than an intervening act between the service of the last alcoholic beverage and the accident.

Hafner's argument that a blood alcohol content of .05% nearly 2 ½ hours after the accident creates a presumption that Carello was not intoxicated at the time he struck and killed Rupert has no merit. Carello's testimony shows his level of impairment and the observations documented by the police officers and Ellis demonstrate both impairment of his ability to drive and intoxication. The BAC finding creates no presumption of intoxication standing by itself and the finding of a BAC is considered as some evidence of intoxication or perhaps some evidence that one is not intoxicated. See Romano v. Stanley, 90 NY2d 444 (1997); Kish v. Farley, 24 AD3d 1198 (4th Dept 2005); Johnson v. Plotkin, 172 AD2d 88 (3rd Dept 1991). Still further, the jury is allowed to consider that the BAC measured at 9:27 am would have been higher had it been measured at 6:45 am when the accident took place. All that is left is a potential issue concerning the BAC for the jury to consider. See VanValkenburgh v. Koehler, 164 AD2d 971 (4th Dept 1990) motion for leave to appeal denied 76 NY2d 714.

Conscious Pain and Suffering.

There is no direct evidence presented either for or against a claim of conscious pain and suffering given that Rupert was found unconscious and unresponsive approximately 15 minutes after the accident. She had no pulse and was not breathing when found and did not regain consciousness. Based on this Hafner's asserts that any claim against it for conscious pain and suffering must be dismissed as a matter of law. This assertion has no merit.

A jury is permitted to infer survival or pre-impact terror based on

proof of any noise, scream or cry or even scratch marks or other manifestations of any struggle. See Cummins v. County of Onondaga, 84 NY2d 322 (1994). The motion is resolved, in part, by reference to Houston v. McNeilus Truck & Manufacturing, Inc., 115 AD3d 1185 (4th Dept 2014) which held as follows:

“Contrary to defendant's contention, however, we conclude that the court properly denied those parts of its motion for summary judgment dismissing the claims for conscious pain and suffering and preimpact terror. Although "a plaintiff bears the ultimate burden of proof at trial on the issue of conscious pain and suffering, on a motion for summary judgment the defendant bears the initial burden of showing that the decedent did not endure conscious pain and suffering" (Gaida-Newman v Holtermann, 34 AD3d 634, 635, 825 NYS2d 503 [2006]; see Dmytryszyn v Herschman, 98 AD3d 715, 715-716, 950 NYS2d 401 [2012]; Haque v Daddazio, 84 AD3d 940, 941, 922 NYS2d 548 [2011]). With respect to such a claim, it is well settled "that summary judgment should not be granted where a party—such as defendant[] herein— . . . [establishes] that a decedent was unconscious when found at the scene and continued to be unconscious thereafter, if the [evidence does] not establish the decedent's unconscious condition during the interval immediately after the accident but before emergency help arrived" (Barron v Terry, 268 AD2d 760, 761, 702 NYS2d 171 [2000]). Here, although defendant established that decedent's coworker found him unresponsive a short time after the accident, defendant failed to establish decedent's condition in the short time before that. Similarly, defendant failed to establish as a matter of law that decedent did not experience preimpact terror (see generally Lang v Bouju, 245 AD2d 1000, 1001, 667 NYS2d 440 [1997]).”

Hafner's has failed to meet the burden on summary judgment because it has failed to account for the time between the impact and when Rupert was discovered approximately 15 minutes later.

A strikingly similar case was presented in Rice v Corasanti, 122 AD3d 1374 (4th Dept 2014) holding as follows:

“We conclude in appeal No. 1 that Supreme Court properly denied defendant's motion. While defendant submitted evidence that "decedent was unconscious when found at the scene and continued to be unconscious thereafter," his submissions fail to address the interval immediately after the impact until decedent was discovered by witnesses 167 feet from the collision (Barron v Terry, 268 AD2d 760, 761, 702 NYS2d 171 [2000]; see Houston v McNeilus Truck & Mfg., Inc., 115 AD3d 1185, 1186, 982 NYS2d 612 [2014]). Thus, defendant failed to establish as a matter of law that decedent did not endure conscious pain and suffering (see Houston, 115 AD3d at 1186; Jehle v Hertz Corp., 174 AD2d 812, 813, 570 NYS2d 746 [1991]). With respect to the claims for preimpact terror and psychic injury, "defendant's submissions . . . were inconclusive as to whether the decedent saw the oncoming vehicle, and thus failed to demonstrate the absence of any material issues of fact" (Cadieux v D.B. Interiors, 214 AD2d 323, 324, 624 NYS2d 582 [1995]; see Houston, 115 AD3d at 1186).”

Hafner's offers no proof that Rupert did not or could not see Carello's vehicle coming at her and no proof as to Rupert's condition after the impact until she was found some 15 minutes later by Ellis and Blondin. Consequently, Hafner's has not met the burden on the summary judgment motion and the motion has to be denied regardless of the sufficiency of the papers in opposition on this point.

Aside from the failure to meet its burden, Hafner's ignores proof that reasonably could infer that Rupert survived the initial impact and

experienced conscious pain and suffering and pre-impact terror. Rupert was running along the shoulder of Lakeshore Drive facing oncoming traffic and was found with her eyes open from which a jury could potentially infer that she saw Carello's vehicle careening sideways towards her. Rupert was still pink and warm when she was found roughly 15 minutes being hit which allows for the reasonable inference that she did not immediately perish by reason of the accident.

Covell's Failure To Appear For Depositions.

Hafner's argues that Covell's answer should be stricken due to her failure to appear for depositions. This relief is not set forth by Hafner's notice of motion nor is the basis for the relief sought. Both are required by CPLR §2214(a). The issue isn't addressed by Hafner's until a single sentence appearing at paragraph 87 of counsel affidavit. There was no request to Hafner's made no previous motion to compel the deposition or to obtain a conditional order of preclusion under CPLR §§3124 or 3126. Hafner's made no motion to strike the trial note of issue filed May 25, 2018 as provided by 22 NYCRR §202.21 and thus assented that disclosure was complete. There has been no showing of special, unusual or extraordinary circumstances. See Sims v. Ferraccio, 265 AD2d 805 (4th Dept 1999) to warrant relief by the Court. Hafner's raises no claim of prejudice under circumstances where permissive use of the vehicle is well established and Covell provided a sworn statement to the police. There is no basis for the relief that has been improperly sought to strike the answer of Covell.

Contribution and Indemnification.

Hafner's motion for dismissal of all claims for contribution and common law indemnification is without merit. See Oursler v. Brennan, 67 AD3d 36 (4th Dept 2009); Smith v. Guli, 106 AD2d 120 (4th Dept 1985). The motion is predicated on the supposition that Hafner's possesses no liability to Rupert and the claim against it has no merit and must be

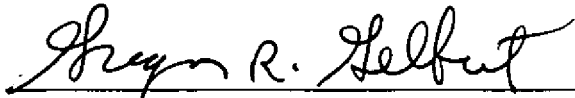
dismissed as a matter of law. The Court disagrees and finds that there are questions of fact as to Hafner's liability. A claim of contract indemnification or implied indemnity has not been raised and Hafner's discussion of the same has no basis.

Accordingly, and based upon all of the foregoing, it is

ORDERED, that the motion for summary judgment by Jake Hafner's Tavern, Inc. and Jake Hafner's Restaurant & Tavern St. Joseph's Hospital to dismiss all claims against it under General Obligations Law §11-101, including wrongful death under General Obligations Law §11-101(2); all claims for conscious pain and suffering; all cross claims for contribution and common law indemnification and to strike the answer of Haylee E. Covell is **DENIED** in all respects.

ENTER

Dated: January 7, 2019
Syracuse, New York


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE