

**Jerman v Hughes**

2020 NY Slip Op 30486(U)

February 6, 2020

Supreme Court, Suffolk County

Docket Number: 022578-2012

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 09/11/2019  
ADJ. DATE:  
Mot. Seq. 014-MG

MOTION DATE: 08/07/2019  
ADJ. DATE:  
Mot. Seq. 015-MG

MOTION DATE: 07/07/2019  
ADJ. DATE:  
Mot. Seq. 011-MD

MOTION DATE: 09/18/2019  
ADJ. DATE:  
Mot. Seq. 016-MD

MOTION DATE: 07/16/2019  
ADJ. DATE:  
Mot. Seq. 012-MD

MOTION DATE: 07/29/2019  
ADJ. DATE:  
Mot. Seq. 018-MG

MOTION DATE: 08/07/2019  
ADJ. DATE:  
Mot. Seq. 013-MG

MOTION DATE: 07/30/2019  
ADJ. DATE:  
Mot. Seq. 019-MG

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LILLIAN JERMAN, as Administrator of the Estate of Merell Jerman, and  
YASMIN JERMAN, by her Court Appointed Guardian Lillian Jerman,

Plaintiffs

-against-

RICHARD J. HUGHES; TACO BELL OF AMERICA, INC.; LORICH  
CONSTRUCTION MANAGEMENT, LLC; "A" FOOD CORP. d/b/a  
McDONALD'S; McDONALDS CORPORATION; CONCRETE  
STRUCTURES, INC.; CONBOY TAVERN CORP.; and JDRC GRILL, LTD;  
Defendants

**COUNTY CLERK  
DIRECTIVE**

WITH

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TACO BELL OF AMERICA, INC. and LORICH CONSTRUCTION  
MANAGEMENT, LLC,

Third-Party Plaintiffs

**DECISION & ORDER**

-against-

CONCRETE STRUCTURE, INC. and CONBOY TAVERN CORP.

Third-Party Defendants

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CONBOY TAVERN CORP.,

Second Third-Party Plaintiff

-against-

JDRG GRILL, LTD. d/b/a R.C. DUGAN'S,

Second Third-Party Defendants

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TACO BELL OF AMERICA, INC. and LORICH CONSTRUCTION  
MANAGEMENT, LLC,

Third Third-Party Plaintiffs

-against-

SIPALA LANDSCAPE SERVICES, INC., d/b/a ISLAND IRRIGATION

Third Third-Party Defendants

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**TO:**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (**Seq. 011**) by Plaintiffs or an Order: quashing defendant Taco Bell of America, Inc. and Lorich Construction Management, LLC's subpoena duces tecum served on plaintiff's experts Joseph Carfi, MD and Gary M. Crakes, Phd.; granting a protective order preventing further items/information sought in said subpoenas; and granting costs and such other relief that the Court deems just and proper; Affirmation of Salvator R. Marino Esq. affirmed on June 13, 2019;

(2) Notice of Motion (**Seq. 012**) by Defendant Lorich Construction Management, LLC to vacate the note of issue filed by Plaintiffs in this action with Exhibits A-J; (3) Affirmation in Opposition for Plaintiffs by Salvatore R. Marino, Esq. affirmed on July 19, 2019 with Exhibit 1 attached thereto;

(4) Motion (**Seq. 013**) by Order to Show Cause granted on July 24, 2019 with Exhibits A- L attached thereto; and (5) Affirmation in Opposition for Plaintiffs by Salvatore R. Marino, Esq. affirmed on August 2, 2019;

(6) Amended Notice of Motion (**Seq. 014**) by Third Third-Party Defendant Sipala for Summary Judgment; (7) Amended Notice of Motion by Third Third-Party Defendant Sipala Part 1 of 4 with Exhibits A-I; (8) Amended Notice of Motion by Third Third-Party Defendant Sipala Part 2 of 4 with Exhibits J-R; (9) Amended Notice of Motion by Third Third-Party Defendant Sipala Part 3 of 4 with Exhibits S-V; (10) Amended Notice of Motion by Third Third-Party Defendant Sipala Part 4 of 4 with Exhibits W-HH; (11) Memorandum of Law in Support of Motion by Third Third-Party Defendant Sipala for Summary Judgment; (12) Taco Bell of America, Inc. and Lorich Construction Management, LLC's Affirmation in Partial Support and Partial Opposition to Third Third-Party Defendant Siplala Landscape Service d/b/a Island Irrigation's Motion fo Summary Judgment, with Exhibit A; (13) Affirmation in Reply to Taco Bell & Lorich Construction Management, LLC's Affirmation in Partial Support and Partial Opposition to Third Third-Party Defendant Siplala's Motion fo Summary Judgment;

(14) Notice of Cross Motion (**Seq. 015**) by JDRC Grill, LTD. d/b/a R.C. Dugan's dated June 27, 2019 with Exhibits A-W; (15) Amended Notice of Cross Motion by Second Third-Party Defendant; (16) Affirmation in Opposition for Plaintiff by Salvatore R. Marino, Esq. to JDRC Grill, Ltd's Motion for Summary Judgment with Exhibits 1-3; (17) Affirmation in Opposition for Plaintiff by Salvatore R. Marino, Esq. to JDRC Grill, Ltd's Amended Motion for Summary Judgment; (18) Affirmation in Opposition for Defendants Taco Bell of America, Inc. and Lorich Construction Management, LLC to RC DUGANS SPORTS FRILL and JDRC GRILL LTD d/b/a RC DUGAN'S SPORTS GRILL cross motion and amended cross motion for summary judgment

on all claims and cross claims with Exhibits A and B; (19) Reply Affirmation by Meredith Ross Friedler, Esq. for Defendant / Second Third-Party Defendant JDRC Grill, Ltd.; (20) Reply Affirmation by Meredith Ross Friedler, Esq. for R.C. Dugan's in Response to Opposition Submitted By Taco Bell and Lorich in Action #2;

(21) Notice of Motion (**Seq. 016**) by Defendants Taco Bell of America, Inc. and Lorich Construction Management, LLC for summary judgment on all of Plaintiffs' claims and all of the cross claims against it; limiting the apportionment of fault against it to no more than fifty percent; and limiting the claims for future care made by the guardian for Yasmin Jerman to the statistical life expectancy of Merell Jerman, with Exhibits A-C; (22) Affirmation in Opposition for Plaintiffs by Salvatore R. Marino, Esq. with Exhibits 1-14 attached thereto; (23) Affirmation in Opposition for JDRC Grill, Ltd. By Meredith Ross Friedler, Esq. affirmed on October 10, 2019; (24) Affirmation in Opposition for Defendants "A" Food Corp., d/b/a McDonald's by jaclyn L. Dar Conte, Esq. Affirmed on October 9, 2019; (25) Affirmation in Opposition for Defendant Sipala Landscape by Eileen Baumgartner affirmed on October 11, 2019; (26) Reply Affirmation for Defendants Taco Bell of America, Inc. and Lorich Construction Management, LLC by Adam S. Oustatcher, Esq. Affirmed on October 17, 2019;

(27) Notice of Motion (**Seq. 018**) by Conboy Tavern, Corp. For summary judgment dated July 19, 2019; (28) Affirmation in Opposition for Plaintiffs by Salvatore R. Marino, Esq. With Exhibits 1-7 attached; (29) Affirmation in Opposition by Adam S. Oustatcher, Esq. For Defendants Taco Bell of America, Inc. And Lorich Construction Management, LLC with Exhibits A and B; (30) Reply Affirmation for Conboy Tavern, Corp. By Thomas J. Nogan, Esq. Affirmed on September 4, 2019 with Exhibit I attached;

(31) Notice of Motion (**Seq. 019**) by Defendants "A" FOOD CORP. d/b/a McDONALD'S and McDONALDS CORPORATION for summary judgment dated July 30, 2019 with Exhibits A-P attached thereto; and Affirmation in Partial Support and Partial Opposition by Defendants Taco Bell of America and Lorich Construction Management, LLC; it is:

**ORDERED** that the motion (Seq. #011) by Plaintiffs or an Order: quashing defendant Taco Bell of America, Inc. and Lorich Construction Management, LLC's subpoena duces tecum served on plaintiff's experts Joseph Carfi, MD and Gary M. Crakes, Phd. is denied; and it is further

**ORDERED** that the motion (Seq. #012) by Lorich Construction Management, LLC to vacate the note of issue is denied; and it is further

**ORDERED** that the motion (Seq. #013) by Defendants Taco Bell of America, Inc. & Lorich Construction Management, LLC to extend the time within which to make a motion for summary judgment pursuant to CPLR 3212 is granted to the extent provided by the temporary order issued at the time the Order to Show Cause was granted; and it is further

**ORDERED** that the motion (Seq. #014) by Third Third-Party Defendant Sipala for Summary Judgment is granted and the Third Third-Party action is dismissed; and it is further

**ORDERED** that the motion (Seq. #015) JDR Grill, Ltd. for summary judgment on all Plaintiffs' claims against it, all Defendants' cross claims against it, and the Second Third-Party action by Conboy Tavern Corp. is granted the actions against it are dismissed; and it is further

**ORDERED** that the motion (Seq. #016) by Defendants Taco Bell of America, Inc. and Lorch Construction Management, LLC for summary judgment and for this court to restrict their liability to less than fifty percent, or to determine the life span of Merell Jerman as a matter of law is denied; and it is further

**ORDERED** that the motion (Seq. 018) by Defendant Conboy Tavern Corp. is granted and all claims and cross claims are dismissed, and Third-Party Claims and cross claims are dismissed; and it is further

**ORDERED** that the motion (Seq. 019) by Defendants "A" Food Corp. d/b/a McDonald's; and McDonald's Corporation for summary judgment is granted and all claims against them are dismissed; and it is further

**ORDERED** that the County Clerk is directed to amend the caption of this case to be:

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LILLIAN JERMAN, as Administrator of the Estate of Merell Jerman, and  
YASMIN JERMAN, by her Court Appointed Guardian Lillian Jerman,

Plaintiffs

-against-

RICHARD J. HUGHES; TACO BELL OF AMERICA, INC.; LORICH  
CONSTRUCTION MANAGEMENT, LLC; and CONCRETE  
STRUCTURES, INC.

Defendants

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and it is further

**ORDERED** that the County Clerk is directed to amend the caption of Third-Party Action shall be as follows:

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TACO BELL OF AMERICA, INC. and LORICH CONSTRUCTION  
MANAGEMENT, LLC,

Third-Party Plaintiffs

-against-

CONCRETE STRUCTURE, INC.,

Third-Party Defendants

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and it is further

**ORDERED** that the County Clerk shall mark the Second Third-Party action and the Third Third-Party Action as dismissed.

### **DECISION**

#### Overview of the Case

The main action arises from a tragic motor vehicle accident at 5:56 a.m. on Monday, July 25, 2011 when the Defendant Richard J. Hughes is alleged to have been driving his Lincoln Continental southbound on Broadway in Amityville (State Route 110) in an intoxicated condition when he struck and killed Merell Jerman and seriously injured Beauton Byrd<sup>1</sup> who were walking together southbound on the west side of the roadway, in the right hand turn lane, near the intersection with Ritter Avenue, in front of the Taco Bell located at 810 Broadway.

Defendant Hughes is alleged to have met with his coworker Dennis Connolly and Viviana Florez at Defendant Conboy Tavern located in Bethpage and he consumed alcoholic beverages at Conboy Tavern. It is further alleged that Defendant Hughes then drove them all to Defendant R.C. Dugan's in East Meadow and consumed alcoholic beverages here. Plaintiffs have brought Dram Shop actions against Conboy Tavern Corp. and JDR Grill, Ltd. d/b/a R.C. Dugan's Sports Grill based upon the observations of Bishwaraj Bastola who was working as a cashier at the 7-11 convenience store located at 1 Farm Edge Road in Bethpage, NY and observed Defendant Hughes come into the 7-11 a little after 4:00 o'clock in the morning in an intoxicated condition as recorded on store surveillance video.

Plaintiffs further allege that Defendant Taco Bell of America, Inc. had undertaken construction of its premises and had blocked the sidewalk without making provision for safe pedestrian passage and this was a substantial factor in causing Merell Jerman and Beauton Byrd to walk in the

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<sup>1</sup> Byrd brings a related action (Index 28954-2011) that has been joined for trial.

roadway. Plaintiff also brings action against Lorich Construction Management, LLC as it was the contractor for Taco Bell, as well as Concrete Structures, Inc. upon the allegations that it was the masonry contractor responsible for having blocked the driveway apron and sidewalk.

Plaintiff brings action against "A" Food Corp. d/b/a McDonald's. McDonald's is located at 900 Broadway, immediately north of the Taco Bell. Plaintiff alleges that McDonald's had installed sprinklers between curb at the road and the public sidewalk and caused Merell Jerman and Beaton Byrd to leave the sidewalk and walk in the roadway where they were struck by Hughes.

#### Complicating Factor

Upon a conference of this case the court has been informed that Beaufort Byrd is incarcerated. Upon information and belief Byrd was charged with both Attempted Murder and Arson<sup>2</sup> in November of 2017, and is presently incarcerated at the Beaufort County Detention Center<sup>3</sup> in South Carolina.

#### Motion Seq. 011

Plaintiff moves to quash subpoenas duces tecum served by Defendants Taco Bell of America, Inc. and Lorich Construction Management, LLC. These subpoenas were improperly served directly on Plaintiff's experts without notice to Plaintiff's counsel. This was improper.

However, CPLR § 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR 3101(a) is to be liberally construed. *See Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403; *Melworm v Encompass Indem. Co.*, 112 AD3d 794 (2013); *Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 (2nd Dept. 2011).

It is of further significance that CPLR § 4515 "Form of expert opinion" provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. ***Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.***"

Plaintiff has served expert witness reports that bear upon the assessment of the mental condition of Yasmin Jerman and the economic costs associated with the loss of supervision and guidance that could have been provided to her by Merell Jerman had Merell Jerman not died. While the initial disclosure provided by Plaintiff was sufficient, the circumstances of this case require Defendants to be able to assess the expert opinions to be proffered by Plaintiff. Prior to trial this

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<sup>2</sup> *The Beaufort Gazette*, November 30, 2017.

<https://www.islandpacket.com/news/local/community/beaufort-news/article187301538.html>

<sup>3</sup> <https://www.beaufortcountysc.gov/detention-center/inmate-inquiry-system.html>

disclosure has the benefit of permitting complete trial preparation, avoid trial by surprise, and at the time of trial will avoid delays as all counsel will know and be prepared to introduce such evidence that forms the basis of offered opinions and also be prepared to challenge the evidence offered in support of the expert opinions based thereon. *See D'Andraia v Pesce*, 103 A.D.3d 770 (2nd Dept. 2013).

Plaintiff has requested a protective order. No basis has been provided for such an order and discovery is now complete. A party asserting that material sought in disclosure is privileged bears the burden of demonstrating that such material is exempt from discovery. *See Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 (1991) and *Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562 (2nd Dept. 2012). That has not been done. In the event a trial subpoena is served then such a subpoena is subject to a motion to quash. Accordingly, Plaintiffs' motion (Seq. 011) is denied.

#### Motion Seq. 012

Defendant Lorich Construction Management, LLC moves to vacate the Plaintiff's note of issue. This action was commenced on July 26, 2012. Defendant Lorich Construction Management, LLC argues it should now have discovery that it did not demand, was not denied, and never moved to compel. The motion (Seq. 012) is denied.

#### Motion Seq. 013

Defendant Lorich Construction Management, LLC by Order to Show Cause granted by the Hon David T. Reilly, moved the court for an order to permit the filing of a motion for summary judgment after the expiration of the limitation period of 120 days. That court issued a temporary order extending the period within which defendant was to file the summary judgment motion to a date one week after the determination of this motion (Seq. 013) as made by order to show cause. The only opposition to this motion was filed by the Plaintiffs and Defendant made its motion for summary judgment on September 17, 2019 within the time period granted in the temporary order. In any event, the multiplicity of parties and the nature of this action and the related proceeding that is to be joined for trial constitute ample good cause. Accordingly, the Order to Show cause is granted to the extent that Defendants have moved for summary judgment within the time proscribed by the Hon David T. Reilly.

#### Motion Seq. 014

Third Third-Party Defendant Sipala Landscaping Service, Inc. moves for Summary Judgment in the Third Third-Party action brought against it by Taco Bell of America, Inc. and Lorich Construction Management, LLC.

In the main action Plaintiffs alleged that Taco Bell of America, Inc. had employed the services of Lorich Construction Management, LLC to do work for it that included the replacement of the sidewalk and driveway apron in front of its business located at 801 Broadway in Amityville and that Taco Bell, as owner of the premises, was therefore responsible for construction barriers that were in place that blocked the sidewalk occasioning Merell Jerman and Beuton Byrd to enter the street where they were then struck by Richard J. Hughes driving his motor vehicle.

Lorich Construction Management, LLC subcontracted with Sipala Landscaping Service, Inc. for the installation of irrigation at premises. Taco Bell of America, Inc. and Lorich Construction Management, LLC bring a Third Third-Party Action against Sipala Landscaping Service, Inc.

The Third Third-Party complaint was signed by counsel and they contend that Sipala Landscaping Service, Inc. installed sprinklers that sprayed water on the sidewalk in front of the Taco Bell and the spray from the sprinklers was a substantial factor that caused Merell Jerman and Beuton Byrd to leave the sidewalk and enter the roadway where they were then struck by Defendant Hughes.

Sipala Landscaping Service, Inc. moves for summary judgment pursuant to CPLR § 3212. In support of its motion Sipala Landscaping Service, Inc. has made a *prima facie* case that it had concluded the installation of the sprinklers, the controls for the sprinklers were within building under the control of Taco Bell of America, Inc. and further there is no basis upon which anyone asserts that the sprinklers were positioned such that pedestrians would have been sprayed with water. In opposition Third-Party Plaintiffs fail to raise a material issue of fact. It is notable that while the sprinklers have been under the control of Third-Party Plaintiffs, before the date of the accident, on the day of the accident, and after the accident, they have not offered any witness who avers that the sprinklers sprayed the sidewalk. Third-Party Plaintiffs have not offered any evidence whether by observation before the accident or by testing the sprinklers after the tragic event that the sprinklers were a substantial factor in this accident. As such this confected Third Third-Party action, that is not even based upon information and belief, *see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC, 136 A.D.3d 680 (2nd Dept. 2016)*, is dismissed.

#### Motion Seq. 015

Defendant JDRC Grill, Ltd. moves this court for summary judgment dismissing the complaint against it and all cross claims, and dismissing the Second Third-Party action brought against it by Conboy Tavern, Corp. In support of its motion for summary judgment Defendant relies upon the deposition testimony of Dennis Connolly who is a co-worker testified that between 7:00 p.m. and 8:00 p.m. he arrived at Defendant Conboy Tavern and fifteen minutes later Defendant Richard J. Hughes arrived. He testified that Hughes had one beer and did not appear intoxicated and they left together with Vivianna Florez with Hughes driving to Defendant JDRC Grill for dinner. Connolly testified they ate the bar and Hughes had dinner and possibly two or three beers and then three dinner companions left JDRC Grill after about an hour or an hour and one-half and Hughes dropped them off at Conboy Tavern at about 11:30 p.m. Hughes never got out of his vehicle and Connolly driving with Florez then followed Hughes and observed him drive to a 7-11 located about 50 feet from Conboy Tavern in Bethpage. Connolly testified that Hughes was never visibly intoxicated. Florez also testified at an examination before trial and she did not observe Hughes in an intoxicated condition.

“To establish a cause of action under the Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages. General Obligations Law § 11-101(1); Alcoholic Beverage Control Law § 65(2).” *Pinilla v City of New York, 136 A.D.3d*

774 (2<sup>nd</sup> Dept. 2016). Defendant JDRC Grill has made a *prima facie* case that Richard Hughes was not in a visibly intoxicated condition when he was at its establishment.

In opposition, Plaintiff identifies the limitations of the deposition testimony of Vivianna Florez in which she did not recall many significant details from the time she, Connolly and Hughes were at the JDRC Grill. Plaintiff argues that the observations of the 7-11 cashier, Bishwaraj Bastola, made after 4:00 o'clock in the morning on July 25<sup>th</sup> that Hughes had come into the store and was intoxicated, and a subsequent observation of Hughes at about 5:43 a.m. of a motorist Bisilio Vilorio in Huntington Station near the intersection of West 19<sup>th</sup> Street and New York Avenue (State Route 11) driving southbound and swerving over the roadway and minutes later striking Merell Jerman and Beauton Byrd. This was followed by the observations made by Suffolk County Police Officer Jungen Jon after the accident in which he concluded Hughes was intoxicated as consistent with the observations of Police Officer Avital Donnefeld. In opposition, Defendants Taco Bell of America, Inc.; Lorich Construction Management, LLC offers similar arguments as Plaintiff.

There is compelling evidence that Hughes was intoxicated when he struck Merell Jerman and Beauton Byrd with his vehicle. However, the observations of Richard Hughes at 4:00 o'clock in the morning at the 7-11 in Bethpage, and later at 5:43 a.m. in Huntington Station do not raise a material question of fact as to whether Hughes was visibly intoxicated while at JDRC Grill in East Meadow more than four hours earlier when Dennis Connolly testified that he was not. Accordingly, the motion by JDRC Grill, Ltd. dismissing all claims, cross claims and Third-Party actions against it is granted.

#### Motion Seq. 016

Defendants Taco Bell of America, Inc. and Lorich Construction Management, LLC move for summary judgment. In this action it is alleged that Merell Jerman and Beauton Byrd were struck by a motor vehicle while the at 5:56 a.m. on Monday, July 25, 2011 when the Defendant Richard J. Hughes is alleged to have been driving his Lincoln Continental southbound on Broadway in Amityville (State Route 110) in an intoxicated condition when he struck and killed Merell Jerman and seriously injured Beauton Byrd<sup>4</sup> who were walking together southbound on the west side of the roadway in the right hand turn lane of Broadway near the intersection of Ritter Avenue, in front of the Taco Bell located at 810 Broadway. Plaintiff claims that Taco Bell of America, Inc. and Lorich Construction Management, LLC were negligent in that they had blocked the sidewalk for reconstruction of the sidewalk and driveway apron into the Taco Bell located at 810 Broadway.

Defendants argue that upon these facts the sidewalk barriers were not a proximate cause of the accident that occurred in the roadway. Plaintiffs and rely upon the holding in *Akinola v Palmer*, 98 A.D.3d 928 (2<sup>nd</sup> Dept. 2012) to support their motion for summary judgment. The facts as reported in *Akinola* are:

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<sup>4</sup> Byrd brings a related action (Index 28954-2011) that has been joined for trial.

“At approximately 7:30 P.M. on April 10, 2008, the infant plaintiff, then six years old, was walking with his three siblings along a sidewalk on Jewett Avenue in Staten Island. The infant plaintiff and his siblings attempted to cross the street in the vicinity of 78 Jewett Avenue where a construction fence had been erected on the sidewalk and which blocked further pedestrian traffic. As they were crossing, the infant plaintiff allegedly was injured when he was struck by a vehicle operated by the defendant Tiffany C. Palmer. The defendant 78-22 Jewett Avenue Enterprises, LLC (hereinafter 78-22), owned the property located at 78 Jewett Avenue, and at the time of the accident, was engaged in a construction project at that site for which it received all necessary permits. The defendant V & V Plus, LLC (hereinafter V & V), was the general contractor on the project. V & V and 78-22 (hereinafter together the appellants) moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.”

*Akinola v Palmer, 98 A.D.3d at 929.*

The Court in *Akinola* held that the foregoing facts make a *prima facie* case that sidewalk barrier was not a proximate cause of the Plaintiff's injuries, that Plaintiff's had not raised a material question of fact, reversed the trial court, and granted Defendants' motion for summary judgment.

In opposition, Plaintiffs have presented evidence in admissible form that for Merell Jerman and Beauton Byrd to proceed southbound they could not walk to the westerly side of the barricaded sidewalk where there was a construction site, but necessarily walked in the roadway to proceed past the closed sidewalk. Whether Merell Jerman and Beauton Byrd were negligent in entering the roadway when they did, whether Richard Hughes was negligent in driving his car into them, and whether moving Defendants proximately caused the accident and bears some portion of fault is a question of fact. Accordingly, Defendants' motion for summary judgment is denied.

Defendants' motion to limit the percentage of fault ascribed to them or determine the life expectancy of Merell Jerman are all questions of fact for the jury and cannot be resolved as a matter of law. Accordingly, the motion (016) is denied in all respects.

#### Motion Seq. 018

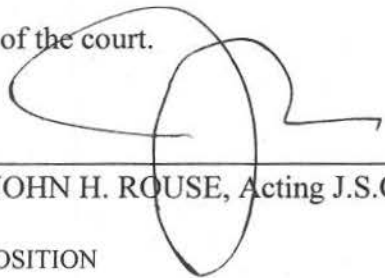
Defendant Conboy Tavern, Corp. moves for summary judgment. The claims against Conboy Tavern, Corp. are even more remote in time than those against JDRC Grill, Ltd. and upon the same evidence submitted in support of JDRC Grill, Ltd.'s motion for summary judgment it too has made a *prima facie* case in support of its motion for summary judgment. Plaintiffs alone oppose the motion, but as with the motion for JDRC Grill, Ltd.'s motion for summary they have not raised a material question of fact to support an inference that Defendant Conboy Tavern, Corp. served Richard Hughes at a time when he was visibly intoxicated. Accordingly, the motion for summary judgment is granted.

Motion 019

Defendants "A" FOOD CORP. d/b/a McDONALD'S and McDONALDS CORPORATION move (Seq. 019) for summary judgment. The only *theory* of liability advanced against this defendant was that lawn sprinklers were on causing Merell Jerman and Beauton Byrd enter the sidewalk in front of the McDonald's. However, eyewitness testimony presented was that Merell Jerman and Beauton Byrd entered the roadway at the obstruction to the sidewalk in front of Defendant Taco Bell of America, Inc.'s construction site. There is no opposition to this motion, except that Taco Bell of America, Inc. and Lorch Construction Management, LLC argue the legal point that if this movant is not liable, then it should not be liable. The facts as to the alleged liability of each are different. Accordingly, the Defendants "A" FOOD CORP. d/b/a McDONALD'S and McDONALDS CORPORATION move for summary judgment as to all claims and cross claims against them is granted.

The foregoing shall constitute the decision and order of the court.

Dated: February 6, 2020



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JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION