

# Navigating Novel Negligence Cases

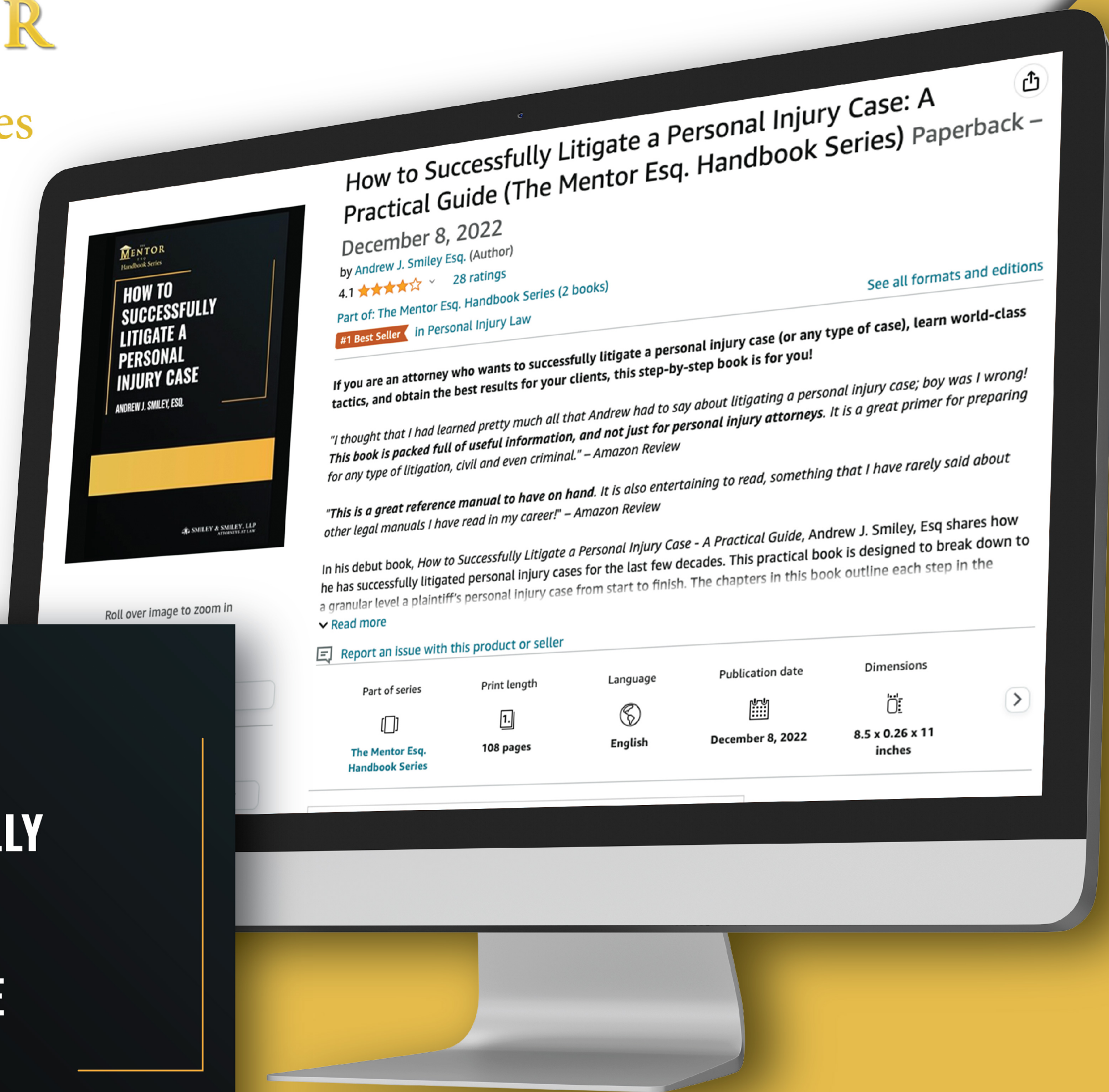
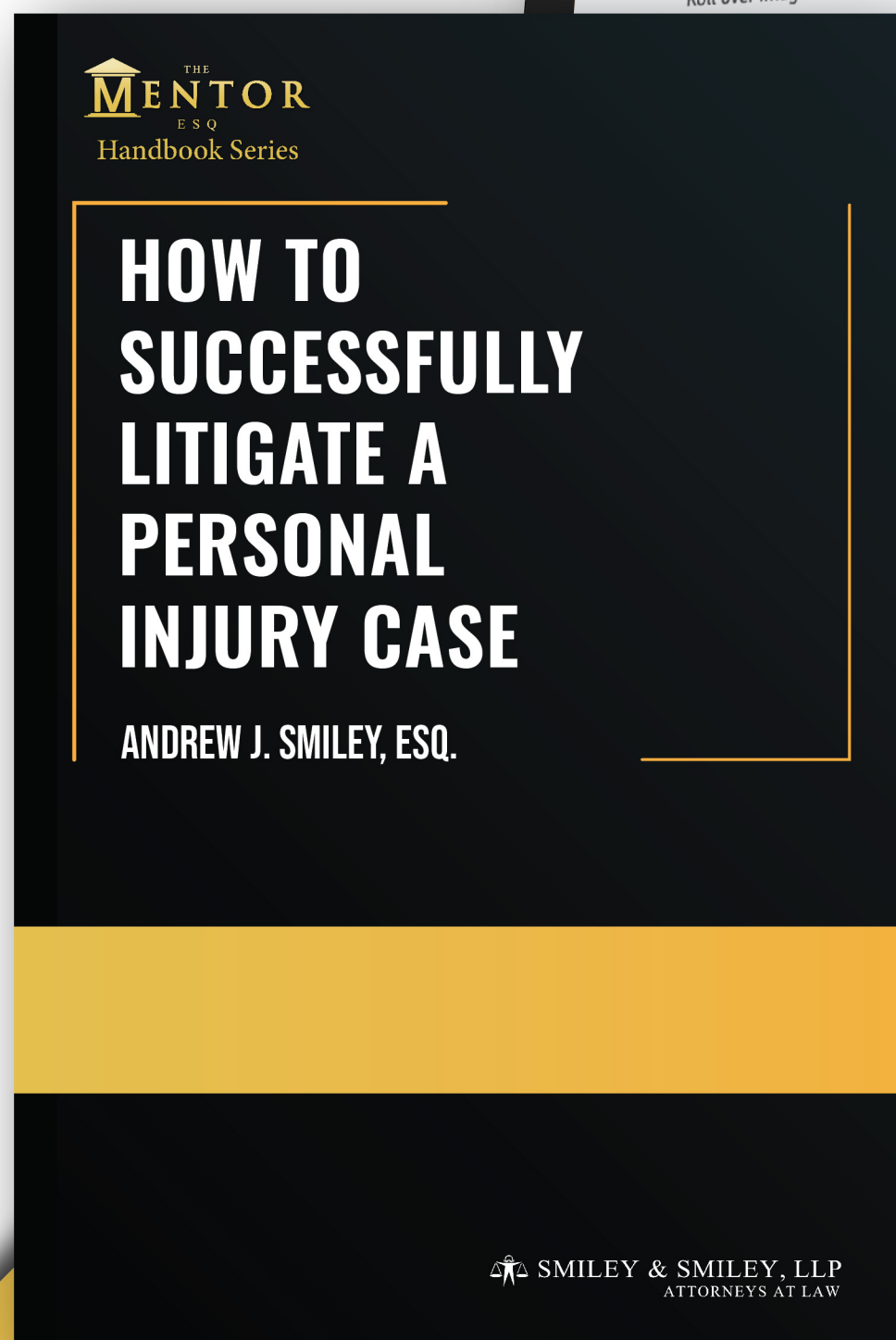
Part 2: How To Successfully Litigate Dram Shop Cases

MATERIALS BY  
Andrew Smiley

—New York State—  
**ACADEMY**  
OF TRIAL LAWYERS

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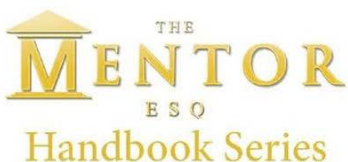
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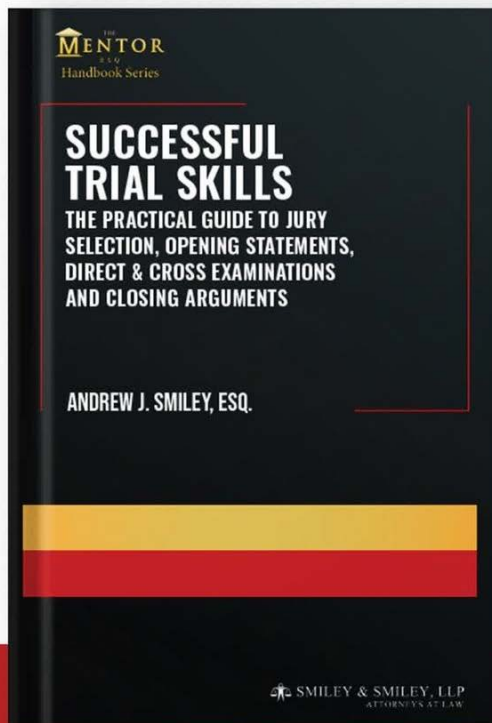




# SUCCESSFUL TRIAL SKILLS

ANDREW J. SMILEY ESQ.

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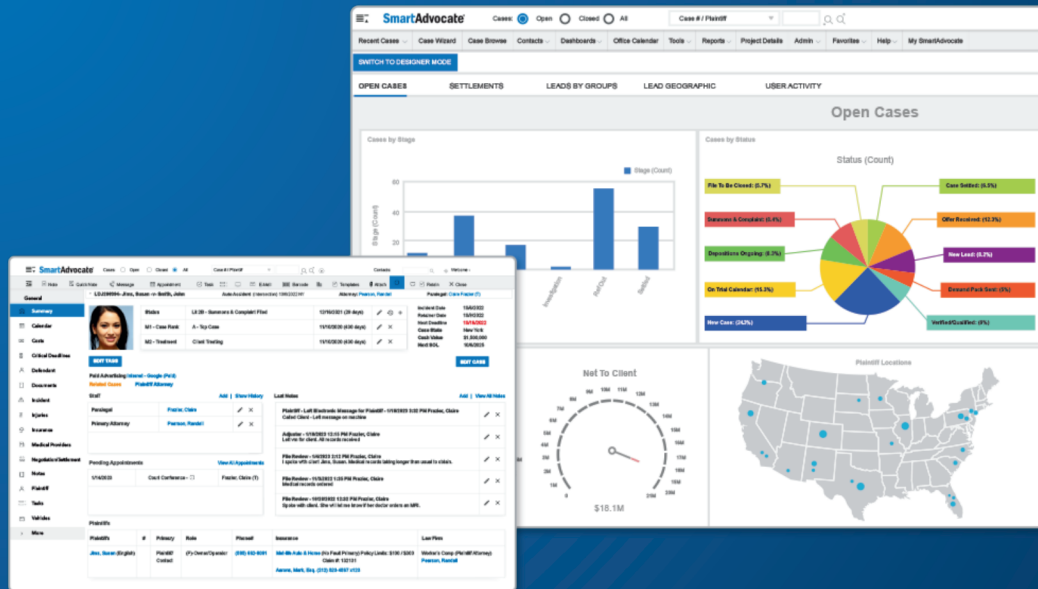


**ARE YOU READY TO ELEVATE YOUR TRIAL  
SKILLS AND CONQUER THE COURTROOM?**

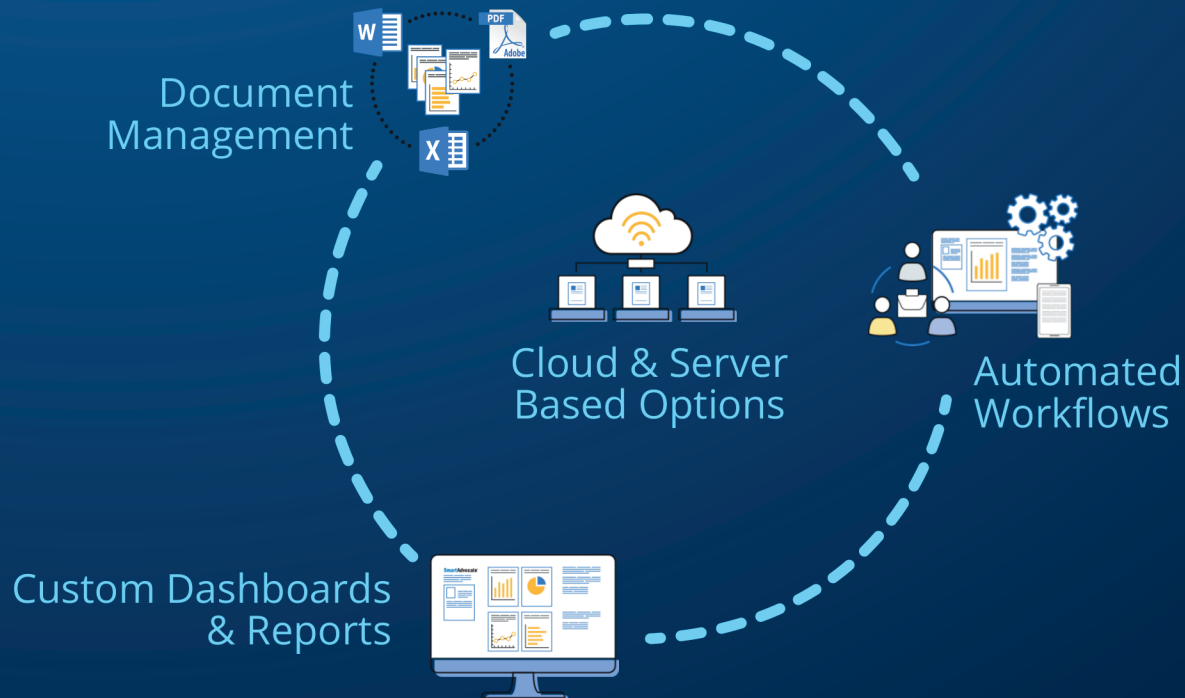
My latest book “Successful Trial Skills” is already sitting as the #1 new release in Trial Practice, Juries and Litigation Procedures.



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**Smiley & Smiley, LLP**  
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**[www.thementoresq.com](http://www.thementoresq.com)**

***CURRICULUM VITAE***

**Education:**

· Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)  
Moot Court Honor Society - Competitor - National Appellate Trademark Competition  
Moot Court Honor Society – Coach, National Trial Team – Regional Champions  
CALI Excellence For The Future Award - Advanced Legal Research  
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

· Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

**Professional:**

· *Smiley & Smiley, LLP*

Managing Partner & Senior Trial Attorney, January 2001 - present

Associate, June 1996 - December 2000

Law Clerk, September 1993 - June 1996

Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

## Andrew J. Smiley, Esq. Curriculum Vitae, Page 2

· *Adjunct Clinical Instructor of Law - Brooklyn Law School, Trial Advocacy Program (1998-2004)*

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York “Super Lawyer”*

2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024

### Bar Admissions:

- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United States District Court of Vermont

### Organizations/Affiliations:

· New York State Academy of Trial Lawyers

- Immediate Past President (May 2018- May 2019)
- President (May 2017 – May 2018)
- President-Elect – (April 2016- May 2017)
- Vice President – 1st Dept. (July 2013-May 2016)
- Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

· New York City Trial Lawyers Alliance

- Chairman of Board of Governors (July 2017 – July 2019)
- President (July 2015 – July 2017)
- Vice President (June 2013 – July 2015)
- Treasurer (June 2011 – June 2013)
- Secretary (June 2009- June 2011)
- Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
  - Medical Malpractice Committee
  - Supreme Courts Committee
- American Bar Association
- The American Association for Justice



## Andrew J. Smiley, Esq. Curriculum Vitae, Page 3

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Lime Rock Drivers Club
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

### Authored Books

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide*, 2022, The Mentor Esq. Handbook Series – Amazon Best Seller in Personal Injury Law

Smiley, Andrew J. *Successful Trial Skills – A Practical Guide to Jury Selection, Opening Statements, Direct & Cross Examinations and Closing Arguments*, 2024, The Mentor Esq. Handbook Series – Amazon #1 New Release in Trial Practice

### Continuing Legal Education (CLE) Presentations:

(72) *Working with Experts*, Office of The New York State Attorney General – Legal Education and Professional Development, April 2, 2024

(71) *Novel Negligence Cases – Part 3: How to Successfully Litigate Ski Accident Cases*, New York State Academy of Trial Lawyers, March 6, 2024

(70) *Novel Negligence Cases – Part 1: How to Successfully Litigate Personal Trainer and Gym Negligence Cases*, New York State Academy of Trial Lawyers, January 3, 2024

(69) *Litigation Back to Basics – Part 3: Introducing Evidence and Impeaching Witnesses*, New York State Academy of Trial Lawyers, December 6, 2023

(68) *Litigation Back to Basics – Part 2: Working With Experts*, New York State Academy of Trial Lawyers, November 1, 2023

(67) *Construction Site Injury Litigation: Pursuing or Defending Claims Against Site Owners, Contractors, and Other Third Parties*, Strafford CLE/BarBri, October 17, 2023

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 4**

Continuing Legal Education (CLE) Presentations Continued:

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4: Motion Practice*, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions*, Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar*, Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law*, New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement*, New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions*, New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts*, New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action*, New York State Academy of Trial Lawyers, March 2, 2022

## Andrew J. Smiley, Esq. Curriculum Vitae, Page 5

### Continuing Legal Education (CLE) Presentations Continued:

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation*, New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations*, New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination*, New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination*, New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements*, New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection*, New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!*, New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial*, New York State Academy of Trial Lawyers, June 2, 2021

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5: Pre-Trial Disclosures and Gearing up for Trial*, New York State Academy of Trial Lawyers, May 5, 2021

(38) *How to Successfully Litigate a Personal Injury Case Series - Part 4: Depositions*, New York State Academy of Trial Lawyers, April 7, 2021

(37) *How to Successfully Litigate a Personal Injury Case Series - Part 3: Your Adversary, the Preliminary Conference and Initial Discovery*, New York State Academy of Trial Lawyers, March 3, 2021

(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit*, New York State Academy of Trial Lawyers, February 3, 2021

(35) *How to Successfully Litigate a Personal Injury Case Series - Part 1: Getting the Case, Investigation and Ready to File*, New York State Academy of Trial Lawyers, January 6, 2021

(34) *Brick by Brick: Building a Personal Injury Practice*, New York State Academy of Trial Lawyers, December 10, 2020

(33) *Working with Experts to Build Your Case*, New York State Academy of Trial Lawyers, October 8, 2020



**Andrew J. Smiley, Esq. Curriculum Vitae, Page 6**

Continuing Legal Education (CLE) Presentations Continued:

- (32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020
- (31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court*, New York State Academy of Trial Lawyers, June 9, 2020
- (30) *Crisis Management - The Corona Virus Pandemic*, The Mentor Esq. Podcast, April 9, 2020
- (29) *Do You Have a Federal Tort Claims Act Case in Your Office*, New York State Academy of Trial Lawyers, December 10, 2019
- (28) *Auto and Truck Claims, Accidents and Litigation 2019 – Evaluating Damages and Use of Experts*, New York State Bar Association, September 9, 2019
- (27) *Thoughts and Strategies in the Ever-Evolving Product Liability Litigation – The Plaintiff's Perspective*, The Defense Association of New York, March 12, 2019
- (26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019
- (25) *Trial Techniques: Interactive Lessons from the Plaintiff and Defense Perspectives*, The Defense Association of New York, September 17, 2018
- (24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017
- (23) *Presenter on Evidence, 2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016
- (22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA*, New York State Bar Association, October 11, 2015
- (21) *Effectively Using Experts in Personal Injury Cases*, Lawline, October 8, 2015
- (20) *Killer Cross Examination Strategies*, Clear Law Institute, April 21, 2015
- (19) *Powerful Opening Statements*, Clear Law Institute, January 13, 2015
- (18) *The Dram Shop Law: New York Liquor Liability*, Lawline.com, November 20, 2014
- (17) *Killer Cross Examination Strategies*, Lawline.com, November 20, 2014
- (16) *Trial Techniques: Tricks of the Trade Update*, Lawline.com, October 14, 2014
- (15) *Personal Trainer Negligence Update*, Lawline.com, October 14, 2014
- (14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

## **Andrew J. Smiley, Esq. Curriculum Vitae, Page 7**

### Continuing Legal Education (CLE) Presentations Continued:

- (13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014
- (12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013
- (11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013
- (10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012
- (9) “*You Had Me at Hello*”: *Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012
- (8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012
- (7) *The Nuts and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011
- (6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011
- (5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011  
*Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011
- (4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011
- (3) *Jury Selection 101*, New York State Academy of Trial Lawyers, December 14, 2010
- (2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010
- (1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

### Television Appearances

#### *Fox News Channel*

- The O'Reilly Factor
- What's Happening Now with Martha McCallum
  - America's News Room
  - Fox & Friends
- Fox Business Channel
  - Neil Cavuto
  - Money with Melissa Francis

*CNN -Anderson Cooper 360*

*ET – Entertainment Tonight*

*Bloomberg TV*

**Andrew J. Smiley, Esq. Curriculum Vitae, Page 8**

*Headline News*

*Tru TV*

*Court TV*

*The Morning Show with Mike and Juliet*

Interests, Hobbies:

High Performance Driving Events, Sim Racing, Tennis, Lego, Cooking





McKinney's General Obligations Law § 11-101

§ 11-101. Compensation for injury caused by the illegal sale of intoxicating liquor

[Currentness](#)

1. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

2. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.

3. Such action may be brought in any court of competent jurisdiction.

4. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

**Credits**

(L.1963, c. 576, § 1. Amended L.1980, c. 281, § 20.)

[Notes of Decisions \(325\)](#)

McKinney's General Obligations Law § 11-101, NY GEN OBLIG § 11-101  
Current through L.2015, chapters 1 to 13, 50 to 54, 61.

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# **New York Consolidated Laws, General Obligations Law - GOL § 11-100. Compensation for injury or damage caused by the intoxication of a person under the age of twenty-one years**

Current as of January 01, 2021 | Updated by [FindLaw Staff](#)

1. 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 twenty-one 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 twenty-one years.
2. In case of the death of either party, the action or right of action established by the provisions of this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.
3. Such action may be brought in any court of competent jurisdiction.
4. In any case where parents shall be entitled to such damages, either of such parents may bring an action therefor; but that recovery by either one of such parties shall constitute a bar to suit brought by the other.

# N.Y. Alco. Bev. Cont. Law § 65

Current through 2024 NY Law Chapters 1-50, 52-55, 57, 61-117  
Section 65 - Prohibited sales

No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to

**1.** Any person, actually or apparently, under the age of twenty-one years;**2.** Any visibly intoxicated person;**3.** Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.**4.** Neither such person so refusing to sell or deliver under this section nor his or her employer shall be liable in any civil or criminal action or for any fine or penalty based upon such refusal, except that such sale or delivery shall not be refused, withheld from or denied to any person on account of race, creed, color or national origin.**5.** The provisions of subdivision one of this section shall not apply to a person who gives or causes to be given any such alcoholic beverage to a person under the age of twenty-one years, who is a student in a curriculum licensed or registered by the state education department and is required to taste or imbibe alcoholic beverages in courses which are part of the required curriculum, provided such alcoholic beverages are used only for instructional purposes during on-campus or offcampus courses conducted pursuant to such curriculum.**6.** In any proceeding pursuant to section one hundred eighteen of this chapter to revoke, cancel or suspend a license to sell alcoholic beverages, in which proceeding it is alleged that a person violated subdivision one of this section; **(a)** it shall be an affirmative defense that such person had produced a photographic identification card apparently issued by a governmental entity and that the alcoholic beverage had been sold, delivered or given to such person in reasonable reliance upon such identification. In evaluating the applicability of such affirmative defense, the authority shall take into consideration any written policy adopted and implemented by the seller to carry out the provisions of paragraph (b) of subdivision two of section sixty-five-b of this article; and **(b)** it shall be an affirmative defense that at the time of such violation such person who committed such alleged violation held a valid certificate of completion or renewal from an entity authorized to give and administer an alcohol training awareness program pursuant to subdivision twelve of section seventeen of this chapter. Such licensee shall have diligently implemented and complied with all of the provisions of the approved training program. In such proceeding to revoke, cancel or suspend a license pursuant to section one hundred eighteen of this chapter, the licensee must prove each element of such affirmative defense by a preponderance of the credible evidence. Evidence of three unlawful sales of alcoholic beverages by any employee of a licensee to persons under twenty-one years of age, within a two year period, shall be considered by the authority in determining whether the licensee had diligently implemented such an approved program.**7.** In any proceeding pursuant to section one hundred eighteen of this chapter to revoke, cancel or suspend a license to sell alcoholic beverages, in which proceeding a charge is sustained that a person violated subdivision one or two of this section and the licensee has not had any adjudicated violation of this chapter at the licensed premises where the violation occurred within the previous five year period; and **(a)** at the time of such violation the person that committed such violation held a valid certificate of completion or renewal from an entity authorized to give and administer an alcohol training awareness program pursuant to subdivision twelve of section



seventeen of this chapter, the civil penalty related to such offense shall be recovery of, as provided for in section one hundred twelve of this chapter, the penal sum of the bond on file during the period in which the violation took place; or **(b)** at the time of such violation the licensee has not had any adjudicated violations of this chapter at the licensed premises where the violation occurred within the previous five year period, any civil penalty imposed shall be reduced by twenty-five percent if the licensee submits written proof, within ninety days of the imposition of such civil penalty, that all of the licensee's employees involved in the direct sale or service of alcoholic beverages to the public at the licensed premises where the violation occurred have obtained a valid certificate of completion or renewal from an entity authorized to give and administer an alcohol training awareness program pursuant to subdivision twelve of section seventeen of this chapter.

For the purposes of this subdivision, the five year period shall be measured from the dates that the violations occurred.

N.Y. Alco. Bev. Cont.Law § 65

Amended by New York Laws 2016 , ch. 409, Sec. 1, eff. 11/4/2016.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
MATTHEW FERBER,

Plaintiff,

-against-

Dated Filed: 4/15/13  
INDEX NO. 2013/003146

Plaintiff designates  
Orange County  
as the place of trial.

**S U M M O N S**

OLDE ERIE BREW PUB & GRILL, LLC d/b/a  
DeSTEFANO'S OLD ERIE; CHESTER LANES, LLC  
d/b/a COLONIAL LANES and GW'S AMERICAN  
BURGERS; VALJON INC. d/b/a HACIENDA; and  
JOHN J. BEHLER, JR.,

The basis of venue is:  
Plaintiff's residence  
2817 Whispering Hills  
Chester, NY 10918

Defendants.  
-----X

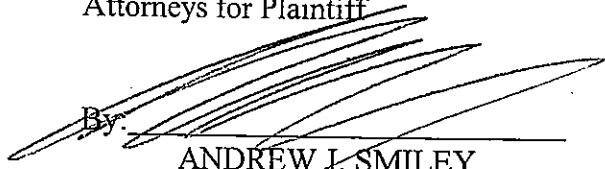
**To the above named Defendant(s):**

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorneys within 20 days after the service of this summons, exclusive of the day of service of this summons, or within 30 days after service of this summons is complete if this summons is not personally delivered to you within the State of New York.

In case of your failure to answer this summons, a judgment by default will be taken against you for the relief demanded in the complaint, together with the costs of this action.

Dated: New York, New York  
April 11, 2013

SMILEY & SMILEY, LLP  
Attorneys for Plaintiff

By   
ANDREW J. SMILEY  
60 East 42nd Street, Suite 950  
New York, New York 10165  
(212) 986-2022



**Defendant(s):**

**OLDE ERIE BREW PUB & GRILL,LLC  
d/b/a DeSTEFANO'S OLD ERIE  
7 West Main Street  
Middletown, NY 10940**

**CHESTER LANES, LLC d/b/a COLONIAL  
LANES and GW's AMERICAN BURGERS  
78 Brookside Avenue  
Chester, NY 10918**

**VALJON INC. d/b/a HACIENDA  
1753 New York 17M  
Goshen, NY 10924**

**JOHN J. BEHLER, JR.  
530 S Centerville Road  
Middletown, NY 10940**



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
MATTHEW FERBER,

Plaintiff,

-against-

OLDE ERIE BREW PUB & GRILL, LLC d/b/a  
DeSTEFANO'S OLD ERIE; CHESTER LANES, LLC  
d/b/a COLONIAL LANES and GW'S AMERICAN  
BURGERS; VALJON INC. d/b/a HACIENDA; and  
JOHN J. BEHLER, JR.,

Defendants,  
-----X

INDEX NO. 2013/003146

**VERIFIED COMPLAINT**

Plaintiff, by his attorneys, SMILEY & SMILEY, LLP, complaining of the defendants,  
hereinafter alleges at all times relevant hereto and upon information and belief, as follows:

**AS AND FOR A FIRST CAUSE OF ACTION  
AGAINST DEFENDANT, JOHN J. BEHLER, JR.**

1. Plaintiff, MATTHEW FERBER, resides at 2817 Whispering Hills, Chester, New York 10918.
2. Defendant, JOHN J. BEHLER, JR., resides at 530 S Centerville Road, Middletown, New York 10940.
3. Defendant, JOHN J. BEHLER, JR. had a son, John A. Behler, now deceased.
4. John A. Behler formerly resided at 530 S Centerville Road, Middletown, New York 10940 with defendant, JOHN J. BEHLER, JR.

5. John A. Behler was born on August 14, 1992 and was 20 years old at the time of his death.

6. On February 2, 2013, defendant, JOHN J. BEHLER, JR., was the owner of a certain motor vehicle bearing New York State license plate number EGN1107.

7. On February 2, 2013, decedent, John A. Behler, was the operator of the aforesaid motor vehicle owned by the defendant, JOHN J. BEHLER, JR.

8. On February 2, 2013, decedent, John A. Behler, was operating the aforementioned motor vehicle owned by the defendant, JOHN J. BEHLER, JR., with the knowledge, permission and consent of its owner, either expressed or implied.

9. At all times hereinafter mentioned, SR17 eastbound, in the vicinity of Exit 125, in the Town of Goshen, County of Orange, and State of New York was and still is a public roadway.

10. On February 2, 2013, plaintiff, MATTHEW FERBER, was a passenger in the aforesaid vehicle, owned by defendant, JOHN J. BEHLER, JR. and driven by his son, John A. Behler.

11. On February 2, 2013, at approximately 12:01 A.M., the aforesaid motor vehicle owned by the defendant, JOHN J. BEHLER, JR., and operated by John A. Behler, suddenly went out of control and struck the guardrail located on SR17 eastbound, 500 feet west of the Exit 125 off-ramp, in the Town of Goshen, causing the plaintiff, MATTHEW FERBER, to sustain catastrophic injuries, and causing the driver, John A. Behler, to be killed.

12. The defendant, JOHN J. BEHLER, JR., is vicariously liable for the negligent operation of his motor vehicle by his son, John A. Behler, deceased.

13. The defendant was negligent, careless and reckless in the operation, management and control of the aforesaid motor vehicle; in operating the aforesaid motor vehicle at a greater rate of speed than care and caution would permit under the circumstances; in operating the vehicle in a negligent, careless and reckless manner; in failing and omitting to provide and/or make timely and adequate use of accelerator, horn, brakes, signaling devices and steering mechanisms; in failing to give any signal or warning of approach, in failing to keep a proper lookout; in allowing the aforesaid motor vehicle to leave the roadway and strike the guardrail; and in violating provisions of the Vehicle and Traffic Laws of the State of New York.

14. At the time of this occurrence, John A. Behler, the driver, was highly intoxicated with a blood alcohol content far in excess of the legal limit.

15. Solely as a result of the defendant's negligence, the plaintiff, MATTHEW FERBER, sustained severe and permanent injuries resulting in the traumatic amputation of both legs above the knee and sustained extreme pain and suffering.

16. This action falls within one or more of the exceptions set forth in the C.P.L.R. Section 1602.

17. The plaintiff, MATTHEW FERBER, has sustained serious injuries as defined by Section 5102 of the Insurance Law of the State of New York.

18. The amount of damages sought in this action exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.



**AS AND FOR A SECOND CAUSE OF ACTION  
AGAINST DEFENDANT, JOHN J. BEHLER, JR.**

19. For a long time and prior to February 2, 2013, the defendant, JOHN J. BEHLER, JR.'s son, John A. Behler, was known to drink excessively and become highly agitated and reckless while in an intoxicated state which rendered him unfit to drive and operate an automobile with reasonable safety upon the public highways in the County of Orange and State of New York.

20. For a long time prior to and on February 2, 2013, defendant, JOHN J. BEHLER, JR., knew or should have known of the predilection of his son, John A. Behler, to attempt to drive and operate an automobile while in a highly agitated and intoxicated state.

21. With such knowledge and notice, defendant, JOHN J. BEHLER, JR., negligently entrusted to his son, John A. Behler, the possession, operation, and control of his automobile for travel and use upon the public highways in the County of Orange and State of New York.

22. While driving the aforesaid automobile owned by defendant, JOHN J. BEHLER, JR., in a highly agitated and intoxicated state, John A. Behler lost control of said motor vehicle and struck a guardrail as aforesaid thereby causing severe and permanent injuries to the plaintiff, MATTHEW FERBER.

23. By reason of the foregoing, plaintiff, MATTHEW FERBER, sustained catastrophic injuries.

24. The amount of damages sought in this action exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

**AS AND FOR A THIRD CAUSE OF ACTION  
AGAINST DEFENDANT, OLDE ERIE BREW PUB & GRILL, LLC  
d/b/a DeSTEFANO'S OLD ERIE**

25. Upon information and belief, defendant OLDE ERIE BREW PUB & GRILL, LLC, was and still is a domestic corporation with a principal place of business located at 7 West Main Street, in the Town of Middletown, County of Orange, and State of New York.

26. Upon information and belief, on or about February 2, 2013, defendant, OLDE ERIE BREW PUB & GRILL, LLC managed, operated, maintained, supervised and controlled a bar known as DeSTEFANO's OLD ERIE located at premises 7 West Main Street, in the Town of Middletown, County of Orange, and State of New York.

27. Upon information and belief, the business of defendant, OLDE ERIE BREW PUB & GRILL, LLC, at the aforementioned premises consisted of the sale of, among other things, intoxicating beverages as authorized and approved by the Alcohol Beverage Control Board and other governmental agencies created for this purpose.

28. Defendant, OLDE ERIE BREW PUB & GRILL, LLC, employed agents, servants, and employees to work at the aforesaid bar known as DeSTEFANO's OLD ERIE.

29. The aforesaid agents, servants, and employees were acting in the course and scope of their employment with defendant, OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEFANO's OLD ERIE, and in the furtherance of its business.

30. On February 1, 2013, decedent, John A. Behler, was a patron of the aforesaid bar known as DeSTEFANO's OLD ERIE located at 7 West Main Street, in the Town of Middletown, County of Orange and State of New York.

31. On February 1, 2013, defendant, OLDE ERIE BREW PUB & GRILL, LLC, its agents, servants and employees, served alcoholic beverages to John A. Behler at the aforesaid bar known as DeSTEFANO's OLD ERIE, located at 7 West Main Street, in the Town of Middletown, County of Orange and State of New York.

32. On February 1, 2013 defendant, OLDE ERIE BREW PUB & GRILL, LLC, its agents, servants and/or employees served alcoholic beverages to John A. Behler, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was in a visibly intoxicated state, thereby contributing to the intoxication of John A. Behler, defendant JOHN J. BEHLER, JR.'s son.

33. On February 1, 2013 defendant, OLDE ERIE BREW PUB & GRILL, LLC, its agents, servants and/or employees unlawfully served alcoholic beverages to John A. Behler, a minor under the age of twenty-one (21) years, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was under the legal drinking age.

34. That the aforesaid serving of alcohol to John A Behler, defendant, JOHN H. BEHLER, JR.'s son, by defendant, OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEPHANO's OLD ERIE, its agents, servants and employees constituted an unlawful sale of alcoholic beverages under Section 65 of the Alcoholic Beverage Control Law.

35. On February 2, 2013, at 12:01A.M., after decedent, John A. Behler, had consumed alcoholic beverages at the aforesaid bar known as DeSTEFANO's OLD ERIE, John A. Behler, while highly intoxicated, suddenly and without warning lost control of the motor vehicle he was operating, struck the guardrail on SR17 eastbound, 500 feet west of Exit 125, in the Town of Goshen, County of Orange and State of New York.

36. That by reason of the aforesaid acts of defendant, OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEFANO's OLD ERIE, its agents, servants and employees, the plaintiff, MATTHEW FERBER, has a right to recover actual and exemplary damages under Section 11-101 of the General Obligations Law of the State of New York.

37. As a result of the foregoing, the plaintiff MATTHEW FERBER, sustained catastrophic injuries.

38. By reason of the foregoing defendant, OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEFANO's OLD ERIE, is liable to the plaintiff, MATTHEW FERBER, for compensatory, punitive, and exemplary damages.

39. The amount of damages sought in this action exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

**AS AND FOR A FOURTH CAUSE OF ACTION  
AGAINST DEFENDANT CHESTER LANES, LLC d/b/a COLONIAL LANES  
and GW's AMERICAN BURGERS**

40. Upon information and belief, defendant, CHESTER LANES, LLC, was and still is a domestic corporation with a principal place of business located at 78 Brookside Avenue, in Town of Chester, County of Orange, and State of New York.

41. Upon information and belief, on or about February 2, 2013, defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS managed, operated, maintained, supervised and controlled a bar known as GW's AMERICAN BURGERS located at premises 78 Brookside Avenue, in the Town of Chester, County of Orange, and State of New York.

42. Upon information and belief, the business of defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, at the aforementioned premises



consisted of the sale of, among other things, intoxicating beverages as authorized and approved by the Alcohol Beverage Control Board and other governmental agencies created for this purpose.

43. Defendant, CHESTER LANES, LLC, employed agents, servants, and employees to work at the aforesaid bar known as COLONIAL LANES and GW's AMERICAN BURGERS.

44. The aforesaid agents, servants, and employees were acting in the course and scope of their employment with defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, and in the furtherance of its business.

45. On February 1, 2013, decedent, John A. Behler, was a patron of the aforesaid bar known as COLONIAL LANES and GW's AMERICAN BURGERS located at 78 Brookside Avenue, in the Town of Chester, County of Orange and State of New York.

46. On February 1, 2013, defendant, CHESTER LANES, LLC, its agents, servants and employees, served alcoholic beverages to John A. Behler at the aforesaid bar known as COLONIAL LANES and GW's AMERICAN BURGERS, located at 78 Brookside Avenue, in the Town of Chester, County of Orange and State of New York.

47. On February 1, 2013 defendant, CHESTER LANES, LLC, its agents, servants and/or employees served alcoholic beverages to John A. Behler, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was in a visibly intoxicated state, thereby contributing to the intoxication of John A. Behler, defendant JOHN J. BEHLER, JR.'s son.

48. On February 1, 2013 defendant, CHESTER LANES, LLC, its agents, servants and/or employees unlawfully served alcoholic beverages to John A. Behler, a minor under the age of twenty-one (21) years, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was under the legal drinking age.

49. That the aforesaid serving of alcohol to John A. Behler by defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, its agents, servants and employees constituted an unlawful sale of alcoholic beverages under Section 65 of the Alcoholic Beverage Control Law.

50. On February 2, 2013, at 12:01A.M., after decedent, John A. Behler, had consumed alcoholic beverages at the aforesaid bar known as, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, John A. Behler, while highly intoxicated, suddenly and without warning lost control of the motor vehicle he was operating, struck the guardrail on SR17 eastbound, 500 feet west of Exit 125, in the Town of Goshen, County of Orange and State of New York.

51. That by reason of the aforesaid acts of defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, its agents, servants and employees, the plaintiff, MATTHEW FERBER, has a right to recover actual and exemplary damages under Section 11-101 of the General Obligations Law of the State of New York.

52. As a result of the foregoing, the plaintiff MATTHEW FERBER, sustained catastrophic injuries.

53. By reason of the foregoing defendant, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW's AMERICAN BURGERS, is liable to the plaintiff, MATTHEW FERBER, for compensatory, punitive, and exemplary damages.

54. The amount of damages sought in this action exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

**AS AND FOR A FIFTH CAUSE OF ACTION  
AGAINST DEFENDANT VALJON INC. d/b/a HACIENDA**





55. Upon information and belief, defendant VALJON, INC. was and still is a domestic corporation with a principal place of business located at 1753 New York 17M, in the Town of Goshen, County of Orange, and State of New York.

56. Upon information and belief, on or about February 2, 2013, defendant, VALJON INC. d/b/a HACIENDA, managed, operated, maintained, supervised and controlled a bar known as HACIENDA located at premises 1753 New York 17M, in the Town of Goshen, County of Orange, and State of New York.

57. Upon information and belief, the business of defendant, VALJON INC. d/b/a HACIENDA, at the aforementioned premises consisted of the sale of, among other things, intoxicating beverages as authorized and approved by the Alcohol Beverage Control Board and other governmental agencies created for this purpose.

58. Defendant, VALJON INC., employed agents, servants, and employees to work at the aforesaid bar known as HACIENDA.

59. The aforesaid agents, servants, and employees were acting in the course and scope of their employment with defendant, VALJON INC. d/b/a HACIENDA, and in the furtherance of its business.

60. On February 1, 2013, decedent, John A. Behler, was a patron of the aforesaid bar known as HACIENDA located at 1753 New York 17M, in the Town of Goshen, County of Orange and State of New York.

61. On February 1, 2013, defendant, VALJON INC, its agents, servants and employees, served alcoholic beverages to John A. Behler at the aforesaid bar known as HACIENDA, located at 1753 New York 17M, in the Town of Goshen, County of Orange and State of New York.

62. On February 1, 2013 defendant, VALJON INC., its agents, servants and/or employees served alcoholic beverages to John A. Behler, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was in a visibly intoxicated state, thereby contributing to the intoxication of John A. Behler, defendant JOHN J. BEHLER, JR.'s son.

63. On February 1, 2013 defendant, VALJON INC., its agents, servants and/or employees unlawfully served alcoholic beverages to John A. Behler, a minor under the age of twenty-one (21) years, at a time when its agents, servants and/or employees knew or should have known that John A. Behler was under the legal drinking age.

64. That the aforesaid serving of alcohol to John A Behler by defendant, VALJON INC. d/b/a HACIENDA, its agents, servants and employees constituted an unlawful sale of alcoholic beverages under Section 65 of the Alcoholic Beverage Control Law.

65. On February 2, 2013, at 12:01A.M. after decedent, John A. Behler, had consumed alcoholic beverages at the aforesaid bar known as, HACIENDA, John A. Behler, while highly intoxicated, suddenly and without warning lost control of the motor vehicle he was operating, struck the guardrail on SR17 eastbound, 500 feet west of Exit 125, in the Town of Goshen, County of Orange and State of New York.

66. That by reason of the aforesaid acts of defendant, VALJON INC. d/b/a HACIENDA, its agents, servants and employees, the plaintiff, MATTHEW FERBER, has a right to recover actual and exemplary damages under Section 11-101 of the General Obligations Law of the State of New York.

67. As a result of the foregoing, the plaintiff MATTHEW FERBER, sustained catastrophic injuries.

68. By reason of the foregoing defendant, VALJON INC. d/b/a HACIENDA is liable to the plaintiff, MATTHEW FERBER, for compensatory, punitive, and exemplary damages.

69. The amount of damages sought in this action exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction

WHEREFORE, plaintiff demands judgment against the defendants, OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEFANO'S OLD ERIE, CHESTER LANES, LLC d/b/a COLONIAL LANES and GW'S AMERICAN BURGERS, VALJON INC. d/b/a HACIENDA and JOHN J. BEHLER, JR., on the First, Second, Third, Fourth and Fifth Causes of Action, together with interest and the appropriate costs and disbursements of these actions.

Dated: New York, New York  
April 11, 2013

Yours, etc.,

SMILEY & SMILEY, LLP

By: 

ANDREW J. SMILEY  
Attorneys for Plaintiff  
60 East 42nd Street  
New York, New York 10165  
(212) 986-2022

**INDIVIDUAL VERIFICATION**


STATE OF NEW YORK   )  
                                  )SS:  
COUNTY OF ORANGE   )

**MATTHEW FERBER**, being sworn says that I am the plaintiff in the action herein; I have read the annexed **SUMMONS and COMPLAINT** and know the contents thereof; that the same is true of my own knowledge, except matters alleged upon information and belief, and that as to those matters I believe them to be true.

Dated: April 11, 2013

  
\_\_\_\_\_  
**MATTHEW FERBER**

Sworn to before me  
the 11<sup>th</sup> day of April, 2013

  
\_\_\_\_\_  
NOTARY PUBLIC

**JOYCE WEINSTEIN**  
Notary Public, State of New York  
No. 01WE4858553  
Qualified in Nassau County  
Commission Expires May 5, 2014

*Index No. 003146*

*Year 2013*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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MATTHEW FERBER,

Plaintiff,

-against-

OLDE ERIE BREW PUB & GRILL, LLC d/b/a DeSTEFANO'S OLD  
ERIE; CHESTER LANES, LLC d/b/a COLONIAL LANES and GW'S  
AMERICAN BURGERS; VALJON INC. d/b/a HACIENDA; and  
JOHN J. BEHLER, JR.,

Defendants.

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**SUMMONS and COMPLAINT**

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**SMILEY & SMILEY, LLP**

*Attorney for Plaintiff*

ONE GRAND CENTRAL PLACE

60 EAST 42nd STREET

NEW YORK, NEW YORK 10165

(212) 986-2022

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1 SUPREME COURT OF THE STATE OF NEW YORK

2 ORANGE COUNTY SUPREME COURT

3 ----- x

4 FERBER, MATTHEW,

Plaintiff

INDEX NO.

- against -

3146/2013

5 OLDE ERIE BREW PUB & GRILL, ET AL.,

6 Defendants.

7 ----- x

8 ORAL ARGUMENT

90 Park Place

Goshen, New York 10924

November 4, 2015

10  
11 B E F O R E :

THE HONORABLE ROBERT A. ONOFRY,

J U S T I C E .

12  
13  
14 A P P E A R A N C E S :

15 ATTORNEY FOR PLAINTIFF

SMILEY & SMILEY, LLP

16 122 East 42nd Street - 39th Fl.

New York, NY 10168

17 BY: ANDREW J. SMILEY, ESQ.

18  
19 ATTORNEY FOR DEFENDANT

PINO & ASSOCIATES, LLP

20 50 Main Street

White Plains, NY 10606

21 BY: JOHN SOCOLOW, ESQ.

22  
23  
24 CATHLEEN MORALES

25 SENIOR COURT REPORTER

1 THE COURT CLERK: Number 17, Ferber  
2 versus Olde Erie, et al.

3 THE COURT: Thank you for your patience,  
4 counsel.

5 MR. SMILEY: Thank you. Yes, your Honor,  
6 Andrew Smiley, Smiley & Smiley for the plaintiff,  
7 Matthew Ferber.

8 MR. SOCOLOW: John Socolow, Pino &  
9 Associates for the defendant, Hacienda.  
10 S-O-C-O-L-O-W.

11 THE COURT: We had motion and cross  
12 motion for summary judgment.

13 MR. SMILEY: Yes, your Honor.

14 THE COURT: Counsel.

15 MR. SMILEY: All right. Thank you.

16 Your Honor, the plaintiff has made a  
17 motion for summary judgment pursuant to the Dram  
18 Shop Act and only pursuant to the Dram Shop Act  
19 which is GOL section 11-101 only. The Dram Shop  
20 Act is one of the oldest statutes on the books in  
21 New York, your Honor. It goes back to 1873; it was  
22 originally the Civil Damage Act. The Court of  
23 Appeals put it into play; it then became Section  
24 16 of the Civil Rights Law in 1921. And it was in  
25 1964 that it came into its present form as General



1           Obligations Law 11-101.

2                       Since that 142 years when it went into  
3           effect, your Honor, it was purposely designed as a  
4           draconian measure to penalize establishments that  
5           are licensed to sell liquor commercially. If they  
6           sell it unlawfully to someone and if that person  
7           that is unlawfully sold alcohol, then gets into an  
8           accident and causes injury to a third party.

9                       The way that the GOL works is it works in  
10          conjunction with the New York Alcohol and Beverage  
11          Control Law, Section 65, which talks about what an  
12          illegal sale is. And one of the three items that  
13          constitutes an illegal sale is the sale of the  
14          alcohol, the sale of the alcohol to someone under  
15          the age of 21 years. And under GOL 11-101, the  
16          Dram Shop Law, if a commercial entity, such as the  
17          defendant here, Hacienda, sells alcohol illegally  
18          to a minor and that minor then gets into an  
19          accident and causes injuries as a result of being  
20          intoxicated to a third party, that defendant is  
21          liable under GOL 11-101.

22                      It was designed to apply to the facts in  
23          this case, your Honor, and it is a strict liability  
24          statute which means that the mistake of fact,  
25          whether they don't know the person is under 21, it

1 doesn't matter. If they sell to someone under 21,  
2 it is an illegal sale and they are strictly liable  
3 for the consequences that flow.

4 Now, the *Patton* case which is in our  
5 papers, really spells out the history and talks  
6 about the penal nature of this and that it was the  
7 New York State's legislature's goal to penalize  
8 these restaurants and bars and put the onus on them  
9 not to sell alcohol to minors. To do whatever it  
10 takes, to set the limits higher, to be an older age  
11 to come in, use scanners, use photo identification  
12 books to make sure that identification is  
13 appropriate. But the burden is on the seller of  
14 the alcohol to make sure that they don't sell  
15 illegally to minors. And if they do, they are  
16 going to bear the full cost and be penalized by it.  
17 And that's clear. And there's a nice opinion by  
18 Chief Judge McMahon from the Northern District, New  
19 York in the *Patton versus Carnrike* case that we  
20 cite in our papers.

21 That law hasn't changed, your Honor, to  
22 date. And the facts of this case are such that my  
23 client, Matthew Ferber, on the night of February  
24 1st, 2013 was out with three other people, a  
25 gentleman named John Behler, who is a minor, he was

1 twenty years old; my client, Matt Ferber, was 26  
2 years old. And he was there with two other women,  
3 Chelsea Gallagher and Carolyn Behler, the minor's  
4 older sister. The two young ladies were also above  
5 the age of 20. They went bar hopping, all of them,  
6 all four. They started at the defendant's  
7 restaurant, Hacienda, where Hacienda sold five  
8 beers to the minor, John Behler. They do not  
9 dispute that. They knowingly sold alcohol to a  
10 minor. There is no dispute, your Honor, that John  
11 Behler was under the age of 21. Their actions  
12 constituted an illegal sale of alcohol. And they  
13 are strictly liable for that sale, that illegal  
14 sale.

15 They continued, after those drinks at  
16 Hacienda, to another bar called Gws American Bar at  
17 Colonial Lanes where John Behler, the minor,  
18 continued to drink more alcohol. They then left  
19 Gws and went to Olde Erie, the last stop of the  
20 night. And at Olde Erie, the minor, John Behler,  
21 continued to drink alcohol. That's no dispute that  
22 John Behler, the minor, procured the alcohol for  
23 himself. He purchased the alcohol at defendant,  
24 Hacienda, all five beers, and they acknowledged  
25 that, that they sold it, there's no dispute. He

1 purchased and opened up a tab at the other two bars  
2 and it's acknowledged that he procured his own  
3 alcohol that night.

4 The four individuals then got into John  
5 Behler's vehicle. It's actually his older sister,  
6 Carolyn's; that she gave him the keys. He got  
7 behind the wheel. They went and picked up some  
8 fried chicken. Then they got on the highway to  
9 drive back home. The minor was behind the wheel;  
10 my client, Matthew Ferber, was seated behind the  
11 minor; the ladies were seated in the passenger  
12 front and rear seat. The minor drove at  
13 approximately 103 miles an hour on Route 17, lost  
14 control of the vehicle, crashed into the median  
15 barrier. The barrier broke. The barrier then  
16 pierced through the entire left side of the  
17 vehicle, killing the minor, transecting both legs  
18 of my client, Matthew Ferber, and ejecting him from  
19 the vehicle at approximately midnight of February  
20 1st into February 2nd.

21 Blood was drawn from the minor at the  
22 scene. Toxicology results show, and we have  
23 submitted those reports and the police reports,  
24 that he had a .29% blood alcohol level, almost  
25 three times the limit. He was highly intoxicated.

1 And by all accounts in the police reports, it is  
2 listed that intoxication was a contributing cause  
3 to the accident.

4 Your Honor, the Dram Shop Law was  
5 designed, specifically, for the fact pattern in  
6 this case. It hits on all points. The evidence  
7 we've submitted in admissible form shows clearly  
8 that the defendant, Hacienda, knowingly sold  
9 alcohol to a minor which is an illegal sale, an  
10 unlawful sale pursuant to the Alcohol Beverage  
11 Control Law, Section 65(1), that that alcohol  
12 caused and or contributed to his intoxication. He  
13 kept drinking. He had those five beers in him  
14 until the point where he was a .29 and that he was  
15 intoxicated at the time of the accident that  
16 resulted in the horrific injuries to Matthew  
17 Ferber, who is now a bilateral amputee above the  
18 knees at the age of 28.

19 There is no defense. They are strictly  
20 liable. There is no contributory negligence on  
21 behalf of the plaintiff. That is not recognized  
22 under the law. Contributory negligence is not a  
23 defense. The *Patton* case spells out clearly, it  
24 has to do with other cases cited in our papers,  
25 that it doesn't matter that Matthew Ferber was with

1 him that evening, that he may have even been a  
2 drinking companion, or that he himself had any  
3 level of alcohol in him, or that he got into the  
4 car. That doesn't matter. There's no defense to  
5 this case.

6 Now, the only attempt at raising a  
7 defense that Hacienda raises in their papers is a  
8 defense of mistake of fact or otherwise known as  
9 the "fake ID defense". They're claiming that the  
10 bartender at Hacienda says, Oh, I saw a photo ID  
11 that the minor showed me, and they're claiming that  
12 is a defense. Your Honor, to be clear, that is not  
13 a defense to a Dram Shop Act case under GOL 11-101.  
14 It is not a defense. Showing a fake ID does not  
15 relieve them of the unlawful sale under the  
16 statute. What they are attempting to do in their  
17 papers, knowingly or not, is invoke a defense  
18 that's used in a different statute dealing with  
19 alcohol and minors. That is GOL 11-100. Your  
20 Honor, that is a statute that didn't go into effect  
21 until almost 80 years after the Dram Shop Act in  
22 1983 and, thereafter, amended in 1985, GOL 11-100  
23 went into effect in State of New York. It is  
24 different than a Dram Shop Law. It is what applies  
25 to a situation where there is a house party and

1 parents serve alcohol knowingly to minors and then  
2 that minor gets into an accident and causes  
3 injuries. It does not deal with an unlawful sale,  
4 your Honor. 11-100 deals with furnishing alcohol,  
5 knowingly furnishing alcohol to someone known or  
6 reasonably believed to be under the age of 21.

7 The law is not going to penalize me as a  
8 homeowner if I have teenagers in my house and I  
9 believe them all to be 22 years old and I serve  
10 them alcohol. I'm not going to be penalized  
11 because I had all the reason to believe they were  
12 of age.

13 It is different whereas Dram Shop Law  
14 11-101, it's on commercial vendors. They have the  
15 means and opportunity and as a commercial  
16 enterprise, they need to make sure that they're not  
17 selling illegally. The onus is on them. So GOL  
18 11-100 puts an onus on the defendant in those  
19 cases, non-commercial entities, the onus on them,  
20 private citizens, that they need to have known  
21 that, you know, or reasonably assumed that the  
22 person was underage to be liable. And it is a  
23 defense for those cases if an individual, a non  
24 restaurant, a non liquor license, a non commercial  
25 entity gives alcohol to someone that they believe



1 was of age and it is a mistake of fact, they're not  
2 going to be liable. That is a defense. It is not  
3 a defense to a GOL 11-101 case; it doesn't exist.  
4 And the defense is trying to make our case an  
5 11-100 case, which it's not. We haven't pled  
6 11-100. We don't need that case because we're  
7 dealing with the Dram Shop. And the cases cited by  
8 the defense in support of this false ID defense are  
9 all cases that have the Dram Shop Law being  
10 claimed, our statute, 11-101, and 11-100.

11 what's happened in New York, your Honor,  
12 is after 11-100 went into effect in the eighties,  
13 many plaintiffs invoked both statutes in their  
14 lawsuits because there's oftentimes where you can't  
15 prove that a liquor establishment actually sold  
16 alcohol to the person who ends up being  
17 intoxicated. So they tried to argue they furnished  
18 it because under the Dram Shop Law, you have to  
19 prove a sale; and sometimes you can't prove a sale  
20 so plaintiffs in those cases invoked 11-100 and  
21 hoped they can make their case out under that.

22 So all of the cases that the defense  
23 cites, including the Court of Appeals in *Sherman*  
24 have 11-101 and 11-100. And on the fact patterns  
25 of those cases, they've often dismissed those cases

1 against the defense because there was a mistake of  
2 age or maybe a fake ID and that applies to the  
3 11-100 case. And there's also failure to prove  
4 proof of sale so those cases get dismissed. But  
5 that mistake of fact does not apply to this case,  
6 to the Ferber case, which is a Dram Shop action  
7 only case. We cite the case law. There is no  
8 defense as far as mistake of fact and that is clear  
9 under the law. So they have no defense. The fact  
10 that there is no such fake ID in existence in the  
11 record is aside from the point. But police did an  
12 inventory of John Behler's body at the scene, they  
13 took everything off his body, everything out of his  
14 wallet, they inventoried the car. The only photo  
15 identification on him said "Under 21" on it, said  
16 "conditional" because we learned that previously he  
17 had been convicted for a DWI defense, so it was a  
18 conditional license. He didn't even have a proper  
19 photo ID, so the self-serving testimony of the  
20 bartender is exactly that. But that doesn't  
21 matter. It is not a defense.

22 And, respectfully, your Honor, we would  
23 ask this Court, to the extent it's inclined, to  
24 specifically identify in your ruling, in your order  
25 and your decision, as if it were a certified

1 question, does a fake ID or false identification  
2 stand as a defense to a Dram Shop case? And our  
3 answer is, and we respectfully submit you'd have to  
4 say no, it doesn't. And we would like a clear  
5 articulation from the Judiciary on that because,  
6 otherwise, counsel such as counsel for the defense  
7 is going to be misguided in these one hundred cases  
8 that are intertwined.

9 Now, your Honor, the only defense that  
10 they can argue and that they're trying to argue  
11 unsuccessfully because there's no admissible  
12 evidence is something called "guilty  
13 participation." And the theory of that under the  
14 law is if someone procures the alcohol, goes and  
15 buys the alcohol, gives it to the minor, then the  
16 minor goes and gets drunk and causes that person an  
17 accident, they're not going to let them recover  
18 because they're the ones that got the alcohol for  
19 the minor, okay. And the defense is trying to  
20 argue that here.

21 First of all, that's not the facts of the  
22 case. John Behler, the minor, procured all the  
23 alcohol on his own and all of the receipts have  
24 been submitted to the Court. Hacienda acknowledges  
25 they sold directly to him. Secondly, your Honor,

1 there's not one shred of admissible evidence before  
2 this Court on this motion to show, one, that our  
3 client, Matthew Ferber, purchased any alcohol  
4 throughout the entire evening or, two, that he  
5 purchased alcohol and gave it to the minor, not one  
6 shred of evidence.

7           The defense tries to submit something to  
8 the Court and it fails utterly. And I want to  
9 point out the failures of that to your Honor.  
10 First of all, not one witness and Matt Ferber was  
11 questioned, the two young women in the car that  
12 were out with John Behler that night were all  
13 questioned, the bartenders were questioned, and an  
14 owner of one of the bars was questioned. Not one  
15 witness testified that Matthew Ferber purchased  
16 alcohol. Not one witness testified that Matthew  
17 Ferber gave alcohol to John Behler. So that's the  
18 testimonial evidence and nothing is in there before  
19 you. The defense then tries to introduce two  
20 pieces of evidence to this Court, one which they  
21 say is a receipt which is proof that Matthew Ferber  
22 purchased alcohol and gave alcohol to the minor.  
23 And that receipt is annexed to their reply  
24 affirmation, Exhibit Y, which is called a chit.  
25 And they had a late stage in their reply when their

1 challenge to my opposition submit an affidavit  
2 saying that it is, from the owner saying it's a  
3 true and direct correct copy of something from  
4 their POS system. Aside from the -- First we'd  
5 argue that that affidavit does not authenticate it.  
6 But even let's assume it is authenticated, this  
7 chit says nothing. You can't even make it out and  
8 all it shows is "3 Jameson, 19.50 cash payment". It  
9 doesn't have Matthew Ferber's name on it. It  
10 doesn't have anything to connect this, not only to  
11 my client, Matthew Ferber, or to stand for the fact  
12 that this has anything to do with my client giving  
13 alcohol to John Behler. How do we know that this  
14 chit wasn't to one of the other several hundred  
15 people at the bar that Friday evening? How do we  
16 know that this chit at all relates to Matthew  
17 Ferber? We don't. Nobody can prove it. There's  
18 nothing to connect that. So even if this Court  
19 were to deem this to be in admissible form, which  
20 we submit it is not, it is proof of nothing. Ask  
21 the question of counsel, respectfully, how does  
22 this piece of paper at all connect to the  
23 plaintiff, Matthew Ferber? How do we know this  
24 doesn't connect directly to some other individual  
25 not even related to this case.

1           The other piece of evidence defendant  
2           submits to their cross motion in opposition is  
3           Exhibit Q, the video submitted as Exhibit Q. Your  
4           Honor, looking at this video, we have no idea where  
5           this came from. It's the type of disc you get at a  
6           Staples with a handwriting on it saying Ferber  
7           versus Hacienda, Olde Erie surveillance video. It  
8           is not authenticated at all. There is no affidavit  
9           submitted authenticating this video. The burden is  
10          on the defendant. We have made the motion to  
11          strike their affirmative defenses of culpable  
12          conduct and they made a cross motion of guilty  
13          participation using this video. We don't know  
14          where this video came from. They need to lay a  
15          foundation and they need to authenticate it as if  
16          we are on trial here today. For all we know, your  
17          Honor, this video is downloaded off the internet  
18          and shows a college bar in Florida with people  
19          unrelated to this case. Not only is it not  
20          authenticated, we don't know where it came from,  
21          how it was recorded, how it came to me, how it came  
22          to your Honor, to this Court, how it was submitted,  
23          but nobody is on record as identifying any of the  
24          people in this video. Not one person in this case  
25          was shown this video at their deposition. It was

1 never marked, not once was the video marked and  
2 shown to any witnesses throughout discovery. There  
3 is not one person who says "I've seen this video  
4 submitted by the defendant as Exhibit Q and I  
5 identify Matthew Ferber, John Behler". That  
6 doesn't exist. No one identifies the people in  
7 this. No one even identifies that this took place  
8 at the night in question, took place at Olde Erie,  
9 or even took place in New York State. This Court  
10 cannot even consider this because it is not  
11 submitted in admissible form. The case law is  
12 clear on that. It's not authenticated. And even  
13 if this Court were to consider this video, there's  
14 no one to talk about what is seen on this video,  
15 who is depicted and it is proof of nothing. So  
16 there is no way, using this unauthenticated,  
17 inadmissible video, or that chit, that they can say  
18 that Matthew Ferber purchased any alcohol that  
19 evening or purchased alcohol on behalf of John  
20 Behler and gave it to him. The evidence simply  
21 doesn't exist as much as Mr. Socolow wants to argue  
22 to the contrary.

23 So this Court, I respectfully request  
24 that this Court strike the affirmative defenses of  
25 culpable conduct because now is the time, now is

1 the time for the defense to show their proof and  
2 they've utterly failed in doing that. They can't  
3 come back later. And it is the second and twelfth  
4 affirmative defenses in their answer from Hacienda  
5 on page 7 and page 9 of their answer where they  
6 allege affirmative defenses of culpable conduct.  
7 We ask that those be stricken because they've  
8 failed to meet their burden in proving those  
9 defenses. Also, in support of their cross motion  
10 they must be denied. They can't even make a out a  
11 prima facie case of guilty participation on the  
12 cross motion, your Honor.

13 The evidence is overwhelmingly clear and  
14 there's nothing to refute it. A direct unlawful  
15 sale to John Behler resulted in his intoxication  
16 which caused the accident and subsequent injuries  
17 to Matthew Ferber, your Honor. Now, again, I  
18 respectfully request that this Court not be  
19 mislead (sic) by their reference to 11-100, the  
20 civil non commercial, non liquor authority statute  
21 that went into effect in the eighties. That does  
22 not apply and that is not this case and it is  
23 misleading to suggest that it does, your Honor.

24 Thank you, your Honor, subject to any  
25 rebuttal.



1 THE COURT: Thank you, counsel.

2 Mr. Socolow.

3 MR. SOCOLOW: May I address the issue  
4 related to the video first, your Honor?

5 THE COURT: Yes.

6 MR. SOCOLOW: The video was produced, I  
7 think first and formally in discovery by Olde Erie  
8 last year. I made multiple copies of the video on  
9 my computer at work to attach as an exhibit to my  
10 cross motion. The video is Olde Erie's video.  
11 When I received Mr. Smiley's opposition to my cross  
12 motion attacking the authenticity of the video, I  
13 began to take steps to authenticate it through an  
14 affidavit through the managing party from Olde  
15 Erie. I received his opposition when I was out of  
16 town. I've spoken with Olde Erie's personal  
17 counsel. The managing partner needs to sit down  
18 and watch the video. After she does so, she will  
19 either or will not provide the affidavit attesting  
20 that it is a true copy of what Olde Erie produced  
21 in this case. And I ask that your Honor allow me  
22 to have a little time to get that affidavit.  
23 That's point one on the video.

24 Secondly, there's ample testimony from  
25 Stephanie Hance, the bartender at Olde Erie, that,

1 yes, she did, in fact, watch the video. She didn't  
2 watch Exhibit Q that I attached to my cross motion,  
3 she watched the video that was in Olde Erie's  
4 possession and I, again, submit that what I've  
5 attached as an exhibit is the same thing; it's a  
6 copy of what I made at my office.

7 But she went through the video and  
8 identified the man with the beard. The only person  
9 with a beard in this foursome of two women and two  
10 men was Mr. Ferber. The video shows Mr. Ferber  
11 putting down a twenty and it shows shots of liquor  
12 which Miss Hance testified were shots of Jamesons  
13 based on where she reached to get the bottle to  
14 pour the shots and put the bottle back. The video  
15 shows both Mr. Ferber and Mr. Behler drinking the  
16 shots at the bar on their last stop of the night.  
17 At Olde Erie, Mr. Behler had his own tab which was  
18 on a credit card that he opened to pay for the, I  
19 believe, six beers that he bought at the last stop  
20 of the night.

21 The receipt, the chit whatever we want to  
22 call here, the record of the sale that Olde Erie  
23 maintain was a cash sale. The cash sale isn't  
24 going to have the purchaser's name on it like a  
25 credit card receipt would have. This chit does

1 have Miss Hance's name on it. It's a little hard  
2 to see but it's there and I pointed out where it is  
3 in my reply affirmation. So, I think I've  
4 submitted an adequate evidentiary background to  
5 describe what's in the video and I will, with the  
6 Court's permission, get an affidavit from Olde Erie  
7 authenticating Exhibit Q.

8 Turning to the arguments that Mr. Smiley  
9 has made. We don't dispute that we, being  
10 Hacienda, does not dispute that it did sell five  
11 beers to John Behler at the start of this tragic  
12 evening. We do dispute that Hacienda sold those  
13 beers knowing or having reason to believe that John  
14 Behler was a minor. I pointed out in my papers  
15 that, and we don't confuse 11-101 with 11-100. We  
16 pointed out, I think, repeatedly and I hope  
17 clearly, the New York Court of Appeals stated in  
18 the *Sherman versus Robinson* case, "while section  
19 11-101 does not explicitly refer to knowledge, that  
20 same requirement must be inferred because the  
21 legislative history makes plain that Section 11-100  
22 was intended to parallel the Dram Shop Act." So,  
23 it's Hacienda's position that the knowledge  
24 requirement is also in play for an 11-101 case  
25 based on *Sherman versus Robinson*, based on the New

1 York Pattern Jury Instructions, based on the  
 2 comments to the New York Pattern Jury Instruction  
 3 that I've cited as well as other cases that I've  
 4 cited which include the *Gutierrez versus Devine*  
 5 case. The *Johnson versus Verona Oil* case and  
 6 another case which I just found yesterday, *Furio*  
 7 *versus Palm Beach Club*, all three of those cases --  
 8 well, *Gutierrez*, there may be an issue of whether  
 9 it's 11-100 or 11-101 but the sale of the alcohol,  
 10 it's a sale, it occurred at a commercial  
 11 establishment. But *Johnson versus Verona* and *Furio*  
 12 *versus Palm Beach Club* are only 11-101 cases. And  
 13 in *Furio versus Palm Beach Club*, the cite is  
 14 204 AD2d 1053. And, granted, this was not in my  
 15 papers but I ask that I be permitted to bring it to  
 16 the Court's attention. The Court found that the  
 17 plaintiff was unable to offer proof that defendants  
 18 knowingly caused the patron to become intoxicated  
 19 or that defendants knew or had reason to believe  
 20 that the patron was underage. Thus, plaintiff's  
 21 cause of action alleging violation of GOL 11-101  
 22 was properly dismissed. That was a case like this  
 23 case, your Honor, where the seller did not know and  
 24 did not have reason to believe that the patron was  
 25 underage. Similarly, in *Johnson versus Verona Oil*,

1 which is cited in my reply, 36 AD3D 991. The Court  
2 not only considered evidence regarding a fake ID,  
3 and whether that raised a defense to the illegal  
4 sale to a minor, but the Court said there were  
5 questions of fact as to whether the defendant  
6 should have known that the underage purchaser was  
7 under 21. So, I think given the knowledge and the  
8 "should have known" concept, that Courts since  
9 *Sherman V Robinson* have applied with respect to  
10 11-101, it's not a strict liability statute. If  
11 you don't prove that Hacienda knew or had reason to  
12 believe that John Behler was underage, then the  
13 plaintiff, I submit, has not made a prima facie  
14 case under 11-101. In that regard, we've got, I  
15 think, overwhelming testimony that they had no  
16 reason to believe that he was under 21. We have  
17 the bartender's testimony which can never be  
18 refuted by anyone. The bartender testified that  
19 when John and his sister, Carolyn, got to the bar  
20 that night, he asked to see their ID. He testified  
21 that he was presented with a New York State photo  
22 ID driver's license. Carolyn Behler, all due  
23 respect to Miss Behler, got so drunk that night,  
24 she can't remember what happened at Hacienda and  
25 that's what she testified to. The other two

1 members of this foursome, Chelsea Gallagher and Mr.  
2 Ferber, got to the bar later. So they weren't  
3 there when the Hacienda bartender asked to see John  
4 Behler's ID, so they can't offer anything to  
5 contradict that. You've got the testimony of  
6 Ebennie Johannes, E-B-E-N-N-I-E, J-O-H-A-N-N-E-S.  
7 She's the door person at Olde Erie. She testified,  
8 first of all, that she knew Mr. Ferber from school  
9 some years before. She testified that she saw the  
10 video and identified him in the video. But she  
11 also testified that she remembered the foursome and  
12 she remembered asking to see ID from all of them.  
13 And, there was no testimony that John Behler  
14 presented anything other than a photo driver's  
15 license ID indicating that he was over the age of  
16 21.

17 We've got the testimony of Kyle Roddy who  
18 was the bartender at Gws, the second stop of the  
19 night. Mr. Roddy testified that he did not ask to  
20 see John Behler's ID that night. That's because  
21 he'd seen it in the past and he testified that John  
22 Behler was a "regular" at Gws. So that testimony  
23 which I would submit is all in admissible form, I  
24 think supports the argument that there's no  
25 evidence in this case that Hacienda knew or should

1 have known that John Behler was under the age of  
2 21.

3 There's more that I would like to  
4 mention. We have the testimony of Chelsea  
5 Gallagher who is Carolyn Behler's best friend. She  
6 was the right front seat passenger and she was  
7 lucky enough to basically walk away from this  
8 accident without a scratch. Miss Gallagher  
9 testified that she had been out to bars with John  
10 Behler in the past. She knew that John Behler was  
11 underage. She identified at least two bars, I  
12 think they're in Middletown, and I think the names,  
13 if I remember correctly, are Poor Bobby's and The  
14 Empty Bottle. She testified that you can't get  
15 into either of those places unless you show a valid  
16 ID. So she testified that in hindsight she agreed  
17 that John Behler must have had some sort of photo  
18 ID that allowed him to get served.

19 I also attached as an exhibit, your  
20 Honor, excerpts from John Behler's social media  
21 activity. He was fairly active on Twitter, and  
22 there are many many tweets where he's bragging  
23 about his drinking exploits and listing the  
24 quantities of alcohol he's going to buy that night  
25 at a convenience store or describing the shots he's

1 buying at the bar for someone at the bar sitting  
2 next to him. So, I think the totality of evidence  
3 overwhelmingly establishes that he did have some  
4 form of fake ID that enabled him to acquire alcohol  
5 and that at the same time prevented Hacienda, among  
6 others, from knowing or having reason to believe  
7 that he was underage.

8 On the fake ID point, I cited a number of  
9 cases, *O'Rourke versus Chew* to, again, the *Johnson*  
10 *versus Verona Oil* case. In *O'Rourke*, the Court did  
11 discuss the defendant seller's fake ID defense, but  
12 wouldn't accept it because it was not in admissible  
13 form. In *Johnson versus Verona Oil*, there was  
14 testimony just like in this case, that a photo ID  
15 was shown and that based on that photo ID, the  
16 seller didn't believe that the purchaser was  
17 underage. And there the Court, the Court accepted  
18 that defense finding that it raised a question of  
19 fact.

20 Here, there's nothing that can refute or  
21 contradict the Hacienda bartender's testimony. So,  
22 for that reason, I would suggest that Hacienda  
23 should not be found liable for a violation under  
24 GOL 11-101. The case that plaintiff cites in  
25 support of his strict liability, they haven't been



1 cited by New York case in years, *Patton v Carnrike*,  
 2 C-A-R-N-R-I-K-E. The last time -- That is a 1981  
 3 case out of Southern District. The last time it  
 4 was cited by any Federal case in New York State was  
 5 a belief in 1996 and 1997, and it wasn't for the  
 6 purposes of discussing the fact that 11-101 is a  
 7 strict liability statute.

8 So those are the primary points I wanted  
 9 to make. I think they're all spelled out in my  
 10 opposition to Mr. Smiley's motion as well as in the  
 11 reply that I just served on Friday, which I hope  
 12 the Court has received by now.

13 Thank you.

14 THE COURT: Mr. Smiley.

15 MR. SMILEY: Yes, your Honor. Just  
 16 briefly, with respect to the cases cited by Mr.  
 17 Socolow, I trust your Honor will read those cases  
 18 and see clearly that he's wrong in how he's  
 19 referencing them. Any of the cases he talks about  
 20 where there is an issue of fact cites 11-100 which  
 21 is just not the case here. And as far as citing a  
 22 commentary to the PJI which is not precedent, what  
 23 you have to look at is the cases the commentary  
 24 puts at the end of what they say and that's the  
 25 Sherman case. And to the extent that the defense

1 is resting on Sherman in support of its claim that  
2 fake ID is a defense to a Dram Shop case, it  
3 doesn't exist. What that case is about, the Court  
4 of Appeals clearly spoke in the knowledge  
5 component, there's two different ones, and we tried  
6 to make it clear in the papers, but bear with me  
7 with this, your Honor. Where they're saying where  
8 it's the same knowledge component between the Dram  
9 Shop Act and the civil part 11-100 is knowledge of  
10 the sale, is knowledge of giving it to that  
11 tortfeasor.

12 So what happened, the Sherman case, the  
13 Court of Appeals talked about an indirect sale and  
14 they said, listen, we're not going to hold Dram  
15 Shop liability or 11-100 on the seller that sells  
16 to "Mister A" who then goes and gives the alcohol  
17 to "Mister B" and it's "Mister B" who gets  
18 intoxicated and causes the accident. That's what  
19 *Sherman* stands for. You have to have knowledge of  
20 the sale to the tortfeasor. It has nothing to do  
21 with age.

22 What the defense is trying to do, and  
23 it's misleading, and I'm not saying they're doing  
24 it purposely; they're probably just confused about  
25 it. They're saying -- where they're quoting the

1 same knowledge component should be in both is the  
2 knowledge that the sale was made to the tortfeasor.  
3 And when your Honor sees Sherman, it's clear on  
4 that. The holding on that is that a place will not  
5 be held liability under any theory, Dram Shop or  
6 otherwise, for an indirect sale. It has to be  
7 direct.

8 In this case, Hacienda had that  
9 knowledge. It had the knowledge that it was  
10 selling to Behler. We have the receipt showing  
11 that they sold it and they admit it. And the  
12 defense cites this letter from assembly woman  
13 that's quoted, they do it twice, they quote it in  
14 their cross motion and in their reply from the  
15 Sherman case, where they say that they must infer  
16 the same knowledge component of 11-101 and 11-100.  
17 The very next line, your Honor says, here, "It's  
18 undisputed that the defendant did knowingly sell,  
19 furnish or assist in procuring alcoholic beverages  
20 to or for Robinson, the intoxicated tortfeasor.  
21 The transaction was with Relf. Nor were the facts  
22 or circumstances in which the requisite knowledge  
23 could be reasonably inferred. For example,  
24 Robinson and Relf appearing together at the  
25 checkout counter with Relf taking money from

1 Robinson or handing him the beer." So the  
2 knowledge component they're trying to impute from  
3 11-100 to our case improperly is the knowledge of  
4 the sale, not knowledge of the age. Knowledge of  
5 the age is in 11-100, not in the Dram Shop case.  
6 So hopefully I'm -- because I know that can be  
7 tricky in the law.

8 And, finally, the defendant referenced  
9 testimony that's not annexed to his papers from  
10 different witnesses. He talks about Ebennie, door  
11 person seeing a video. Just so your Honor knows,  
12 the owner of Olde Erie said there's about 25 videos  
13 in the place, okay, and there's a lot of loose  
14 talk, "I saw a video; I saw a video." We don't  
15 know what video, frankly, anyone saw in this case.  
16 What we do know and it's undisputed is that Exhibit  
17 Q, the only video being submitted to this Court by  
18 the defense, was not shown to any single one of  
19 these witnesses. None of them identified them;  
20 none of them talked about it in their deposition.  
21 The video has not been authenticated and we  
22 absolutely oppose counsel's request to submit a  
23 late affidavit.

24 Thank you, your Honor.

25 THE COURT: Thank you, counsel.

1 Transcript will be ordered, cost of which will be  
2 shared by the parties. The Court reserves  
3 decision.

4 MR. SMILEY: Thank you, your Honor.

5 MR. SOCOLOW: Thank you.

6 Your Honor, may I ask you one question on  
7 the issue of getting a further affidavit? Have you  
8 decided whether that would be permissible at this  
9 stage, so we can authenticate what I've submitted  
10 as Exhibit Q.

11 THE COURT: What timeline are we talking  
12 about?

13 MR. SOCOLOW: The timeline would be that  
14 if your Honor is amenable to that, I would call  
15 Olde Erie's personal counsel now and drive over my  
16 copy of the Exhibit Q since I'm up here.

17 Otherwise, I would think within, within a couple of  
18 weeks, your Honor, certainly before Thanksgiving.

19 MR. SMILEY: Your Honor, we absolutely  
20 oppose that. There's no justifiable delay and he  
21 submitted a cross motion with this video. The fact  
22 we called him out on it and he couldn't produce it,  
23 he got an affidavit as far as this chit from Olde  
24 Erie in time, and to submit an affidavit after the  
25 papers have been submitted and the arguments have

1       been made, and even an affidavit which I suspect  
2       would not even be sufficient because even the  
3       owners of Olde Erie didn't know the people that  
4       were there that evening and wouldn't be able to  
5       identify it. So we would absolutely oppose it,  
6       unless he can show just excuse for the delay. Our  
7       papers were submitted in August and cross motion  
8       was submitted in September, and there's absolutely  
9       no reason that proper authentication was not done  
10      in time.

11               THE COURT: All right. I will adjourn  
12      the submissions to the 18th. I'll give you an  
13      opportunity to file it. Counsel, you'll have an  
14      opportunity to argue against it. That is not to be  
15      construed as a ruling by this Court that I will be  
16      entertaining that piece of evidence in the context  
17      of the motions.

18               MR. SMILEY: And that will just be on  
19      papers as far as --

20               THE COURT: It will fall under the  
21      heading of "I'll know it when I see it." There are  
22      a lot of issues that need to be addressed, points  
23      that you have raised, Counsel, but it should not be  
24      construed that the mere fact that I'm adjourning  
25      the motion to permit the submission to the 18th is

1 determination that the Court is going to consider  
2 it. And, that, in addition to the issues that  
3 counsel's requested the Court zero in on in its  
4 analysis, that will be part of the specific finding  
5 in the decision.

6 MR. SMILEY: Thank you, your Honor.

7 MR. SOCOLOW: Thank you.

8 would it be appropriate for my opposition  
9 for whatever we see is submitted in the form of a  
10 supplemental affirmation?

11 THE COURT: Yes.

12 MR. SOCOLOW: And that's papers only?

13 THE COURT: Yes, thank you.

14 MR. SMILEY: Your Honor, may I just have  
15 a deadline by which your Honor would like my  
16 supplemental affirmation? I know the 18th must be  
submitted the affidavit, if any.

17 THE COURT: Well, I'm going to, I'll  
accept receipt by next Friday.

18 MR. SOCOLOW: I'll do my best. My  
daughter is studying abroad. I'm going out of the  
19 country; I'll do my best to get it to you then.

20 THE COURT: Your response will be the  
18th.

21 MR. SMILEY: Thank you, your Honor.

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REPORTER'S CERTIFICATION

22  
23 I, CATHLEEN MORALES, certify the above to  
be a true and accurate transcript of the minutes recorded  
24 herein.

*Cathleen Morales*

25  
\_\_\_\_\_  
SENIOR COURT REPORTER

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D55487

C/htr

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Argued - April 9, 2018

RUTH C. BALKIN, J.P.  
BETSY BARROS  
ANGELA G. IANNACCI  
LINDA CHRISTOPHER, JJ.

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2016-03939

DECISION & ORDER

Matthew Ferber, appellant, v Olde Erie Brew Pub &  
Grill, LLC, etc., et al., defendants, Valjon, Inc.,  
doing business as Hacienda, respondent.

(Index No. 3146/13)

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Bardavid Law, P.C., New York, NY (Joshua E. Bardavid of counsel), for appellant.

Fitzpatrick & Hunt, Pagano & Aubert, LLP, White Plains, NY (John M. Socolow of  
counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Orange County (Robert A. Onofry, J.), dated February 17, 2016. The order denied the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of General Obligations Law § 11-101 against the defendant Valjon, Inc., doing business as Hacienda, and granted the cross motion of that defendant for summary judgment dismissing that cause of action insofar as asserted against it.

ORDERED that the order is affirmed, with costs.

On the evening of February 1, 2013, the plaintiff met John A. Behler, who was then 20 years old, and two other people at Valjon, Inc., doing business as Hacienda (hereinafter Hacienda), for food and drinks. The group then went to two more commercial establishments, where they consumed additional alcoholic beverages. Shortly after midnight, the plaintiff was a passenger in a vehicle operated by Behler (hereinafter the driver) when it crashed into a median guiderail barrier, causing the plaintiff to sustain serious injuries. The plaintiff thereafter commenced this action to recover damages for personal injuries against, among others, Hacienda. In relevant part, the plaintiff alleged that Hacienda violated General Obligations Law § 11-101, known as the Dram

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Shop Act, by unlawfully serving alcoholic beverages to the driver, who was under 21 years of age. The plaintiff moved for summary judgment on the issue of liability on the cause of action alleging a violation of General Obligations Law § 11-101 against Hacienda, and Hacienda cross-moved for summary judgment dismissing that cause of action insofar as asserted against it. The Supreme Court denied the motion and granted the cross motion. The plaintiff appeals, and we affirm.

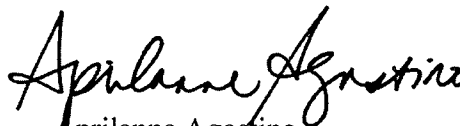
General Obligations Law § 11-101, which applies only to the commercial sale of alcohol (*see D'Amico v Christie*, 71 NY2d 76, 83), provides that a party who “unlawfully” sells alcohol to another person is liable for injuries caused by reason of that person’s intoxication (*see Sherman v Robinson*, 80 NY2d 483, 486-487). In 1983, the Legislature supplemented the Dram Shop Act by adding General Obligation Law § 11-100, which applies to any provider unlawfully furnishing alcoholic beverages to or unlawfully assisting in procuring alcoholic beverages for minors. Pursuant to Alcoholic Beverage Control Law § 65(1), it is unlawful to furnish an alcoholic beverage to any “person, actually or apparently, under the age of twenty-one years” (*see Sherman v Robinson*, 80 NY2d at 486-487). “[L]iability under General Obligations Law § 11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage. While [General Obligations Law §] 11-101 does not explicitly refer to knowledge, that same requirement must be inferred because the legislative history makes plain that section 11-100 was intended to parallel the Dram Shop Act” (*Sherman v Robinson*, 80 NY2d at 487-488; *see Tansey v Coscia*, 159 AD3d 850; *Johnson v Verona Oil*, 36 AD3d 991, 993).

Here, the plaintiff failed to demonstrate his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of General Obligations Law § 11-101 against Hacienda, and Hacienda demonstrated its prima facie entitlement to judgment as a matter of law dismissing that cause of action insofar as asserted against it. Hacienda established through the submission of the deposition testimony of its bartender that it did not have knowledge or reason to believe that the driver was under 21 years of age when it served alcoholic beverages to him. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, we agree with the Supreme Court’s determination denying the plaintiff’s motion for summary judgment on the issue of liability on the cause of action alleging a violation of General Obligations Law § 11-101 against Hacienda, and granting Hacienda’s cross motion for summary judgment dismissing that cause of action insofar as asserted against it.

The plaintiff’s remaining contentions are without merit.

BALKIN, J.P., BARROS, IANNACCI and CHRISTOPHER, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court

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