

**Surowiec v Kearns**

2006 NY Slip Op 30170(U)

March 27, 2006

Supreme Court, Wayne County

Docket Number: 0053529/2005

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

ORIGINAL

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CHARLES M. SUROWIEC, JR.,

Plaintiff,

-vs-

DAVID W. KEARNS,

Defendant

DECISION  
AND  
ORDER

Index No. 53529

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Burke and Burke

Patrick J. Burke, Esq., of counsel  
Attorney for Plaintiff

Trevett, Lenweaver & Salzer, P.C.

Clark J. Zimmermann, Jr., Esq., of counsel  
Attorney for Defendant

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The Plaintiff, Charles M. Surowiec, Jr., has moved pursuant to CPLR §3212 for an order granting partial summary judgment against the Defendant, David W. Kearns, on the issue of liability. The Defendant has opposed the motion, maintaining that there are issues of fact which must await trial.

The Plaintiff was a bicyclist who, in the course of participating in a bicycle road race, referred to as the Seven Hills Race, was traveling on Walworth Road in the Town of Macedon on June 2, 2002. The Defendant

lives at 1813 Walworth Road, where he has resided for approximately 13 years. The Defendant's driveway exits onto Walworth Road roughly 100 to 120 feet south of the sharpest point of a severe curve in the road. The speed limit on the pertinent stretch of Walworth Road is 45 miles per hour, but there is also a posted suggested speed limit sign in the area in question reading 20 miles per hour.

On the day in question, the Plaintiff and several other bicyclists were navigating around the curve and heading southbound into the straight section of Walworth Road. In the interim, the Defendant was attempting to make a left turn out of his driveway into the northbound lane. The Defendant allegedly came to a complete stop at the end of the driveway, and then proceeded into the road, at which point, according to his deposition testimony, he first spotted the oncoming cyclists. The Defendant, realizing he was blocking the southbound lane, made the decision to get out of the way of the cyclists, and he turned into the northbound lane. The Plaintiff, having seen the Defendant's vehicle in the southbound lane, attempted to move to the right. However, when he started to slide, the Plaintiff decided to move to the left, passing in front of the Defendant's vehicle and landing in a ditch. The other bicyclists were

not involved.

The Plaintiff maintains that he has presented sufficient evidence to establish as a matter of law that the Defendant was negligent. As a bicyclist lawfully on the roadway, the Plaintiff had the right of way and was entitled to expect that other vehicle operators would yield, in accordance with statutory requirements. The Plaintiff asserts that the Defendant's failure to yield the right of way, considered with the absence of any negligence of the part of the Plaintiff, is sufficient to establish a *prima facie* showing of negligence on the part of the Defendant. Finally, the Plaintiff maintains that the affirmation of the defense attorney is insufficient to create a legitimate issue of fact.


While the Court agrees that an attorney affirmation, standing on its own, is without evidentiary value, due to the attorney's lack of personal knowledge of the salient facts, in this instance Defendant's attorney has set forth numerous references to the sworn deposition testimony of the parties. Based on this testimony, the Defendant maintains that there are numerous issues of fact created by certain discrepancies in the parties' respective accounts of the accident, including the speed at which the Plaintiff was traveling just prior to the accident, the issue of whether the

Defendant came to a complete stop in his driveway, and the position of the Plaintiff as he negotiated the curve into the straightaway. Deposition testimony can create conflicting inferences regarding both culpability and credibility. (See, e.g., Lacagnino v Gonzalez, 306 AD2d 250 (2<sup>nd</sup> Dept, 2003)).

It is axiomatic that a motion for summary judgment is a drastic remedy and may not be granted where there is any doubt as to the existence of a triable issue of fact. (See, e.g., Mason v Dupont Direct Financial Holdings, Inc., 302 AD2d 260 (1<sup>st</sup> Dept, 2003)). Having reviewed the evidence in the light most favorable to the non-moving party, the Court must conclude that, despite the evidentiary showing made by the Plaintiff, the Defendant has raised several legitimate issues regarding the part played by the Plaintiff's actions in the accident, which must await resolution at trial. (See, e.g., Drew v J.A. Carmen Trucking Co., Inc., 8 AD3d 1112 (4<sup>th</sup> Dept, 2004)).

Therefore, the Plaintiff's motion for partial summary judgment is denied. This Decision constitutes the Order of the Court.

Dated: March 27, 2006  
Lyons, New York

  
Honorable Dennis M. Kehoe  
Acting Supreme Court Justice