

Cotty v Town of Southampton

2007 NY Slip Op 32622(U)

August 6, 2007

Supreme Court, Suffolk County

Docket Number: 0020312/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-20-07 (006, 008)
3-2-07 (007, 009)
3-20-07 (010)
ADJ. DATE 5-8-07
Mot. Seq. # 006 - MD
007 - MG
008 - XMD
009 - XMD
010 - MG

-----X
KAREN COTTY, :
 :
 Plaintiff, :
 :
 - against - :
 :
 TOWN OF SOUTHAMPTON, SUFFOLK :
 COUNTY WATER AUTHORITY, ELMORE :
 ASSOCIATES CONSTRUCTION CORP., CAC :
 CONTRACTING CORP. and DENNIS P. :
 SCHMIDT, :
 Defendants. :

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-----X
ELMORE ASSOCIATES CONSTRUCTION :
 CORP., :
 Third-Party Plaintiffs, :
 :
 - against - :
 :
 PETER DEUTCH, :
 :
 Third-Party Defendant. :

& Deft CAC Contracting
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-----X
SUFFOLK COUNTY WATER AUTHORITY, :
 :
 Fourth-Party Plaintiff, :
 :
 - against - :
 :
 PETER DEUTCH and JOSEPH AMATO, :
 :
 Fourth-Party Defendants. :

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Upon the following papers numbered 1 to 90 read on these motions and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-7 ; Notice of Cross Motion and supporting papers 8-19; 20-26; 27-36; 37-57 ; Answering Affidavits and supporting papers 61-75; 76-77 ; Replying Affidavits and supporting papers 78-83; 84-85; 86-90 ; Other supplemental affirmation 58-60 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (006) by defendants Suffolk County Water Authority and CAC Contracting Corp. pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and all cross motions against them, is denied; and it is further

ORDERED that this cross motion (007) by defendant Dennis P. Schmidt pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability dismissing the complaint and cross claims as asserted against him, is granted; and it is further

ORDERED that this cross motion (008) by third-party/fourth-party defendant Peter Deutch pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability dismissing the complaint and cross claims as asserted against him, is denied; and it is further

ORDERED that this cross motion (009) by defendant Town of Southampton pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability, is denied; and it is further

ORDERED that the portion of cross motion (010) by defendant Elmore Associates Construction Corp. pursuant to CPLR 3212 for summary judgment dismissing the complaint has been rendered academic by plaintiff's discontinuance of the action with prejudice, as against it, and is accordingly denied. That portion of the motion which seeks dismissal of the cross claims asserted against Elmore by the codefendants is granted and the cross claims asserted by Suffolk County Water Authority, CAC Contracting Corp., Schmidt, Deutch and the Town of Southampton, and the counterclaim asserted by defendant Amato in the answer in the fourth-party action, are hereby dismissed. The third-party complaint by defendant Elmore seeking recovery over against Peter Deutch is hereby dismissed.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff while she was riding a bicycle on July 27, 2002 on a two lane paved highway known as Deerfield Road, located in the Town of Southampton, approximately 250 feet north of Woodthrush Lane. She was the last bicyclist in a group of eight cyclists, when the rider immediately in front of her, Peter Deutch, fell. In seeking to avoid the fallen cyclist, plaintiff lost control of her bicycle and slid into an oncoming car driven by defendant Dennis Schmidt.

A third-party action was commenced against Peter Deutch by Elmore Associates Construction Corp., who sought contribution.

The fourth-party action was commenced by the Suffolk County Water Authority against plaintiff's husband Joseph Amato and against Peter Deutch.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented

(*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

With regard to the motion and cross motions for summary judgment, the parties rely primarily upon the deposition testimony given by each of them. While some of the copies of the deposition transcripts submitted to the Court are unsigned and unsworn and therefore not in admissible form, no party has objected to their use on the instant motions and the Court will consider them.

The testimony given by plaintiff at her 50-h hearing and at her examination before trial is consistent in that she testified in pertinent part that she joined a group of about eight bicyclists on the morning of Saturday, July 27, 2002 at Rotations bicycle club to go bike riding as she did approximately 30 to 40 times in the past. She usually rode about 100 to 120 miles a weekend. She arrived at about 7 a.m., checked her tires, and prepared for the ride which started at about 8 a.m. The weather was dry and about 80 to 85 degrees, and partly cloudy. She considered herself to be an advanced intermediate bicyclist. She considered the other cyclists she was riding with as good cyclists” - advanced intermediate to proficient, except for her husband, Joseph Amato, whom she considered a skilled cyclist. He was riding with her on the day of the accident. The total length of the ride was to be 72 miles, and the accident happened at approximately 66 to 67 miles into the trip. She was wearing a high-end helmet at the time of the accident. Her pedals had clips and her feet were clipped in place. She was the last in line, riding single file on Deerfield Road. Her husband was ahead of her, but immediately ahead of her was the cyclist Peter Deutch. She was approximately a wheel length behind Peter Deutch, traveling approximately twelve or seventeen miles per hour, on the right hand side of the road.

She stated that as a habit she does not to ride directly on somebody’s wheel on Deerfield Road because it is a hilly, winding road and isn’t completely smooth. Typically, she stated, when you ride up and down hills, you don’t ride on somebody’s wheel. She had ridden on Deerfield about 20 to 30 times by bike. In the past she noticed there were places on Deerfield Road where it was sort of paved over, and then there was a lip, paving, and then it went back into the road again. The road was dug up, a pipe was laid, and then it was paved over. She did not believe they had gotten to that part of the road when the accident occurred. She described Deerfield Road as a country road with brush on the side, wild, not manicured grass. She did not know the place on Deerfield Road where the accident occurred and did not recall the condition of the road that she had already traveled. Immediately before her accident, she was about one to two or three feet from the right hand edge of the road when she saw Peter going down on his bike. There was no contact between

her bike and Peter's bike. When she saw Peter go down, she remembered saying "Oh, my God" and the next thing she remembered there were EMTs around her asking her questions.

She could not remember seeing Peter's bike hit the bad spot, but thought it was something she learned afterwards from somebody else. She remembered Peter going down and swerving to her left to avoid Peter. She did not remember if she was able to avoid him, or if she came into contact with him as she was still riding her bike. She thought he may have hit her, and he may not have hit her. She fell on her left side. She did not recall anyone in front of her signaling about any problem with the roadway on Deerfield. She testified that it would not be unusual for someone in front to notify about a road condition by calling out or pointing to the road condition. She did not see any work being done north of the accident, and did not recall seeing any orange cones, warning tape, flagmen, trenches, or construction vehicles.

When Peter Deutch's bike went down, she testified she was traveling about thirteen to eighteen miles per hour. His speed was about the same. She said she was not drafting him as she was not riding on his wheel. She described drafting as "when you ride in back of another cyclist and you ride on their wheel, directly on their wheel with very little space between the two wheels."

At his examination before trial Peter Deutsch testified he had traveled often with Karen Cotty over a six to seven year period. They were riding in a group, single file, and made a left turn from Little Noyak Path onto Deerfield Road, traveling in a southbound direction for about one half mile when the incident occurred. He was in the second to last position with Karen Cotty traveling behind him. They were about fifty to fifty five miles into the ride and were on the right hand side of the road. He thought there was a slight curve in the road to the right and a slight incline. He described the roadway from the point they entered onto Deerfield Road as concrete.

At the point where he fell, there was construction on Deerfield Road. There were no barricades, cones or anything around the construction. There was no shoulder on the road, so the construction was on the roadway on their travel lane. He saw a lip about an inch, inch and a half, elevated from the blacktop. He saw two people riding ahead of him "bunny hop" to get out of the lip wherein they lifted their bicycle up, went down low and literally went off the ground and got out of the lip from right to left. He was about two feet behind the bike in front when it did the bunny hop. About one second lapsed from about the time he saw the bunny hop until he went down. He turned his wheel at an angle to the left to try to maneuver that way, caught the lip and went down. He fell to the right and slid a bit on his right side. Karen Cotty, he thought, was about three feet behind him. When he went down, she went around to the left of him. There was never any contact between her bike and him. He looked toward her and believed she slid the same way he did, then she slid into the oncoming northbound lane, under the oncoming car which he stated was still moving. He was not sure if she was moving. He testified about three to five seconds passed from the time she passed him on his left until the time of the contact with the vehicle in the northbound lane.

At his examination before trial of Joseph Amato (plaintiff's exhibit H), testified that the first rider of the group alerts the others about potential problems in the road, potholes, automobiles, animals, dogs, pedestrians, and monitors speed. This is done orally or with hand gestures. On the day of the accident, they were traveling south on Deerfield Road which consisted of two black topped lanes, one southbound and one northbound. He stated there were a lot of potholes on Deerfield Road and a portion of the road was torn up "like a preconstruction" in the portion of the road where a cyclist would normally ride on the right. There

was a significant section on the right portion of the road that was not the same level as the main portion of the road. He described there being a lip with some irregularities to the depth of the ridge, varying from an inch or two to several inches, a minimum of two inches or greater.

The group was not in tight formation on Deerfield Road. There were about three people who were riding in front of him and about three riding in back of him. Karen Cotty was riding in the group in back of him. He did not know if the riders behind him were traveling directly behind each other at the time the accident occurred. He rode his bike just to the left of the construction towards the middle of the road as they could not have ridden on the grass, hedges and trees. He did not ride in the area of the accident as he had moved to the left of it. He was not drafting anyone on Deerfield and did not know if they were drafting each other behind him. He did not know who the lead bicyclist was, and did not recall if any of the bicyclists, who were at least 100 yards ahead of him gave him any warning about the roadway. He was about fifty feet, or more, ahead of the others when he came upon the construction and yelled out once "hole right" to notify the others. His head was facing forward when he yelled out. He did not make any signal with either of his hands. There were also holes to the left, it varied. There were also portions of the road further north that had been tampered with, but not as severe as that section where the accident took place. He had called out a number of obstacles prior to this on Deerfield Road. He did not know whether they could hear him or not.

He was first alerted to the fact that there had been some type of incident when he heard the screeching sound of a car stopping, tires on a pavement. He stopped and immediately turned back to look for his wife. He found her unconscious underneath a car.

Peter Deutch told him he fell because he ran into a hole, imperfections in the road. He did not remember him telling him what happened to his wife after he crashed, but said there was contact between his bicycle and his wife's bicycle. Michael Cole, another cyclist told him he tried to avoid the hole the best he could and he did not go down. Michael told him that the road was in horrible condition and that it was difficult to get down the road. Michael Cole did not fall. Michael was riding ahead of Peter Deutch and Karen Cotty was riding last. He did not know exactly where the accident happened. Plaintiff's bicycle wound up on the shoulder of the northbound side of the road. Joseph Amato described his wife's bike as a Merlin road bike which is designed for speed going long distances, with thinner tires than a mountain bike. He described it at times as more difficult to control over irregularities than a mountain bike.

Mr. Amato also testified he experienced road construction in the past, but there were signs or cones marking the area. There were no signs or cones or markings in the area of the construction on Deerfield Road. He did not recall any vehicles pass him in a southbound direction. He recalled one vehicle traveling northbound on Deerfield Road going very fast and he had crossed the yellow line about a foot. He couldn't see the tire, but said a foot of the front of the vehicle crossed the medium. He did not know the speed limit on Deerfield Road. He thought the car was traveling 40 or 50 miles per hour when he first saw it. He himself was traveling about fifteen to twenty miles per hour. He called out about the hole right around the time he saw the vehicle, a few seconds before or after. He heard down shifting or causing an acceleration in the motor, the sound of an engine accelerating, picking up in speed, the sound of an engine when it goes from a flat zone to a hilly zone.

Plaintiff also submitted the witness statement of Michael Cole (plaintiff's exhibit I) who set forth he was ahead of Peter Deutch who was riding ahead of Karen Cotty. As he proceeded south on Deerfield Road,

he encountered an area of pavement on the right side of the road where the pavement was of different heights and colors. The area of pavement nearest the right side of the road was initially even with the rest of the road but then gradually dropped in level and was darker in color than the rest of the roadway. The dark area on the right side of the road gradually sank as one proceeded southbound. It was evident that the darker area to the right had recently been filled. He described the disparity in height between the two levels as approximately one inch in spots and that disparity created a trench-like condition with a raised lip on the right side of Deerfield Road. He executed an advanced maneuver known as a bunny hop in which the rider jumps the bike while riding and hops over the obstruction. He did this to get over the ridge. He stated the height disparity was not noticeable until one was already in the trench on the right edge of the road, running parallel to the roadway.

He further set forth that he observed a northbound car going in the opposite direction on Deerfield at a high rate of speed and as that car passed him, it began to lock up its brakes and skid. He stopped his bicycle and when he looked behind him, he saw Ms. Cotty underneath the northbound car.

Dennis Schmidt testified at his examination before trial that he was operating his motor vehicle traveling north on Deerfield Road which he described as a two lane road, one lane in each direction separated by a double yellow line. There were grass and trees on the side of the roadway to his right. He had traveled the roadway many times in a northbound direction. There was no construction taking place on his side of the roadway at the time of the accident and he does not remember seeing signs indicating construction. He knew they had put water pipes in and there was a trench about a foot wide where a new blacktop trench had been put on the other side of the road, the southwest side in the southbound lane. He had traveled about a half mile on Deerfield Road, had been on the roadway for maybe a minute in the northbound lane, traveling about forty miles an hour in a forty mile per hour speed zone, when he saw a pack of bikes coming. Some were out front by themselves, but the majority were riding three abreast. When he saw them, he either took his foot off the gas or hit the brake or both. He saw a bicyclist bang into a second person, who banged into the third person, and as he witnessed this, he was starting to brake. He then saw a female bicyclist hit the ground and start sliding towards him. He thought she slid about one hundred feet, more or less. The time lapse was about five seconds. He slammed his brakes "when she came squirting out towards me." His vehicle skid, maybe twenty feet. He did not feel any of the tires make contact with the bicyclist. He didn't think he hit her. He thought she came to rest under his car which had come to a stop, and that the car stopped her from sliding any further.

Howard Greenwald set forth in his affidavit (Schmidt exhibit G) that on July 27, 2002 he was driving in a car following a group of bicyclists which were moving at a considerable speed. He witnessed a male cyclist hitting the curb and falling on the ground. To avoid him, the last female cyclist swerved to her left too sharply, fell, and within 2-3 seconds, slid into the left oncoming car lane. The oncoming car's driver was driving no more than 35 miles per hour within the speed limit, applied his brakes, but there was not sufficient time and space to avoid the collision with the female bicyclist.

Christine Brennan set forth in her affidavit (Schmidt exhibit H) that she witnessed an accident from the front lawn of her home. She saw about 8 to 10 bicyclists pass her driveway. They were all riding racing bikes and wearing helmets and racing attire, riding two by two, some single file, and as a result, were in the middle of the southbound lane of traffic, traveling a very high rate of speed and very close to one another. She observed approximately two bicycles colliding and become entangled with one another, falling on the

roadway. She indicated she saw a female bicyclists fall to the ground, and within a couple of seconds, cross over the double yellow line into the northbound lane of traffic. A silver BMW was traveling north on Deerfield Road about two car lengths south of this person, traveling a normal rate of speed of 35-40 miles per hour. That car began braking and skidding. He was able to stop his vehicle but there was not time to avoid collision with the female bicyclist. She was laying on the left side of the BMW between the left front and left rear wheels.

AUTOMOBILE NEGLIGENCE

In motion (007) defendant Dennis P. Schmidt, the driver of the automobile involved in this matter, seeks an order granting summary judgment. Plaintiff asserts in her complaint that defendant Schmidt was negligent, careless and reckless in the ownership, maintenance, management, and/or control of his motor vehicle. In support of this application, the following have been submitted, inter alia: affirmation of counsel for defendant; copies of pleadings, answer and discovery demands; uncertified copy of a Police Accident Report-MV 104; deposition transcripts of Karen Cotty, Peter Deutch, and Dennis Schmidt; affidavits of Howard Greenwald and Christine Brennan; and four photocopies of photographs.

In opposing motion (007) by defendant Schmidt, plaintiff argues that Schmidt's motion is procedurally defective in that he has not included all the pleadings required by CPLR 3212(b). However, a search of the totality of the records (*see*, CPLR 3212[b]) reveals that they have been provided to this court, and such failure is not fatal to defendant's motion which this Court chooses to decide on the merits. In reviewing the same, it is also determined that defendant Schmidt did plead the emergency doctrine, which plaintiff claims defendant did not.

Defendant Schmidt testified as set forth previously above. Plaintiff claims that defendant Schmidt was exceeding the speed limit and supports this claim with, inter alia, the testimony of plaintiff's husband Joseph Amato, and the affidavit of Michael Cole. However, plaintiff's submissions are deemed conclusory, self-serving and unsupported by admissible evidence. Amato does not state what speed defendant Schmidt was traveling at, only that he was traveling at a high rate of speed. He does not indicate what he considers to be a high rate of speed or if Schmidt was traveling within the speed limit. He did not state he knew the speed limit on the road either. Cole sets forth in his affidavit that the BMW was driving at a high rate of speed, but does not quantify what that speed is, or state if Schmidt was traveling within the speed limit. Accordingly, plaintiff has not demonstrated with the submission of admissible evidence that defendant Schmidt was driving negligently or in excess of the speed limit either immediately prior to the accident or at the time of the accident.

The adduced evidence demonstrates there was no construction involving the northbound lane in which defendant Schmidt was traveling. When defendant Deutch went down, plaintiff went around to the left of him. Deutch testified there was never any contact between her bike and him. He looked toward her and believed she slid the same way he did, then slid into the oncoming northbound lane, under the oncoming car which he stated was still moving. He was not sure if she was moving. He testified about three to five seconds passed from the time she passed him on his left until the time of the contact with the vehicle in the northbound lane.

In reviewing all the submissions, this court concludes that defendant Dennis P. Schmidt has

established prima facie entitlement to an order granting summary judgment on the issue of liability as testimony bears that plaintiff fell while riding her bicycle when she tried to avoid striking Peter Deutch, and slid across the roadway into the oncoming lane of traffic and collided with defendant Schmidt's car which was in the northbound travel lane and which car he tried to stop by slamming on his brakes.

None of plaintiff's submissions dispute these events as described by defendants and the two witnesses, Greenwald and Brennan. Joseph Amato, as per his deposition transcript, stated he did not witness the accident. He was first alerted to the fact that there had been some type of incident when he heard the screeching sound of a car stopping, tires on a pavement. He stopped and immediately turned back to look for his wife. He found her unconscious underneath a car. Michael Cole, who was also riding his bicycle with the group did not know exactly where the accident happened and did not witness it. He stated plaintiff's bicycle wound up on the shoulder of the northbound side of the road. It is undisputed that from the time plaintiff fell until she slid under defendant Schmidt's car, that there was a lapse of two to five seconds. It is also undisputed that there was no shoulder on the roadway in either direction. At all times from when he first saw the bicyclists, defendant Schmidt kept them in his view, began braking and slowing down and slammed on his brakes when he saw plaintiff fall. It is also undisputed that defendant Schmidt was not the proximate cause of plaintiff falling and sliding across the roadway into oncoming traffic and sliding under defendant Schmidt's car. It is incumbent on plaintiff to submit evidence in admissible form, creating an issue of fact to defendant's negligence (*Hornacek v Hallenbeck*, 185 AD2d 561, 586 NYS2d 426 [3rd Dept 1992]), but plaintiff has not done so. Accordingly, it is determined defendant Schmidt did not contribute to the happening of the accident. Defendant Schmidt claims he acted reasonably under the circumstances when the emergency arose and that plaintiff assumed the risks in engaging in this 72 mile long bicycle trip.

A cyclist is subject to the general rules of the road, and the movement of a motor car is governed generally by rules applicable to other vehicles (*Clarke v Woop*, 159 AD2d 437, 144 NYS2d 595 [2nd Dept 1913]). A bicycle is seen by the law as a vehicle and therefore defendant is under a legal obligation to yield to a bicycle and must treat bicycles as if they were vehicles (*People of the State of New York v Marr*, 187 Misc2d 280, 721 NYS2d 737 [NY J Ct 2001]). A driver is not required to anticipate that a vehicle, in this case a bicycle (*see* Vehicle and Traffic Law §1231), traveling in the opposite direction will cross over into oncoming traffic (*Goff v Goudreau*, 222 AD2d 650, 635 NYS2d 699 [2nd Dept 1995]). It is well established that a "driver in his proper lane is not required to anticipate that a car going in the opposite direction will cross over into that lane (*Gooch v Shapiro*, 7 AD2d 307, *affd* 8 NY2d 1088). And the failure of a driver not otherwise negligent, who meets such a car, to avert the consequence of such an emergency can seldom be considered negligent (*Meyer v Whisnant*, 303 NY 369; *Breckir v Lewis*, 21 AD2d 546, 549, *affd sub nom* (*Beckir v Pliebel*, 15 NY2d 1027)" (*Benedetto v The City of New York*, 166 AD2d 2009, 564 NYS2d 95 [1st Dept 1990]). "When a defendant is faced with an emergency without opportunity for deliberation, thought or consideration, the ensuing accident may be within the field of nonliability for injury...; when an emergency is not created by the driver's own acts, he is not obligated to exercise the best judgment and that if it is a mere error of judgment the choice of an alternative course of conduct, even if unfortunate, does not make it negligent...; where an emergency is not created by the defendant's own acts, he is not obliged to exercise the best judgment" (*Rowlands v Parks*, 2NY2d 64, 156 NYS2d 834 [1956]; *see also*, *Tenenbaum v Martin*, 131 AD2d 660, 516 NYS2d 741 [2nd Dept 1987]). Plaintiff has not submitted any admissible evidence to demonstrate that defendant was negligent or could have avoided the accident concerning the incident wherein plaintiff slid across the road into his lane of traffic, sliding under his car while he slammed on his brakes to stop to avoid hitting her. Plaintiff's mere speculation that defendant may have failed to act properly, or was

negligent, is insufficient to defeat the summary judgment motion (*Schneider v American Diabetes Association*, 253 AD2d 807, 677 NYS2d 627 [2nd Dept 1998]). Here, it is determined, and the record supports, that defendant Schmidt was faced with an emergency situation, had only seconds to react, and was not driving in a reckless manner or otherwise acting negligently. It is therefore determined that Schmidt's reaction to the situation was reasonable and the collision was unavoidable (see, e.g. *Cohen v Masten*, 203 AD2d 774, 775-776; *Rocourt v Kelly*, 230 AD2d 483, 657 NYS2d 759 [2nd Dept 1997]; *Moller v Lieber*, 156 AD2d 434, 548 NYS2d 552 [2nd Dept 1989]) and that Schmidt was not negligent as a matter of law. What is more apparent to this Court is that had Schmidt reacted differently, he could have very easily run plaintiff over under his tires, instead of her body sliding under his car between the tires.

Accordingly, motion (007) by defendant Schmidt for an order granting summary judgment dismissing the complaint and any and all cross claims asserted by codefendants is granted.

ASSUMPTION OF RISK

In motion (008) defendant Peter Deutch, as fourth-party defendant, seeks an order granting summary judgment as against Suffolk County Water Authority, dismissing the complaint and all cross-claims asserted against him. Suffolk County Water Authority commenced a fourth-party action against Peter Deutch as third-party defendant, alleging he caused or contributed to the accident in whole or in part due to his negligence, recklessness, and culpable conduct, and seeks contribution from defendant Deutch should liability be imposed against Suffolk County Water Authority. In support of the application, defendant Deutch has submitted, inter alia, an attorney's affirmation; and copies of the transcripts of the 50-h hearing of Karen Cotty and examination before trial of Peter Deutch.

Counsel for defendant Deutch argues that Karen Cotty assumed the risks commonly associated with bicycling and thus Deutch owed no duty of care to her. Counsel also argues that the doctrine of assumption of the risk applies in those situations wherein "through one's participation in a sport or recreational activity, that there is an inherent consent to those commonly appreciated risks which arise out of the nature of the sport and flow from such participation." Counsel further argues that the doctrine of primary assumption of risk eliminates the tortfeasor's duty of care and can be a complete bar to recovery, depending upon the nature and scope of the participant's awareness and consent, whether it can be concluded that plaintiff made an informed estimate before deciding to participate depends on the openness and obviousness of the risk, plaintiff's background, skill, experience, conduct under the circumstances, the nature of defendant's conduct and whether the risk is inherent in the activity.

The doctrine of assumption of risk provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation, including the risks associated with the construction of the playing surface and any open and obvious condition on it (*Joseph v New York Racing Association, Inc.*, 28 AD3d 105, 809 NYS2d 526 [2nd Dept 2006]). In determining applicability of doctrine of primary assumption of the risk, awareness of the risk is to be assessed against the background of the skill and experience of the particular plaintiff (*Joseph v New York Racing Association, Inc.*, *supra*). It is not necessary to the application of the doctrine of primary assumption of risk that the injured plaintiff may have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results (*Joseph v New York Racing Association, Inc.*, *supra*).

The courts have recognized that the risk of striking a hole and falling is an inherent risk in riding a bicycle on most outdoor surfaces and, where the defective condition was open and obvious, the plaintiff will be held to have assumed the risk associated with riding his bicycle on the path (*see, Goldberg v Town of Hempstead*, 289 AD2d 198, 733 NYS2d 691 [2nd Dept 2001]). By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,” thus barring any legally cognizable cause of action attributable to such known risks (*Morgan v State of New York*, 90 NY2d 471, 484. Although the risk of injury from falling off a bicycle as a result of slight depressions in the pavement (*see, Dobert v State of New York*, 8 AD3d 873 [3rd Dept 2004], *lv to app den* 99 NY2d 504 [2003]) or ruts and bumps in a rough roadway (*Furgang v Club Med, Inc.*, 299 AD2d 162 [1st Dept 2002], *lv to app den* 99 NY2d504 [2003]) has been found to be inherent in the activity of bicycle riding, this Court finds that there is at least an issue of fact as to whether the risk of falling as a result of the presence of grooves, or absence of the top layer of asphalt creating a ridge, constitutes a commonly appreciated risk which is inherent in and arises out of the nature of the sport and flows from such participation.

In reviewing all the submissions, this court concludes Peter Deutch has not demonstrated prima facie entitlement to an order granting summary judgment on the issue of liability. Peter Deutch testified he was an “excellent social causal rider” and that plaintiff was similar to him in ability. Plaintiff testified she was an advanced intermediate rider. There are factual issues concerning what is meant by these terms and how their actual level is determined. It is obvious, that neither Deutch nor Cotty were novice bicyclists. There are factual issues concerning whether Peter Deutch was negligently operating his bicycle when his tire got caught on the lip, and whether his actions contributed to plaintiff losing control of her bike and the subsequent events which followed. It is not known whether he was traveling a safe rate of speed under the circumstances, whether he observed what was to be observed on the roadway to avoid falling and the subsequent events which followed, or whether he was traveling too closely behind the two bicyclists in front of him to appreciate the potential danger the ridge presented. There are factual issues concerning whether the condition complained of was open and obvious, and if such condition should have been anticipated or if such risk would have been consented to.

Based upon the foregoing, it is determined that Peter Deutch has not demonstrated prima facie entitlement to summary judgment dismissing the fourth-party complaint asserted against him.

Accordingly, motion (008) by defendant Peter Deutch for summary judgment is denied.

ROAD CONSTRUCTION

Motion (006) is brought by Suffolk County Water Authority (hereinafter SCWA) and CAC Contracting Corp. (hereinafter CAC) wherein they seek summary judgment dismissing plaintiff's complaint and the cross claims asserted against them. The complaint of the main action asserts SCWA and CAC entered into an agreement with defendant Town of Southampton, and with each other, to perform certain work on the roadway at the site of the accident, and supervised, controlled, or performed the work to the roadway, and inspected, supervised and repaired the roadway, and that defendants SCWA and CAC were negligent, careless and reckless in their repair and construction, management and control of the roadway, creating a nuisance, trap, and dangerous condition which caused plaintiff to sustain personal injury. The motion is supported with an attorney's affirmation, a copy of the order of February 2, 2005, a copy of the transcript of the examination

before trial of SCWA by Timothy Kilcommons, one page of a transcript from an examination before trial of R. Corazzini, Jr., and photocopies of three pictures.

Timothy Kilcommons testified at his examination before trial on October 6, 2006 (SCWA and CAC's exhibit B) that he is employed by SCWA as the deputy director for distribution. He handles the administration of contracts, oversees the pipeline and paving department, and in-house crews. In 2002, he was the Superintendent of Pipeline and Paving and oversaw pipeline inspectors and SCWA paving contracts. He also oversaw contractors who installed pipelines and performed pavement restoration for SCWA. SCWA made payments on those jobs based on the contracts.

Timothy Kilcommons described the job that was performed on Deerfield Road in 2002 as involving the installation of approximately 3500 feet of water main. The water mains were installed by Elmore Associates as the pipeline contractor. They came in, dug the trench, installed the water mains, and then backfilled and compacted the trench. Since the site involved a paved area, Elmore restored the Deerfield Road site with 1388.67 square yards of temporary asphalt pavement, at a depth of one and a half inches. This, testified Kilcommons, was inferred from the fact that they had a purchase order to Corazzini and Elmore was paid for asphalt on the job. Elmore Associates finished their work at the site on June 7, 2002. He did not know if a paving inspector went to the site as they are provided with a paving sketch from the pipeline inspector. When the sketch looks complete or if he talks to the pipeline inspector and feels that the sketch is exactly what's needed in order to impart the instructions to the restoration contract, that would be the end of it. Otherwise, the paving inspector would go out to the site to make his own sketch.

Pursuant to contract, defendant CAC performed the permanent restoration after the installation of the pipelines. A copy of the contract was produced at the examination, but has not been provided to this court. He testified that CAC worked on Deerfield Road pursuant to the contract from July 24, 2002 to August 2, 2002. He did not know the date, but went to the job site after August 2, 2002, when the job was 100 per cent complete, in response to being told there was a claim at the site involving the instant action. The temporary asphalt was dug out by CAC by cutting it four inches deep, removing it, and then laying four inches of permanent asphalt on top. The specifications require that the completed trench be true and level with the existing roadway.

He testified there were two paving inspectors from SCWA who went to the job site while work was being done, but stated there were no records concerning their findings. He stated these inspectors can make judgment calls with regard to completion of the job or on issues of safety. He did not know if they made such a call with regard to safety as it is not a part of their job function which is to make sure the contractors follow the specifications of the contract and that the purchase order instructions are being followed. There were no inspections done which ultimately resulted in a finding of less than satisfactory work.

When shown a picture of Deerfield Road marked as defendant's exhibit D, Mr. Kilcommons testified that it looked like the trench was based, that the first lift of asphalt had been placed in it by CAC after they saw cut the edge of the trench and removed temporary blacktop and two and a half inches of soil. He did not know when this was done. The next step would have been to install the final lift of asphalt to make the trench true and level with the existing road. Then asphalt cement would be placed on the edge of the trench to seal it. A trip up, or asphalt curb on the edge of the road was planned for this particular project. He did not believe it could be determined when that first lift was placed or how much time lapsed between when the first

lift was placed and when the final lift was placed. There was no time frame set forth in the contract for CAC to complete the work and no understanding for the same. When asked what the time frame for completion given the length of the trench, he did not know because it could be done in sections. Each section could be finished for the night and another section done the next day. He did not know whether that was done and had no records to ascertain the same.

Kilcommons further testified the contract required the contractors to place barricades or cones around the areas if a trench was left unfilled for the night. SCWA requires levels of the trench in relation to the road not create a trip hazard, which is in the range of a quarter inch. The second lift is usually placed the same day as the first, but this was a 3500 foot trench, which is considered a long trench. The contract required the first and second lift to be done the same day, however, he said it is was not realistic to think that 3,500 feet could be dug out in a single day. The project was completed August 2, 2002. When asked if a section with a first lift was being left overnight or over a weekend, if the paving supervisor for the SCWA was required to notify the Town of Southampton and the Highway Department it was being left in that condition, he said it was not required. He also testified that SCWA does not give full payment to the contractor until there is approval by the Town that the job meets their standards.

Richard Corazzini testified at his examination before trial that he is employed as president of Corazzini Asphalt and CAC contracting. His job function with CAC is that of a project supervisor and a Local 138 operator. They have 1298 Laborers and 138, and he operates a Bobcat or roller, whatever machinery is necessary for the particular job they are doing. He testified Corazzini Asphalt had nothing to do with the job at Deerfield Road in 2002. CAC, he testified, was to do asphalt restoration due to new main installation by SCWA. CAC has held the restoration contract for the SCWA since 1999. Corazzini Asphalt held the contract before that. His wife owns CAC Contracting.

CAC received a purchase order from SCWA with a map stating on the purchase order what restoration was to be done at the site. He would have been there with the inspector to lay the job out to set limits of the saw cut, the limits of the proposed restoration, where to start, where to stop, which areas to remove and replace. SCWA provides guidelines by their inspector and the layout would be done with paint. There was temporary asphalt laid out by Elmore when he arrived. There were no guidelines by SCWA concerning the saw cuts. Generally a walk behind self-propelled saw with an operator and a flag man are used to do the cuts before the removal. CAC performed the saw cut on the roadway beyond the temporary replacement to prepare for the removal of a four inch replacement by cutting back approximately six inches beyond the temporary asphalt, excavating it out with a Bobcat or skidsteer, fine grading the base with a shovel or rake, and installing the base course asphalt with a skidsteer, dumped in piles and hand shoveled and hand raked to the limits of the saw cut. An asphalt roller, which compacts the asphalt, is used throughout the restoration to roll the subbase, the base and the top course. A top course would be placed on top of the base course asphalt. He believed it would have been done in about 300 foot sections as they never remove more temporary pavement than they can replace in a day. There would have been two, possibly three operators on that job. They had a flagman on the job flagging the traffic to one lane, and they used the lane they were working in. Temporary asphalt was being removed during the period of July 24, through July 27, 2002. CAC did not work on the job on the weekends.

Mr. Corazzini identified several photographs as the Deerfield Road site with a base course of asphalt which was left in that condition overnight. He stated the base course was within the specifications of the

SCWA and the Town of Southampton. It was not true and level with the roadway as some variant thickness has to be left for the top course. If the base layer of asphalt is laid and left overnight or over a weekend, CAC would not make the base layer true and level with the adjacent roadway. They did not leave any barriers around the work area which was left overnight or over the weekend with the base course of asphalt. If the top course were four inches, he stated, then they would use cones and barrels, but it is acceptable practice if the lip is a varying lip of an inch or so not to use a barricade. He stated a lot of times with the state or the county, in the SCWA contract, the specification is different; it is a thicker specification, so they have to put cones and barrels, but in this situation, it was not required. When CAC left the Deerfield project overnight or over a weekend with the base layer laid, there were inspectors from SCWA who examined it before the end of the business day. He did not remember anyone from the Town of Southampton being there or having interaction with them.

Mr. Corazzini testified that on this particular job, the top layer of asphalt was not laid the same day as the base course. He stated that according to Southampton Town specifications or SCWA specifications, you can't leave an open trench, which is why they don't remove all the temporary and then run short on the base course and not get it up to grade for the top course. He stated as long as it is up to grade for the top course, it is acceptable. The top layer is approximately a half inch to an inch and a half.

He also testified that there was a portion of the job that was an overlay of an inch and a half resurface for the entire road surface, so it seems like it is 3,000 feet, whatever. They did not resurface the entire roadway from one side to the other. There was an area down the road further where the main would have been out in the travel lane of the roadway, and at that point, they key cut the roadway and overlay the entire road. They also key cut by some driveways.

Based upon the foregoing submissions by defendants SCWA and CAC, it is determined they have not established prima facie entitlement to an order granting summary judgment on the issue of liability as defendants' submissions have raised factual issues. There have been no expert affidavits submitted in support of defendants application to eliminate any factual issues to demonstrate that the condition of the roadway at the time of the accident was safe and did not create an unsafe passageway for plaintiff or that it complied with industry standards. Mr. Kilcommons testified CAC repaired the trench with only a first lift, and although it was required that the second lift be placed the same day, it was not. There are issues of fact concerning whether there should have been cones, signs or barricades placed at the site where the first lift was placed until the second lift was completed. There are factual issues concerning whether the alleged uneven surface created a safety hazard, and whether SCWA knew, or should have known, of the condition of the roadway surface through its paving inspectors. There are issues of fact concerning whether SCWA or CAC advised the Town of Southampton of the roadway condition, and whether they complied with terms of the permit issued by the Town of Southampton.

Turning to defendants SCWA and CAC's motion for summary judgment, since this court determined that defendants failed to meet their initial burden, it is unnecessary to consider whether plaintiff's opposition papers raised a triable issue of fact (*see, Facci v Kaminsky*, 18 AD3d 806, 795 NYS2d 457 [2d Dept 2005]). However, in reviewing the same, it is determined that plaintiff has raised factual issues which preclude an order granting summary judgment to SCWA and CAC.

The testimony of the Superintendent of the Highway Department for the Town of Southampton,

supported by a copy of the permit (plaintiff's exhibit A) issued to SCWA by the Town, demonstrates the permit had certain requirements to be met by SCWA wherein they were to ensure that "Pedestrian and vehicle traffic is to be protected and maintained." There are factual issues concerning whether SCWA and CAC protected vehicle and pedestrian traffic with the condition of the roadway and whether the one to one and a half inch lip is considered a safety issue. The permit further provides "Barricades, whether in sidewalk or roadway area, shall have prominently displayed, for police convenience, the address and telephone numbers of 24 hour availability of someone who will re-establish it, in emergency." There are factual issues concerning whether barricades or cones or tape or signs or other markers warning of the surface defect should have been in place as a responsibility of SCWA or CAC, since the contract between CAC and SCWA required that the contractor shall maintain adequate signs, barricades and flashing lights on all roads under construction. There are factual issues concerning whether SCWA consented to CAC not using any warnings on the roadway or permitted the unprotected first lift area to have a lip, when SCWA required the temporary asphalt installed by Elmore to be true and level with the road surface. Additionally, there are factual issues concerning whether the lip unreasonably increased the risks of cycling, and was it the type of risk a cyclist would expect and/or have consented to.

Accordingly, motion (006) by SCWA and CAC for summary judgment is denied.

In motion (009) the Town of Southampton (hereinafter Town) seeks summary judgment on the issue of liability, and in addition to their own arguments and submissions, adopts the factual and legal arguments submitted by counsel for co-defendants SCWA, CAC, Schmidt and Deutch, and argues that the sole proximate cause of this accident was plaintiff's following too closely behind the bicycle being operated by Peter Deutch while "drafting" behind his bike. For whatever reason, argues the Town, that Deutch lost control of his bicycle, plaintiff was unable to safely stop and avoid the accident because of drafting or tailgating at a high rate of speed, which resulted in her own injuries.

In support of their application, the Town has submitted, inter alia, copies of the pleadings and bill of particulars; copy of the transcript of the hearing conducted pursuant to GML 50-h of Karen Cotty; copies of the deposition transcripts of Karen Cotty and Peter Deutch. It is noted that defendant Town's motion is not supported by an affidavit of a person with knowledge or a copy of the examination before trial transcript of a person from the Town and therefore fails to comport with CPLR 3212(b). However, the application of the Town is denied due to the existence of factual issues in the Town's moving papers and due to the existence of factual issues concerning assumption of the risk by plaintiff.

William Masterson, Jr. testified on behalf of defendant Town of Southampton (plaintiff's exhibit M) and stated he worked for the Town of Southampton Highway Department seventeen years as Superintendent of Highways. He stated he is in charge of the maintenance of the 450 miles of Town-owned roads in the Town of Southampton, which maintenance includes repaving, snowplowing, grass cutting, and leaf pick-up. He was familiar with Deerfield Road and the area of Deerfield Road at Woodthrush Lane comes under his jurisdiction.

He stated SCWA submitted a permit application to open cut a portion of Deerfield Road in the Town of Southampton. There was no indication from SCWA that the job had been completed. At the end of the job, SCWA was to submit a paper that the Town signs saying the job was completed. He did not know if that was done. It would normally be kept in the file that the Town of Southampton maintains with regard to this

permit, but he did not know if it was. This was something required by SCWA, not the Town. There were no conversations between the Town of Southampton and SCWA concerning this job. He did not have any records concerning an inspection of the job, but stated the Town would inspect at the completion of the job. When asked what type of inspection the Town did, he said the job was completed as required. He did not know when that inspection was done. The Town of Southampton had requirements with regard to restoration of the road surface in the permit it issued to SCWA. To his knowledge, the work had been done if they signed off on the permit. The Town would have physically observed the job.

He did not have any recall of actually seeing this road cut personally. SCWA verbally advised the Town as to who they were going to be hiring to do the work on this job as they have working relationship with SCWA and they know who the contractor is because they have a yearly contract which does not require the Town's approval. The Town of Southampton or the Highway Department did not make any kind of inspection of the work being performed while it was being performed to ascertain whether there was compliance with the requirements of the permit. The reason no inspection was made by the Town of Southampton at the site was that it is a Suffolk County Water Authority project, not a Town of Southampton project. He did not personally make a determination that the work had been performed to his satisfaction, and most probably, someone else did. He could not say who did, and there would possibly be records which are maintained in his office in the Suffolk County Water Authority file. The only other document would be the sign-up sheet from the SCWA which they send to SCWA and do not keep. The Town of Southampton did not make any inspections of the work site during the progress of the work performed pursuant to this permit. All of the requirements of the Town of Southampton are on the permit.

He stated the permit required that "Highway pavement is not to be undermined and drainage along highways not to be obstructed." He also stated that "Shoulder restoration on Deerfield Road, this is 'As per Town specification with asphalt tip up.' Replace where tip up currently exists. Trench Woodthrus Lane to be restored as per Town specification with one and a half inches of asphalt overlay at the intersection of two stated roads as a final restoration."

He stated the rule of thumb is that the pipes are 48 inches below the surface of the road. This does not undermine the road as they rip up the road. The undermining consists of the existing asphalt. They are expected to replace or refill the trench to approximately the same condition it was in before they dug the trench. The temporary restoration is a responsibility of the Suffolk County Water Authority and they have their own specifications as far as what is required. The only requirement of the Town is that because the job has not been finished, that the road becomes safe.

He described Deerfield Road as being two and a half to three miles long. He did not know when the work began on that road. The work must be commenced within 90 days of the permit. He described the roadway as having two travel lanes, one north and one south for vehicular travel. There is top asphalt on the surface which he stated has a lot more stones in it as it the wearing surface. There is also a shoulder on the roadway. There is no requirement for inspections of the roadway within the Town of Southampton. He does not keep a journal or log concerning inspections of the roads. He received no complaints about the roadway in the vicinity of Woodthrus and Deerfield within six months of the accident. The Town does not require SCWA to file or submit copies of contracts for the subcontractors that are actually going to be doing the work regarding the cutting or the asphaltting or the restoration. The Town does not maintain photographs of the roads in the Town. No other entity made application to do any work along this same portion of the roadway.

The permit was issued in the area for water mains running parallel to Deerfield Road. The cuts that are required to be done are in the top area of the roadway. The Deerfield travel lanes are each about twelve feet wide, comprised of top asphalt. There is a grass area along the side of the road on both sides of the road. During the time the road work was being done, the Town of Southampton did not place any street signs along the area of the construction marking the construction area. He did not know if any other entity placed signs in the area of the construction. The Town of Southampton does not require signs in the work area; the only requirements are listed in the permit. He further testified there is no responsibility for the Town to put any signs up. He further stated the permit states at line five that "Pedestrian and vehicle traffic to be protected and maintained. Barricades whether inside or on roadway area shall have prominent display for police convenience and... addresses 24 hour someone who will be responsible. Pedestrians and vehicle traffic is to be protected and maintained. There shall be no unprotected or unlighted drop-offs or obstacles at any time. Open holes shall be fenced or guarded. Permittee is required to pay all costs involving the Town, including man hours and equipment used necessary to correct any unsafe conditions this office finds necessary to correct on a charge-back basis."

He did not know when work was completed under the permit. He stated that based upon the picture shown him, he felt the project looked like it has been temporarily paved and waiting for final restoration. There are no requirements that SCWA provide the Town with photos of the progress or completed work. He also stated that the permit provided "The superintendent of highways reserves the right at any time to revoke or annul this permit should the said applicant fail to comply with the terms and conditions of...upon which it is granted." He also testified that without revoking the permit, the Town of Southampton Highway Department had the right to take any steps it saw fit to repair any type of opening or condition in the road along this project if they deemed it unsafe. He further stated the Town did not deem any of the work in this project as unsafe. He also stated that the reason they require the restoration asphalt to be level with the existing asphalt is for a safety factor. He stated a drop-off refers to the edge of pavement to a shoulder or any uneven surface. That also applies to situations where there's a difference in elevation between top asphalt and temporary asphalt. He further testified that the work was done to the roadway on Deerfield Road and not the shoulder.

The Town does not deny that SCWA obtained a permit from the Town of Southampton for the work done in the area, and the Town of Southampton has not denied ownership and control of Deerfield Road. It is concluded by this court that there are factual issues concerning what, if anything, the Town did to ensure that the construction site was safe and/or appropriately marked, and how it ensured that SCWA complied with the terms of the permit to maintain a safe passage on Deerfield Road

Additionally, the adduced evidence does not establish that plaintiff was engaging in drafting as she testified that she did not at the time of the accident, and customarily, did not engage in drafting on Deerfield Road. There are factual issues concerning what constitutes "drafting" and whether plaintiff was traveling at a safe distance and safe rate of speed under the circumstances, and whether these factors even contributed to plaintiff losing control of her bike. There are factual issues concerning what caused defendant Deutch to fall and factual issues concerning whether plaintiff's bicycle was caused to fall over due to the lip in the asphalt. There are factual issues concerning whether there was any contact between plaintiff's bike and Deutch's bike.

"A governmental body, be it the state, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries

resulting from a breach of the duty. Because the duty is nondelegable, even if the dangerous condition of the road, which caused the injury, is created by an independent contractor, the obligation imposed on the governmental body nevertheless remains fixed” (*Lopez v Rostad*, 45 NY2d 617, 412 NYS2d 127 [2nd Dept 1978]). “One responsibility of government is to provide the public with roads and highways for travel. With this responsibility comes the further obligation to assure, insofar as is reasonably possible, that the thoroughfares of travel will be constructed and maintained in a safe condition. A governmental body would have hardly have fulfilled its responsibility if the roadways it provided for public use were a source of public danger. It is for this reason that governments have ever been most zealous to afford special protection to the users of streets, highways and other means of transportation” (*Lopez v Rostad, supra*).

This court concludes that the Town of Southampton has not demonstrated prima facie entitlement to summary judgment on the issue of liability due to the existence of factual issues concerning the cause of the accident, assumption of the risk, and due to its nondelegable duty of providing safe roadways to the users of the road where the accident occurred.

Accordingly, motion (009) by the Town of Southampton for summary judgment is denied.

Turning to motion (010), Elmore Associates Construction Corp. (hereinafter Elmore) seeks summary judgment on the issue of liability. Elmore has been named as defendant in the main action and commenced the third-party action against defendant Peter Deutch. In support of its application, Elmore has submitted a copy of a stipulation of discontinuance executed by counsel for plaintiff and for defendant Elmore, dated March 6, 2007 (Elmore’s exhibit A, affirmation in further support of motion). Also in support of the application, Elmore has submitted, inter alia, copies of the pleadings; copies of the transcript from the hearing conducted pursuant to GML 50-h; and copies of the transcripts of the examinations before trial of Peter Deutch, Timothy Kilcommons, Thomas Rattler, and Richard Corazzini; and an exhibit labeled SCWA Construction Summary Sheet.

In reviewing defendant Elmore’s submissions, it is determined that defendant Elmore has demonstrated prima facie entitlement to an order granting summary judgment on the issue of liability. It was clearly set forth in the testimony of Timothy Kilcommons, employee of defendant SCWA, that the water mains were installed by Elmore Associates as the pipeline contractor on Deerfield Road. They came in, dug the trench, installed the water mains, and then backfilled and compacted the trench, and since they were in a paved area, restored it with temporary asphalt. There were no inspections done by SCWA which ultimately resulted in a finding of less than satisfactory work. They installed 1388.67 square yards of temporary asphalt pavement, at a depth of one and a half inches. This, testified Kilcommons, was inferred from the fact that they had a purchase order to Corazzini, and Elmore was paid for asphalt on the job. Elmore Associates finished their work at the site on June 7, 2002, prior to the date of the accident. Kilcommons further testified that CAC laid the permanent asphalt in this project pursuant to a restoration contract and started the job on July 24, 2002.

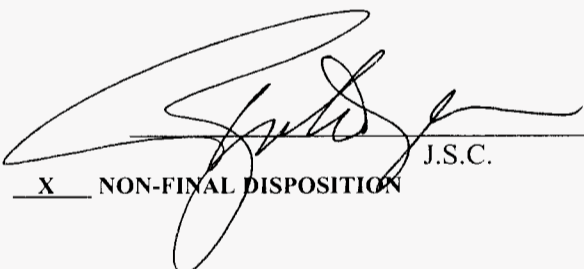
Thomas Rattler, an employee of Elmore Associates, testified at his examination before trial that he was familiar with the Deerfield project that took place in 2002, in that Elmore was contracted by SCWA to install a new water main on Deerfield Road. He was personally at the Deerfield job everyday. A SCWA inspector was at the job every day, but not all day long. There was no one that he can remember who came from the Town of Southampton. He stated the job was performed on the dirt shoulder on the edge of the road,

on the grass side for a distance of about 3000 feet, which is dug in about twenty foot sections. The edge of the roadway was lost in some areas, the greatest width being a foot which was excavated with a backhoe. Elmore does not score the roadway with a saw blade on a backhoe. They started work toward the middle to the end of May and finished the beginning of June. They placed temporary asphalt on the intersecting driveways and any intersections. It was his testimony that the hole in which the piping is installed is never left open. The maximum time it is open is ten to fifteen minutes, then it is closed up right away and backfilled with dirt and compacted up to grade the same elevation as the driveway and the road. Temporary pavement is placed if its necessary. On this job, a full dump truck passes over the edge and compacts the soil down. Then it is raked out and the backhoe or backfilling machine drags it flat. Then the patch is put on about an inch to and inch and a half thick and rolled out with a ten ton roller to make it nice and smooth. The temporary patch is always intended to be level, in that it would be equal grade to the roadway for safety so that there would not be an edge. The SCWA inspectors let them know if there is anything that needs to be corrected, and, if not, they are finished. Normally, the last day of the project the inspector comes with a completion sheet which will not be given until the job is left in a condition that they want it to be left in, which is safe, clean and everything is as per contract. It was normal procedure for another company to come in to do permanent restoration after Elmore finished. He did not know who came in for that and he did not know what parts of the project needed permanent restoration as that would be up to SCWA.

Based upon the submissions of defendant Elmore, it is determined that Elmore has demonstrated entitlement to an order granting summary judgment as the adduced testimony supports that their work was completed well before the date of the accident. Defendant CAC came in at a later date and removed the temporary asphalt placed by Elmore and put in the base course of asphalt at the site on Deerfield Road, leaving a depression of approximately one to one and a half inches for the installation of the top course of asphalt. In opposing this motion, neither plaintiff or any of the co-defendants have come forward with admissible evidence to overcome Elmore's demonstration of prima facie entitlement to an order granting summary judgment. Plaintiff has discontinued the action against Elmore.

Accordingly, defendant Elmore's motion (010) for summary judgment dismissing the complaint and all cross claims asserted against them is granted. The third-party action commenced by third-party plaintiff Elmore is dismissed as well.

Dated: AUG 06 2007


 _____ J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION