STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

ROBERT CANCELLARO, as Guardian ad Litem for
DESTANY CANCELLARO and JAZZMINE GOMEZ,

Plaintiff,

-against-

JOHN R. SHULTS, III, THE CITY OF KINGSTON and
ANGELINA VELEZ,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 55-06-01740 Index No. 06-41

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The above-captioned action arises out of a very serious motor vehicle accident which occurred on Hurley Avenue in the City of Kingston, New York on December 21, 2004 at approximately 8:42 a.m. of that day. Angelina Velez ("Velez")was operating her motor vehicle in a southerly direction on Hurley Avenue. With her were her two children, the infant plaintiffs, Destany Cancellaro (then age 1), and Jazzmine Gomez (then age 7). It is undisputed that at some point Ms. Velez lost control of her vehicle, which then entered the on-coming lane where it was struck by a vehicle operated by defendant John R Shults, III ("Shults")[1]. The plaintiff alleges, inter alia, that the City of Kingston was negligent with regard to the maintenance of Hurley Avenue, and with regard to the absence of signs warning of a dangerous curve in the road. The plaintiff alleges that defendant Shults was negligent in the operation of his vehicle. Both said defendants have made motions for summary judgment.

Defendant Velez testified at her pre-trial deposition that she has no independent recollection of how the accident occurred. That morning she was driving her daughter Jazzmine to school. It was cold out, but there was no precipitation. Jazzmine was in the back seat behind the driver's seat, and was secured by a seat belt. Destany was in the middle of the back seat secured by a car seat. Velez remembers going under a New York State Thruway overpass. She remembers observing some icy patches on the road At some point

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[1]The direction of the curve for Velez, as she traveled in a southerly direction on Hurley Avenue, was to the left. The direction of the curve for Shults, as he traveled northerly on Hurley Avenue, was to the right.

she felt a "smack" in her face. She did not immediately realize that her vehicle had been involved in a motor vehicle accident. Her car came to rest in the northbound lane of Hurley Avenue.

Defendant Shults testified at his pre-trial deposition that he had left his house on Hurley Avenue minutes prior to the accident. He was traveling northbound on Hurley Avenue. He first saw the Velez vehicle as it came around a bend in the road. He estimated that at that point the Velez vehicle was seventy-five feet away from his vehicle. He indicated that he was traveling twenty-five or thirty miles per hour. He estimated that the Velez vehicle was traveling in excess of forty-five miles per hour, and that the car was traveling so fast that it was tipping as it went around the curve. He testified that about two seconds transpired from the time he first saw the Velez vehicle until the collision. The Velez vehicle came into his travel lane, and the front of his vehicle struck the passenger side of the Velez vehicle. The collision took place at a point in the center of his lane. Defendant Shults testified that after the accident (while still at the accident scene) defendant Velez told him that just before the accident Velez had turned around screaming at her daughter, and told her daughter to shut up. According to Shults, Velez indicated to him that when she looked up she was heading off the road; and the next thing she knew her vehicle struck Shults' vehicle.

Turning first to the motion of the City of Kingston, as a part of its argument, said defendant maintains that the plaintiffs failed to comply with its prior written notice statute, which is a condition precedent to commencement of an action. It is well settled that "prior

written notice laws are a valid exercise of legislative authority" (Amabile v City of Buffalo, 93 NY2d 471 [1999], at p. 473 , citing Fullerton v City of Schenectady, 285 App Div 545, affd 309 NY 701, appeal dismissed 350 US 980, and Holt v County of Tioga, 56 NY2d 414). "Thus, in derogation of the common law, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions . . . if it has not been notified in writing of the existence of the defect or hazard at a specific location" (Amabile v City of Buffalo, supra, at p. 474, citing Doremus v Incorporated Vil. of Lynbrook, 18 NY2d 362, 366). The City of Kingston has submitted a copy of Article XVII, § C17-1 of the Kingston City Charter which requires prior written notice of enumerated unsafe or dangerous conditions in any street or highway as a condition precedent to commencement of an action against the City for damages. The City has also submitted the affidavit of its City Clerk, Kathy Janeczek, in which she indicates that she made a search of the records in the City Clerk's Office and found that the City of Kingston had not received written notice of a defective condition in the location where the accident occurred prior to December 21, 2004. Notwithstanding the foregoing however, it is also well settled that prior written notice statutes do not apply to highway traffic devices and signs (see Alexander v Eldred, 63 NY2d 460 [1984], at 467; Herzog v Schroeder, 9 AD3d 669, 671 [3d Dept., 2004]; Norton v Village of Endicott, 280 AD2d 853, 854-855 [3d Dept., 2001]; Mosher v Town of Oppenheim, 263 AD2d 605, 606 [3d Dept., 1999]; Bova v County of Saratoga, 258 AD2d 748, 749 [3d Dept., 1999]; Akley v Clemons, 237 AD2d 780, 781-782 [3d Dept., 1997]).

The Court finds that the City satisfied its burden of proof on the motion by

demonstrating the existence of the prior written notice requirement in its City Charter together with the affidavit of its City Clerk that no such notice had been received. In the absence of a triable issue of fact, the Court that plaintiff's complaint must be dismissed with regard to all causes of action related to a dangerous condition existing in Hurley Avenue at the accident site, other than those related to the adequacy of highway traffic signs.

It is well settled that municipalities have a duty to maintain their highways in a reasonably safe condition, subject to a qualified immunity arising from highway planning decisions (see Friedman v State of New York, 67 NY2d 271, 283 [1986]; see also Winney v County of Saratoga, 8 AD3d 944, 944-945 [3d Dept., 2004]). Thus, "'[a] governmental body may be liable for a traffic planning decision only when its study is "plainly inadequate or there is no reasonable basis for its [ ] plan'" (Affleck v Buckley, 96 NY2d 553, 556 [2001], quoting Friedman v State of New York, supra, and citing Weiss v Fote, 7 NY2d 579; see also Racalbuto v Redmond, 46 AD3d 1051, 1052-1053 [3rd Dept., 2007]). With regard to highway signing it is also well settled that the absence of a warning sign will not be deemed a proximate cause of a motor vehicle accident where the driver possessed intimate knowledge of the highway (see Boucher v Town of Candor, 234 AD2d 669, 671 [3d Dept., 1996]). As stated in Gilberto v Town of Plattekill, 279 AD2d 863 [3d Dept., 2001] lv denied 96 NY2d 710 [2001]):

> "Fundamentally, the absence of a warning sign or other traffic control device or highway marking may be excluded as a cause of an accident "if the driver's awareness of the physical conditions prescribed the same course of action as the warning sign would have, [or] if the driver, by reason of his recollection of prior trips over the same road, 'actually had the danger in

> mind' as he approached it on the highway" (Gilberto v Town of Plattekill, supra, at 864, citations omitted; see also Winters v Town of Germantown, 20 AD3d 713, 714-715 [3rd Dept., 2005]; Alber v State, 252 AD2d 856, 856-857 [3d Dept., 1998]).

The City points out that Velez conceded at her pre-trial deposition that she was very familiar with Hurley Avenue, having traveled it twice a day while taking her daughter Jazzmine to and from school, from the beginning of the school year to the date of the accident. Velez acknowledged at her pre-trial deposition that as she was driving from Kingston to Hurley she "knew which way the road would turn as [she] would proceed on it..."; and that she knew this on the morning of the accident. The Court finds that the City demonstrated, prima facie, that the absence of adequate warning signs with regard to the curve in Hurley Avenue was not a proximate cause of the accident, due to Velez's intimate knowledge of Hurley Avenue. In the absence of a triable issue of fact, the Court finds that the City is entitled to summary judgment on this issue as well. The Court concludes that the complaint, and all cross-claims must be dismissed as against the City[2].

Turning to the motion for summary judgment of defendant Shults, said defendant maintains that the sole proximate cause of the accident was the negligent driving of Velez. In addition, he argues that he was confronted with an emergency situation which did not provide time for him to avoid the accident.

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[2]Notwithstanding the argument advanced by the plaintiff that there were no signs to warn southbound travelers on Hurley Avenue of the subject curve, there is photographic evidence in the record that there was an arrow sign pointing left, visible to southbound travelers, positioned at the subject curve on Hurley Avenue. In view, however, of the Court's finding with respect to the issue of proximate cause, the Court need not address any issue with regard to the adequacy of the existing signage.

Under the common-law emergency doctrine, where a person is confronted with a sudden and unexpected situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken are deemed reasonable within the context of the emergency, provided the actor has not created the emergency (Caristo v Sanzone, 96 NY2d 172, 174 [2001], citing Rivera v New York City Tr. Auth., 77 NY2d 322, 327). "'Furthermore, merely encountering an emergency does not completely absolve one from liability; it simply requires that one's conduct be measured against that of a reasonable person confronted with similar circumstances in a similar time frame within which to react'" (Schlanger v Doe, 53 AD3d 827, 828 [3rd Dept., 2008], quoting Davey v Ohler, 188 AD2d 726, 727 [1992], and citing Ferrer v Harris, 55 NY2d 285, 293 [1982], amended 56 NY2d 737 [1982]). As particularly applicable here, "[w]hen a driver in his or her proper lane of travel is confronted with an oncoming vehicle which crosses over into his or her lane, the emergency doctrine will prevent a finding of negligence if the driver's 'actions [were] reasonable and prudent in the context of the emergency situation'" (Aloi v County of Tompkins, 52 AD3d 1092, 1094 [3rd Dept., 2008], quoting Quinones v Community Action Commn. to Help the Economy, Inc., 46 AD3d 1326, 1326 [2007], and citing Lamey v County of Cortland, 285 AD2d 885, 886 [2001]; see also Dearden v Tompkins County, 6 AD3d 783, 784-785 [3rd Dept., 2004]). "[I]t generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the defendant's response thereto was reasonable" (Schlanger v Doe, supra, at 828; Aloi v County of Tompkins, supra, at1094; Dumas v Shafer, 4 AD3d 720, 721-722 [3d Dept.,

2004]).

In this instance, the only direct evidence with regard to Shults' time to respond comes from Shults himself, who testified that "from my initial sighting of the car as it came around the bend until the time that we had the collision that total time could have been two seconds. I don't know. It might have been a little more. I just don't know." Shults also submitted the affidavit of Michael E. Hartman, a licensed professional engineer. Mr. Hartman indicated that he and Shults had visited the accident site together on April 24, 2008. As indicated by Mr. Hartman:

> "During the site visit of April 24, Mr. Shults, while on foot and while traveling in Mr. Hartman's vehicle, reconstructed the accident and indicated physical landmarks representing the locations at which he first saw the Velez vehicle, first saw the Velez vehicle intruding into his lane, and where the vehicles came to rest after impact. Mr. Shults was not able to provide a specific location at which impact occurred.
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> "Based on the information provided by Mr. Shults, during the April 24, 2008 site visit and measurements made at the site, Mr. Shults first observed the Velez vehicle, in the southbound travel lane, approximately 110 feet from where the vehicles came to rest after impact. Mr. Shults first observed the Velez vehicle intruding into his (northbound) travel lane approximately 65 feet from where the vehicles came to rest after impact, or approximately 45 feet after initially observing the Velez vehicle."

From the foregoing, it is evident that a significant portion of the underlying facts upon which Mr. Martin's opinion is based is derived from information imparted to him by Mr. Shults on April 24, 2008. In the Court's view, Mr. Martin's account of his inspection of the accident site is deficient from the standpoint that he fails to disclose what specific

information was provided. This would include the physical landmarks upon which Mr. Shults relied, how Mr. Shults located the position where he claims the vehicles came to rest, and what measurements were taken. In other words, the foundational basis for Mr. Martin's opinion does not appear in his affidavit or elsewhere, rendering the affidavit conclusory and insufficient to entitle defendant to summary judgment (see Martin v Village of Tupper Lake Inc., 282 AD2d 975, 976-977 [3d Dept., 2001]; Berkeley v Rensselaer Polytechnic Inst., 289 A.D.2d 690 [3d Dept., 2001]). In addition, while Shults has estimated that the time interval between when he first observed the Velez vehicle and the collision was two seconds, he qualified his statement by indicating "it might have been a little more" and twice stating "I don't know". Apart from the foregoing, as noted, Mr. Shults testified at his pre-trial deposition that the distance between his vehicle and the Velez vehicle, at the time he first saw the Velez vehicle come into his lane was seventy-five feet, not sixty-five feet. Also, there is no evidence in the record with regard to precise location of the point of impact, and/or how far the vehicles traveled before coming to rest[3].

Mr. Martin also relied upon the Collision Reconstruction Investigative Report of Norman G. Good of the Kingston Police Department dated January 12, 2005. Mr. Good did not witness the accident, and by the time he had arrived at the accident site, the Shults vehicle had been moved. His conclusions concerning the minimum speed of the two vehicles (thirty-four miles per hour for the Velez vehicle and twenty miles per hour for the

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[3]Mr. Shults testified that his vehicle spun one hundred eighty degrees. When asked if his vehicle moved forward or back he testified "I don't know. Like I said, it was a slight forward motion but I really don't know."

Shults vehicle) have no factual basis[4]; but even if they did, inasmuch as they refer to minimum speeds, they provide no support for Mr. Martin's analysis with regard to whether or not Shults had adequate time to avoid the accident.

Under all of the circumstances, the Court finds that Shults did not satisfy his burden of demonstrating, prima facie, his entitlement to summary judgment.

Accordingly, it is

ORDERED, the motion for summary judgment of defendant The City of Kingston is granted, and the complaint and all cross-claims against said defendant be and hereby are dismissed; and it is further

ORDERED, that the motion for summary judgment of the defendant John R. Shults, III is denied.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the defendant City of Kingston, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: February 5, 2009
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated July 8, 2008, Supporting Papers and Exhibits
2. Notice of Motion dated July 13, 2008, Supporting Papers and Exhibits
3. Affidavit of Michael E. Hartman, P.E., sworn to July 14, 2008
4. Affirmation in Opposition of Derek J. Spada, Esq., dated September 22,

[4]The Mr. Good bases his conclusions, to a large extent, upon a Crush Analysis or Wincrash Report which was not provided to the Court.

2008, Supporting Papers and Exhibits

5. Affidavit of Carolyn B. George, Esq., sworn to October 22, 2008 and Exhibits
6. Affidavit of Michael E. Hartman, sworn to October 23, 2008
7. Reply Affidavit of Robert D. Cook, Esq., sworn to October 28, 2008
8. Affidavit of Michael E. Hartman, sworn to July 14, 2008