

Haff v Fidalgo

2010 NY Slip Op 32490(U)

August 30, 2010

Supreme Court, Suffolk County

Docket Number: 07-30631

Judge: Joseph C. Pastorella

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MC

INDEX No. 07-30631
CAL. No. 09-01980-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 004 - MD
005 - XMD

-----X			
ROBERT HAFF, JR., MELISSA HAFF, KEITH	:	SOBEL, KELLY & SCHLEIER, L.L.C.	
JULIANO and KERI JULIANO,	:	Attorneys for Plaintiffs	
	:	464 New York Avenue, Suite 100	
	:	Huntington, New York 11743	
	:		
Plaintiffs,	:	MULHOLLAND, MINION & ROE	
	:	Attorneys for Defendants Fidalgo & J.D. Posillico, Inc.	
	:	374 Hillside Avenue	
	:	Williston Park, New York 11596	
	:		
- against -	:	HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, et al.	
	:	Attorneys for Defendants Avicolli & Sage Equipment	
	:	6851 Jericho Turnpike, Suite 250, P.O. Box 1306	
	:	Syosset, New York 11791	
DANIEL D. FIDALGO, J.D. POSILICO, INC.,	:		
PETER A. AVICOLLI, SAGE EQUIPMENT	:	ROBERT P. TUSA, ESQ.	
LEASING CORP., HAROLD KLEIN and	:	Attorneys for Defendants Klein & Harrison	
ARLENE S. HARRISON,	:	898 Veterans Memorial Highway, Suite 320	
	:	Hauppauge, New York 11788	
	:		
-----X			

Upon the following papers numbered 1 to 79 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 19; Notice of Cross Motion and supporting papers (005) 20-41 ; Answering Affidavits and supporting papers 42-43; 44-58; 59-73; 74-75 ; Replying Affidavits and supporting papers 76-77; 78-79; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by the defendants, Daniel D. Fidalgo and Posillico Civil, Inc. s/h/a J.D. Posillico, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them is denied; and it is further

ORDERED that this cross-motion (005) by the defendants, Peter A. Avicolli and Sage Equipment Leasing Corp, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

This is an action arising out of a motor vehicle accident which occurred on July 20, 2007 at approximately 3:25 p.m. in the left eastbound travel lane of Southern State Parkway approximately one mile east of exit 41, Town of Islip, County of Suffolk, New York, in an area where road repair had been conducted and barrels on the grassy median alongside the left travel lane were being cleaned up. The plaintiffs, Robert Haff Jr. and Keith Juliano, passengers in the vehicle operated by Harold Klein, allege injuries resulting from the

Haff et al v Fidalgo et al

Index No. 07-30631

Page No. 2

accident which occurred when the Klein vehicle struck a pickup truck in the rear as the pickup truck entered onto the left lane of the Southern State from the grassy median. The pickup truck was owned by the defendant Posillico and operated by Daniel Fidalgo. A flatbed truck owned by Sage Equipment Leasing Company and operated by Peter Avicolti was being used to place the barrels on and was struck in the rear by the Posillico pickup truck after the initial impact. Melissa Haff and Keri Juliano assert derivative claims.

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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851[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 [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 [2d 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[2d 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 [1979]).

In support of motion (004) the defendants, Daniel Fidalgo and Posillico Civil, Inc. have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaints and the defendants’ respective answers and plaintiffs’ verified bills of particulars; an uncertified copy of an MV 104 Police Accident Report; copies of the transcripts of the examinations before trial of Robert Haff, Jr., Keith Juliano, Daniel Fidalgo, Peter Avicolti, Harold Klein, Michael Perciballi on behalf of J.D. Posillico, Inc., John Clyne, Theresa Breen, Jared Schwarz; an uncertified copy of the minutes of a Plea and Sentence dated September 27, 2007; and photographs.

In support of motion (005) the defendants Peter A. Avicolti and Sage Equipment have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint and answers served by the defendants; and copies of the transcripts of the examinations before trial of Robert Haff, Jr. and Melissa Haff, Keith Juliano and Kerri Juliano, Daniel Fidalgo, Peter Avicolti, Harold Klein, Michael Perciballi on behalf of J.D. Posillico, Inc., John Clyne, Theresa Breen, and Jared Schwarz.

It is noted that the uncertified copies of the MV 104 Police Accident Report submitted constitute hearsay and are not in admissible form and are therefore not considered on this motion for summary judgment (*see, Lacagnino v Gonzalez*, 306 AD2d 250, [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606 [2d Dept 1999]).

Based upon a review of the evidentiary submissions, it is established that the moving defendants have not established prima facie entitlement to summary judgment as the moving papers submitted in support of both motions raise factual issues which preclude summary judgment.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235[2d Dept.

Haff et al v Fidalgo et al

Index No. 07-30631

Page No. 3

2003]; *Power v Hupart*, 260 AD2d 458[2d Dept. 1999]; *see also*, Vehicle and Traffic Law § 1129[a]). “A rear-end collision with a stopped vehicle creates a prima face case of liability with respect to the operator of the moving vehicle, and imposes a duty of explanation on the operator of the moving vehicle. However, a driver also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision” (*Purcell v Axelsen*, 285 AD2d 379 [2nd Dept 2001]; *Maschka v Newman*, 262 AD2d 615, 692 NYS2d 472 [2nd Dept 1999]). Veh. & Tr Law § 1143. Vehicle entering roadway, provides that “The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed” (see also, *Gandolfo v DeMasi et al*, 28 AD3d 606 [2nd Dept 2006]). “The operator of a motor vehicle is charged with seeing what there is to be seen” (*Grimaldi v Finch*, 99 AD2d 920 [3rd Dept 1984]). “A motorist is negligent if he or she fails to see that which, under the circumstances, he or she should have seen through the proper use of his or her senses (*Guzman v Chesterfield Bowen et al*, 38 AD3d 837 [2nd Dept 2007]). It is well settled that the violation of a statute which establishes a specific standard of care may result in either absolute liability or a finding of negligence per se (*Zupnick et al v Certified Lumber Corp. et al*, 2007 NY Slip Op 52114U [Supreme Court of New York, Kings County 2007]). “Where some reasonable view of the evidence establishes that an actor was confronted by a sudden and unforeseen occurrence not of the actor’s own making, then the reasonableness of the conduct in the face of the emergency is for the jury” (*Kuci v Manhattan and Bronx Surface Transit Operating Authority*, 86 NY2d 923 [1996]). Matters of credibility are for the jury to determine (*Barber et al v Young et al*, 238 AD2d 822 [3rd Dept 1997]). Whether a defendant’s actions amounts to negligence is inherently a question for the fact finder in all but the most egregious instances (*Borgesano v The Hertz Corporation*, 69 AD2d 894 [2d Dept. 1979]).

It is also a factual issue whether Peter A. Avicolli was a special employee of Poscillico (*Tower Insurance Co. of New York v Mike’s pipe Yard and Building Supply Corp. et al*, 18 Misc3d 1120A [Supreme Court of New York New York County 2007]).

The defendants in motion (004) argue that they are entitled to the protection of VTL §1103 exempting them from the rules of the road and that they are subject only to the “recklessness” standard as they were operating a hazard vehicle actually engaged in a hazardous operation at the time of the accident. However, the Posillico defendants did not plead this as an affirmative defense in their answer as required (*Riley v County of Broome*, 95 NY 2d 455 [2000]; *Culhane v State of New York*, 180 Misc2d 61 [Court of Claims New York 1999]) and is therefore not considered.

Michael Perciballi testified to the effect that he is employed by Posillico Civil, Inc. as an area manager. On the date of the accident there was a contract with the State of New York to make concrete repairs replacing damaged parts of the roadway with new concrete patches for the area from the merge with Sagtikos Parkway to Sunrise Highway and to Heckscher Park. He takes over a project once the bid is accepted by the State. Christopher Hurst was the project manager on the job which took about two months. He was not aware of any subcontractors pursuant to the contract. Posillico was to provide all the personnel and equipment necessary to complete the contract. Sage Equipment was a daily hire for truck rental on a daily rental basis. New York State’s DOT engineer, Lou Rodriquez, was overseeing the project. On the date of the accident, Posillico owned portable arrow boards. Barrels were used for lane closure and when not in use, were placed on the grassy area on the median. The accident occurred at or about the overpass to Fifth Avenue. Signage was to be used for the project and is typically the last part of the project that gets removed as DOT does not allow them on the road unless the signs are up. He did not know if the signs were down or up when the accident occurred. The maintenance and protection work had been completed and the maintenance and protection devices were being picked up. It was typical that when the barrels are picked up the signs would be taken down and the project would be done with, and would be evidenced on the daily report. Posillico was the owner of the pickup truck

Haff et al v Fidalgo et al

Index No. 07-30631

Page No. 4

involved operated by Mr. Fidalgo and is termed the "shadow vehicle" used to slow down traffic in order for a slow moving vehicle to go into an open live lane and is required by contract to have a flashing yellow light on it. He was aware that to pick up the barrels that it would be necessary at various points along the Southern State Parkway where bridges or overpasses were located that these vehicles would have to enter onto the roadway.

Robert Haff, Jr. testified to the effect that on the date of the accident, July 20, 2007, he was a passenger in the front passenger seat of the Nissan Titan four-door pickup truck being operated by Harold Klein, a work-related friend from Donaldson. Keith Juliano, who also worked at Donaldson, was also a passenger in the Klein vehicle and was seated behind the driver. After work they were driven by Mark McLoughlin to the Wantagh Park and Ride where they arrived about 2:30 p.m. Harold Klein then used his vehicle to drive him and Juliano home. Klein made one stop to get a piece of molding, then entered onto Southern State Parkway heading east. He described traffic as medium and described Southern State as having three east bound lanes. He did not recall what lane they were in when the accident occurred, whether he saw the other vehicle prior to impact, or the speed of the Klein vehicle. The last memory he had was getting the molding. Prior to the accident, he did not see Harold Klein ingesting any alcohol and stated he seemed to be ok.

Keith Juliano testified to the effect that he was involved in the automobile accident on July 20, 2007 and was a passenger seated behind the driver, Harold Klein, who was operating a four-door Nissan pickup truck. Robert Haff was a passenger in the front passenger seat. He and Haff got into the Klein vehicle in Wantagh and traveled eastbound on the Southern State Parkway after having stopped at a lumber yard on Route 110 where Klein picked up a piece of molding. The accident occurred about one half hour later. He was not sure if they were in the center or left lane of the three eastbound travel lanes when the accident occurred. He remembered seeing the tailgate of the vehicle they had the accident with as they were hitting it. Immediately before impact, he felt Mr. Klein hit the brakes and thought he heard the brakes screech. He thought the Klein vehicle swerved to the left, but he did not recall it skidding. He felt a heavy impact and he thought the Klein vehicle stopped dead. After the accident, some woman came up to him, screaming, saying she couldn't believe the trucks were stopped with no lights on. There had been a vehicle in front of the Klein vehicle immediately before the accident, but that vehicle swerved out of the way. He thought traffic, although heavy, was moving at about 55 miles per hour prior to the impact. He did not consume any alcohol that day and did not observe Mr. Haff, or Mr. Klein drink any alcohol that day. He did not notice Mr. Klein driving in any way that was unusual. He did not see lights or flashers, or flagmen in the area prior to the accident.

Daniel Fidalgo testified through a Portuguese interpreter to the effect that he has been employed by J.D. Posillico for eleven years and that Posillico was fixing broken cement on Southern State Parkway for about two to three months. Chris Hertz was his supervisor but was not at the scene of the accident. He was a foreman whose work was cleaning up the orange barrels and garbage at the road repair sites. At the time of the accident, two other Posillico employees were working with him, Mr. Matty and Mr. Reyes. He received no instructions from Posillico concerning the removal of the orange barrels, but he usually tried to do it in the same direction traffic was moving. He drove a Ford 250 super duty pickup truck with a tailgate from the Posillico yard to Southern State. This Ford pickup which was involved in the accident had tail lights, but there was no reflective tape on the tailgate as it was new, and it did not have any warning signs on it. It also had two rotating lights on the top of the cab. He and his crew did not put up signs at the construction area where they were working, but he later testified that there were construction signs and speed signs for a 45 speed zone to the west of where they were picking up barrels on the east bound direction. There were no additional signs between the first bridge and the place where the accident happened. He did not see a trailer with an illuminating arrow while working. He had no conversation with Chris Hertz regarding using a trailer that had an arrow on it on the date of the accident.

On the date of the accident, he was working at the job site with another company with whom he had not worked before and the driver of that other company was operating a flatbed truck which he stated Posillico rented to bring the barrels back to the yard. The flatbed truck had been at Posillico's yard that morning and was driven to the work site by the union driver. He thought the flat trailer was less than twenty feet long. The only lights on that truck were the tail lights and flashing lights on the back of the truck. There was no arrow. Before the place where the accident occurred in the eastbound left travel lane on Southern State Parkway, he stated his flashing tail lights and the lights on top of his truck were turned on. Mr. Matty was on the flatbed truck and Mr. Reyes walked along or in front of his truck to hand up barrels and cones to Mr. Matty on the flatbed truck. They were working on the grassy median on the left side of the left travel lane and both his pickup truck and the flatbed truck ahead of him were on the grassy median. He stated there were always flashing lights on the flatbed truck. Mr. Fidalgo testified that he had to turn off his flashing lights when he changed lanes as his signal would not work if the flashing lights were on. They approached the overpass and stopped on the grass so Mr. Reyes could pick up the last three barrels on this side of the overpass. His vehicle, and the flat bed truck about ten to thirty feet ahead of him, then had to be driven on the left travel lane underneath the bridge as there was no shoulder and grassy area under the bridge. Before he pulled out onto the left travel lane, he waited to see that there were no cars in the left lane and began to pull out of the grassy area with his turn signal on and the flashers off, traveling east. He had looked two or three times and saw there were no cars coming. He also looked ahead to the flatbed truck driver and flashed his headlights to let him know to pull out. He saw no vehicles in the left lane, but he saw vehicles about one hundred to two hundred feet back in the middle lane, but he did not know what speed they were traveling. The flatbed truck pulled out in front of him seconds after he pulled out his pickup truck into the left travel lane and remained in front of him. he stated that since the flatbed truck was ahead of him, it did not have to turn on its directional. When he got into the left travel lane, he turned off his directional and turned on the flashers. They were traveling about ten miles per hour in the left lane about one hundred to one hundred fifty feet before the accident occurred under the bridge. Less than a minute passed from when his vehicle was on the grass until it was entirely in the left lane, but he did not know if it was less than thirty seconds. He stated he turned his flashers back on within seconds of getting into the left travel lane. He never saw the other vehicle prior to the accident. After the impact to the rear of his truck, his truck then made contact with the flatbed truck ahead of him, striking it in the rear. He stated, the flatbed truck's flashing lights were always on. There were barrels stacked three or four high and four across the flatbed truck blocking the rear window of the flatbed truck.

Peter Avicolli testified to the effect that he is a licensed tractor trailer operator with a class A license which he had on July 20, 2007 without any restrictions. He was employed as a driver for five years by Sweet Hollow Management in Melville, a company that rents dump trucks, dump trailers, etc., and that he was driving for them on July 20, 2007. During his employment with Sweet Hollow, he performed work for Posillico on other jobs on about 200 occasions. Posillico had contacted him and told him a flat truck was needed on the Southern State 7 a.m. Friday morning. He has in the past operated equipment owned by Sage Equipment Leasing and was doing so at the time of the accident as he had picked up the truck from the Posillico yard at the clover leaf by the Southern State and Heckscher Park and Sunrise as the previous person who drove the flatbed truck before left it parked at the job site. He had used the same vehicle for the two days before on the same job. It was a yellow Hino flat truck with a cab over the engine, equipped with headlights, taillights, reverse lights, strobe light (about eight inches around and operated by a two-position toggle switch) on the roof and side marker lights on the bed. There were no signs or arrows on the truck and it had no rear view mirror, but it did have a side view mirror on either side which he positioned to see the side of the truck and the lanes next to him. There is a rear window in the cab. Daniel Fidalgo gave him his instructions for the job. Before he drove the truck the morning of the accident, he checked the tires and oil and the lights. It is his custom and practice that before he moves the vehicle he turns on the strobe light and it was turned on and working on the date of the accident. They had been

collecting barrels for about six hours that day and were finishing up with about a mile to go when the accident occurred. The pickup truck operated by Mr. Fidalgo was behind his flat bed truck. They were eastbound on Southern State with the Fidalgo vehicle still about five feet behind him and the laborer on foot alongside his flatbed truck. The strobe light was in the on position and the flashers were turned on. There was no trailer with an arrow on it being used that day as they were not working on the road. As they drove along at about less than five miles per hour collecting barrels, they came to an overpass where he stopped before reaching it to allow the laborers to pick up a barrel. There was no grassy median, so to travel under the overpass, he had to enter onto the left eastbound lane. Fidalgo, who was still behind him in his pickup truck, flashed his high beam headlights at him to proceed, as they had planned, Fidalgo pulled out into the left travel lane. He then checked his mirrors and pulled out as he saw no traffic in the left lane, and was still ahead of Fidalgo. Both vehicles were on the left eastbound travel lane traveling about five miles per hour. The front of his truck was about one truck length from the beginning of the overpass when he pulled out. During the ensuing ten seconds, he made it halfway through the underpass when the accident occurred. The front of Fidalgo's vehicle struck the rear of his vehicle. Before the contact was made he heard a crash, the sound of metal on metal, and was pushed up about half the distance of the overpass. He looked out his side view mirror and saw smoke, but he did not see the impact. He also saw a black Titan pickup truck smashed into the back of the Posillico truck. When asked if any electrical device in the Fidalgo truck was functioning or on at any point after the collision occurred, he stated that he thought the Fidalgo truck shut off with the impact.

Harold Klein testified to the effect that on July 20, 2007 he was involved in a motor vehicle accident on Southern State Parkway. Robert Haff and Keith Juliano were passengers in his vehicle which he was driving, a silver Nissan Titan pickup truck. He drove east on Southern State and stopped at Route 110 to pick up a fancy trim from a supply house. He got back onto Southern State traveling eastbound for about twenty minutes. Three hundred yards before the location where the accident occurred, there was grass and trees to his left. He thought he was traveling about 65 miles per hour and traffic was "kinda light." The accident occurred under an overpass. About three to four seconds before the accident occurred, he saw the road construction vehicle in the left eastbound travel lane and stated the construction vehicle was stopped. He hit his brakes hard and his vehicle began to slow. There were no brake lights or flashing lights or warning signs on the vehicle or the roadway warning of construction. There were no orange cones along the roadway. There was a silver vehicle in front of him traveling about the same speed in the left lane between his vehicle and the construction vehicle, but he could not see in front of that vehicle in front of him and it suddenly changed lanes. From the time the vehicle ahead of him began to change out of the left lane until the impact occurred between his vehicle and the construction vehicle, no more than five seconds lapsed and the accident occurred immediately after the silver vehicle changed lanes. His speed at the time of impact was about 35 miles per hour. The front of his truck struck the rear of the construction vehicle. He left the accident scene by police car and was issued a ticket for a DWI or an impaired. He stated he pled to a lesser charge, but did not know what he pled to. He testified that while at the JFK terminal, around 11:30 a.m., over the course of an hour when he took a break, he had something of an alcoholic nature, two 12 ounce cans of Budweiser beer, brought in by someone at the job.

John Clyne, a retired New York City detective, testified to the effect that on July 20, 2007 he was driving a black Suburban, with his wife and five children as passengers. They were traveling on Southern State Parkway in an eastbound direction, having entered from Wantagh Parkway. He traveled about thirty minutes and was in the left travel lane when he saw a dark green pickup truck behind a truck loaded with construction cones. He was traveling about sixty or sixty-five miles per hour and described traffic conditions as light. The weather was clear and the roads were dry. When he saw the pickup truck, it did not have brake lights illuminated and there were no flashing lights or hazard lights turned on. The rotating light on top of the cab was

not illuminated. There were no arrows illuminated on any portion of the truck. The truck with the cones did not have its lights on either. He thought the pickup truck was moving when he saw it for the first time. There were no signs on the grassy median indicating a construction site or zone and there were no stationary arrow trailers or signage in the left lane before the trucks. He had to jam on his brakes and swerved to the center lane and just made it around the pickup when, a few seconds later, he was halfway between the two trucks and heard a big crash. He was about ten feet behind the construction pickup truck when he swerved. His vehicle made no contact with any other vehicle. The truck traveling behind him hit the construction vehicle. He stated the construction vehicles were stopped under the overpass. The green pickup was under the bridge and truck with the cones right in front of it. He observed the truck behind him way before the accident and noted it was just a silver truck and he did not notice anything unusual about it. He thought it was traveling about the same speed he was and maintained about the same distance behind him as they traveled.

Theresa Breen testified to the effect that she was a witness to the accident and was driving her vehicle on Southern State Parkway in an eastbound direction. She entered onto the roadway into the right lane, then moved to the middle and then into the left lane. Traffic conditions were medium as she traveled about twenty minutes at about fifty five miles per hour. She was in the left lane for about ten minutes when she saw a dark colored construction vehicle in the left lane about three hundred yards ahead with a bunch of cones on top of it with a person on it also. As she approached it she realized it was stopped or was moving very, very slowly. She made a judgment it was stopped as it stayed in the same spot, so she moved to the middle lane when she was about 100 yards away. There was no shoulder, the truck was underneath the overpass. There were no brake lights illuminated. There were no emergency flasher lights or any kind of light illuminated on the truck. There were no illuminated arrow trucks or arrow signs indicating there was construction. There was no warning there was construction other than seeing the vehicle and there was no signage on the roadway before the truck. She passed the dark colored pickup just at the entrance right under the bridge. The tail end of the truck was where the entrance to the underpass was located. It was completely in the left lane. As she passed it, she could see no lights illuminated on it. As she exited the underpass, she saw a car swerve into the middle lane, and in split seconds, saw a pickup truck with absolutely no time from the time the guy swerved into the middle lane until she heard the crash from the accident. She saw glass debris in her rear view mirror and a guy fly off the top of the construction vehicle onto the median. She also saw another truck, a smaller truck, which appeared to be stopped in the left lane and she did not notice that it had any lights on.

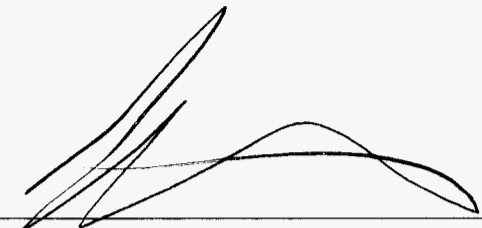
Jared Schwarz testified to the effect that he is a Trooper with the State Police and responded to the call concerning the accident on Southern State and parked west of the accident scene. He observed three truck type motor vehicles. He did not see any signs on the road indicating construction work ahead, or any lights indicating there was construction going on. There were barrels in front of the first two vehicles involved in the accident, but he did not see any barrels and cones in back of the trucks. He did not ask the drivers of the construction vehicles whether their lights were operational at the time of the accident; he did not see the lights on at the scene and made no attempt to turn them on.

Based upon the foregoing, it is determined that there are factual issues which preclude the granting of summary judgment in motions (004) and (005). Those factual issues include, but are not limited to, whether the defendants safely entered onto the roadway from the grassy median; whether the flashing lights were turned on either of the defendants' vehicles at the time of the accident; whether the flashing lights and rotating lights were operational and/or properly operating when the accident occurred; whether the rotating light on top of the defendant's pickup truck was turned on or operating properly; whether there were signs or other warnings erected to warn of construction or road work in the area; whether a trailer with the flashing arrow should have been used by the Posillico defendants; whether the defendants properly observed the traffic conditions before

Haff et al v Fidalgo et al
Index No. 07-30631
Page No. 8

pulling onto the roadway; whether the defendants created a hazardous condition upon entering the roadway; whether the defendant drivers observed what they had the duty to see; whether the defendant Harold Klein was confronted with an emergency situation created by the co-defendants and whether he observed what was there to be seen; and whether defendant Peter Avicolti was a special employee of Posillico.

Dated: August 30, 2010



HON. JOSEPH C. PASTORESSA

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION