

Kohler v Barker

2013 NY Slip Op 32447(U)

October 1, 2013

Sup Ct, Suffolk County

Docket Number: 11-18055

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-2-13
ADJ. DATE 8-1-13
Mot. Seq. # 001 - MD

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GEORGE KOHLER,	:	PALERMO, PALERMO & TUOHY, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	1300 Veterans Memorial Highway, Suite 320
	:	Hauppauge, New York 11788
- against -	:	
	:	
ERIC P. BARKER and NESTLE WATERS	:	WILSON, ELSER, MOSKOWITZ,
NORTH AMERICA INC., d/b/a POLAND	:	EDELMAN & DICKER LLP
SPRING,	:	Attorney for Defendants
	:	3 Gannett Drive
Defendants.	:	White Plains, New York 10604
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Upon the following papers numbered 1 to 56 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-27; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 28-52; Replying Affidavits and supporting papers 53-56; Other ; it is,

ORDERED that this motion (seq. #001) by the defendants, Eric P. Barker and Nestle Waters North America Inc. d/b/a Poland Spring, pursuant to CPLR 3212, for an Order granting summary judgment in their favor on the issue of liability and dismissing the complaint is denied.

In this action, the plaintiff, George Kohler, seeks damages for personal injuries allegedly incurred in a motor vehicle accident on January 24, 2011, on Route 347 (Smithtown Bypass) approximately 400 feet west of Hallock Avenue, in Smithtown, New York, when the plaintiff's vehicle came into contact with the rear of the vehicle operated by defendant Eric P. Barker, and owned by defendant Nestle Waters North America Inc. d/b/a Poland Spring, after defendants' vehicle entered onto the right travel lane of Route 347 from the shoulder, and then moved into the left turn lane.

The defendants seek an Order granting summary judgment dismissing the complaint on the basis that they bear no liability for the occurrence of the accident, and allege that the plaintiff's speed was the sole proximate cause of the accident.

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

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presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 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 [2d Dept 1981]).

In support of the instant motion, defendants have submitted, *inter alia*, an attorney’s affirmation; the affidavit of defendant’s expert John Karpovich; various photographs; copies of the summons and complaint, defendants’ answer, and plaintiff’s verified bill of particulars; one page of plaintiff’s deposition transcript dated February 28, 2012, with a signed correction sheet from which the Court cannot ascertain the changes as the 700 page transcript has not been provided; the signed and certified transcripts of the examination before trial of Eric P. Barker dated March 6, 2012, and of nonparty witness John Becker dated April 10, 2012; unsigned transcripts of the examinations before trial of nonparty witnesses Gary Luisi dated October 27, 2011, Jean Marie Hutchinson dated June 6, 2012, John Browne dated April 10, 2012, Gregory Cannon dated May 10, 2010, William Wallace dated May 1, 2012, Robert Copozzi dated April 11, 2012, with uncertified handwritten notes, Luis A. Bustamonte April 30, 2012, Christopher Nealis dated June 6, 2012 without proof of service upon any of these nonparty witnesses, and which are, therefore, not in admissible form (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); an illegible uncertified copy of a witness statement by Gary J. Luisi; a signed and certified copy of the deposition of nonparty witness Herta I. Wulff dated September 28, 2011; an uncertified copy of a witness statement by Herta I. Wulff dated January 24, 2011; an uncertified copy of the police MVA-104 accident report which constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); an uncertified copy of a motor vehicle inspection report dated February 16, 2011, by an illegible name without a curriculum vitae; and an uncertified police accident investigation report dated April 15, 2011, with photographs.

In opposing this application, the plaintiff has submitted, *inter alia*, an attorney’s affirmation; the expert affirmation of Joseph Carfi, M.D.; a signed report dated June 19, 2012 by Joseph Carfi, M.D.; photographs; an uncertified copy of the police accident investigation report; an uncertified vehicle examination report by Luis Bustamante; New York State Commercial Driver’s Manual printout; photographs and diagrams; continued transcript of the examination before trial of George Kohler dated March 1, 2012; uncertified operative report from Stony Brook Hospital dated January 24, 2011; and the expert affidavit of Robert Genna with curriculum vitae and diagrams annexed.

Based upon a careful review of all the documentary evidence, it is determined that even if the defendants’ evidentiary submissions were all in admissible form, there are factual issues raised in the moving papers which preclude summary judgment. Additionally, the defendants and plaintiff have

submitted expert affidavits which raise conflicting opinions concerning liability and proximate cause of the accident, precluding summary judgment.

It is undisputed that the accident occurred on January 24, 2011, at approximately 10:15 a.m. The roads were dry. Plaintiff George Kohler was operating a 1995 Ford Taurus station wagon, and defendant Eric Barker was operating a 36 feet long, eight feet wide, and nine feet six inches high Freightliner truck owned by Nestle Waters/Poland Spring. Barker's truck had been parked on the shoulder of the westbound travel lane of Route 347. Just prior to the site of the accident, Hallock Road T-intersects from the right. Just before Hallock Road, Terry Road intersects with Route 347. Just beyond the site of the accident, Mount Pleasant Road intersects with Route 347, where the defendant intended to make a left turn. Approximately 350 feet prior to the point of contact, westbound Route 347 merged from three westbound travel lanes to two westbound travel lanes. The defendant, Barker, entered onto Route 347 from the shoulder into the right travel lane and merged into the left travel lane. Plaintiff was traveling in the right travel lane and was located to the rear of the defendants' truck after it pulled onto Route 347. The plaintiff started traveling from the right travel lane to the left travel lane, as did the defendant ahead of him. The plaintiff then traveled back to the right travel lane, striking the rear bumper on the passenger side of the defendants' truck with the front driver's side of the plaintiff's vehicle. The plaintiff's vehicle continuing to move, veered off to the right striking a snow bank on the right shoulder of Route 347. The plaintiff's vehicle had to be cut with the jaws of life to remove the plaintiff from the vehicle. The plaintiff suffered severe head injuries causing brain damage as well as other permanent injuries.

Defendant Eric Barker testified to the extent that he was involved in the accident of January 24, 2011. It was cold and clear out. Lighting conditions were perfect. He was operating a green Freightliner semi-automatic transmission truck owned by Nestle Waters during the course of his employment as a driver delivering Poland Spring water. During the course of his day, he did not use the manual shift, but kept it on automatic. The truck had a cab and a cargo area. Inside the cab is an arm with a computer attached which is used to enter customer's deliveries, typically after the delivery. The computer enters the time deliveries are made. He did not recall if he made the entry for the delivery he had just made at 688 Nesconset Highway immediately prior to the accident. When he started his employment 17 years ago, he was provided sales and safety training, as well as training to obtain a CDL license. He also has ongoing safety training for driving and for safe handling of the product. He has had a class B, New York State CDL license for 17 years. He works 40 to 45 hours per week, generally eight to nine hours per day.

Barker testified that for the two years prior to the accident, he started work at 6:00 a.m. Barker continued that on the date of the accident, he had been driving that vehicle for approximately five years and operated Freightliners for a total of six years. The truck had side view mirrors with spot mirrors below each side which reveal objects lower and closer to the truck. There is a spot mirror on the hood used to determine how close objects in the front are. There is also a rear view mirror on the console, but he later testified that there are no rearview mirrors so when he refers to a rearview mirror he is only speaking of the side view mirrors outside the vehicle. The truck has blind spots, most of which are on the right side along the entire side of the truck, and some are towards the front on the left hand side, all of which cannot be seen with the mirrors, but can be seen doing the proper check with his eyes. He is unable to see vehicles behind his truck, and was unsure if that blind spot was more than twenty feet behind him.

Barker testified that Route 347 runs east and west. The speed limit on Route 347 is 55 miles per hour. After Terry Road, traveling westbound, Route 347 goes from three travel lanes into two lanes just

prior to Hallock Avenue. Route 347 is level but curves slightly to the left between Terry Road and Hallock Avenue, then straightens out before Hallock Avenue. There was a guardrail to the left side of Route 347, and a shoulder to the right approximately one lane wide. The east and west bound lanes of Route 347 are separated by a grassy median about two lanes wide, which contains a guardrail. The nearest intersection to where the accident occurred was one quarter mile ahead at the townhouses located just before Mount Pleasant Road. Mount Pleasant Road is about a hundred yards past that intersection. There is a traffic light at the Mount Pleasant Road intersection, where Barker stated he intended to make a left hand turn onto Mount Pleasant Road, pull into a parking lot, come back up Mount Pleasant Road, and make a wide right hand turn because of the length of the vehicle, to turn onto eastbound Route 347.

Barker continued that just prior to the accident, he had parked his truck on the west shoulder on the right side of 688 Nesconset Highway, also known as Route 347 and Smithtown Bypass, just before and in front of the driveway at that address for the purpose of making a delivery at that home. He left his truck running and made his water bottle delivery, picked up the empty bottles, loaded them into the truck, and got back into the truck. He put his seatbelt on, turned off the hazard lights, put his truck in drive, and illuminated his left turn signal. He stuck his head out of the driver's side window to look for oncoming traffic, saw the road as he looked east, back to the traffic light at Terry Road. Traffic was clear and he saw no cars, except for those vehicles west of Terry Road, east of Hallock Avenue. He did not recall seeing plaintiff's gray station wagon. After less than three seconds, but more than one second later, he applied the gas pedal and pulled into the right travel lane of Route 347. He did not know if he put the truck in drive after his visual check, but he stated he also used his side view mirror a little before and a little after he began to move his truck forward into the right lane. He did not see any vehicles in his left side view mirror before pulling out, but then testified that he did not recall what he saw. He drove very little distance on the shoulder before turning onto the right Route 347 travel lane, and stated he didn't travel "any feet" on the shoulder, or maybe he traveled five feet, and just turned onto the road.

Barker stated that he believed he traveled less than ten seconds and a little less than ten feet, but more than five feet, in the right travel lane before his entire truck was in the right travel lane. As he was doing that, he was looking forward and looked once in his left side view mirror, seeing nothing except for vehicles off in the distance east of Hallock Avenue. He did not know if they were closer than when he saw them initially before pulling onto Route 347, and he did not know their speed or make or model. He described traffic as light. He then did a visual check with his head out the window with his left signal still on, and merged into the left travel lane of Route 347 after having traveled approximately five feet, in the right travel lane. About three seconds passed until he became fully positioned in the left travel lane. He was looking forward, driving, until his truck was entirely within the left travel lane, but he did not know the distance he traveled. Barker testified that he did not know the speed of his truck when he was in the right travel lane, or when his truck entered into the left travel lane, but thought it could have been between zero and twenty miles per hour. The accident occurred immediately in the left travel lane of Route 347, when his truck had just become fully positioned in the left travel lane. Barker testified that the accident occurred less than 50 feet from where his truck had been parked, but he did not know if it was less than 25 feet from where his truck had been parked. He felt the impact to the right rear (rear passenger side) of his truck, heard a loud impact, and felt the truck move. Prior to the impact, he never saw the plaintiff's vehicle. After the impact, after plaintiff's vehicle veered off his truck, he saw it go into an embankment to the right, and come to a stop. He then pulled his truck ahead of the plaintiff's vehicle, and onto the shoulder on the north side of Route 347. He could not estimate the speed the plaintiff's vehicle was traveling when he saw it.

Barker continued that after he exited his truck, a man, Gary Luisi, stopped and called 911. Barker testified that he told Luisi that he did not see the plaintiff's car. Luisi told him that the plaintiff was speeding. When the police arrived, Detective Becker prepared a written statement to which Barker signed his name. This statement was given after his company's personnel and supervisors arrived at the scene. He also gave a second statement which was required by the Suffolk Police Department of Transportation because a commercial vehicle was involved. Barker testified that his company sent an investigator to the scene to whom he gave a third statement, which the investigator wrote and he signed. He also spoke with his attorney at the scene of the accident. He never spoke to Herta Wulff, and did not know her or Gary Luisi, the two witnesses to the accident, nor did he know George Kohler.

Barker testified that he saw skid marks in the vicinity of the accident on the roadway. He remained at the scene of the accident for about six hours. He took photos of his truck and the plaintiff's vehicle with a camera kept in his truck, and gave the camera to his safety manager. Upon being questioned about the statement he gave to Officer Nealis, which statement he stated was accurate, he stated that he disagreed with it because he put on his left directional when he was exiting the shoulder. He testified that he did not know why he did not give the statement to Officer Nealis that he did a visual check looking back out of his truck window before pulling out from the shoulder, or again before moving into the left lane. Barker testified that he gave the statement that he was aware that there is a curve in the road and that vehicles in that area speed, so he is aware of traffic for his own safety. In the statement he gave to Jeanine, the investigator from his company, he stated that there were no vehicles that he could see traveling behind him westbound within the intersection of Terry Road. He testified that that statement meant "right behind me." He could not then state that there were vehicles past Terry Road but not past Hallock, as he was not certain where the vehicles were. He continued that there were no vehicles west of Hallock Road, but there could have been vehicles east of Terry Road when he first looked.

Non-party witness Gary Luisi testified to the extent that when he was on westbound Route 347 in the center lane, about a 100 to 200 yards from the light at the intersection at Terry Road, the plaintiff was in the right westbound travel lane of Route 347 just before that traffic light, and the defendants' truck was on the right westbound shoulder of Route 347, west of the intersection at Terry Road, and a couple hundred yards west of Hallock Road. Luisi began to move into the left lane just before Hallock Road, and the plaintiff flew by him at 80 to 85 miles per hour. Luisi was traveling between 55 to 65 miles per hour. He had seen the plaintiff's car weaving in and out of traffic closer to Southern Boulevard. He described traffic as light. The truck was then in the right lane for five to ten seconds. The plaintiff moved into the center lane which then became the right lane of Route 347 at the merge. As the truck was going into the left lane, the plaintiff's car and the defendants truck "kind of moved lanes together." He believed the truck traveled about 100 to 200 yards from when the truck pulled off the shoulder into the right lane until the accident occurred. Luisi testified that he believed that the truck never saw the car. Luisi testified that it looked like the plaintiff realized he couldn't get by the truck in the left lane and tried to cut back into the right lane when the car smashed into the back right corner of the truck. Luisi testified that Barker told him after he stopped to assist him that he never saw him (the plaintiff). Luisi stated that he gave a statement to a woman police officer at the scene, and that the police came to his office a couple hours later to take a statement. He also gave a statement to a woman from Poland Spring on February 3, 2011.

Non-party witness Herta Wulff testified to the extent that she saw the accident occur a short distance past Terry Road on Route 347. She saw the truck pull onto Route 347 from the right shoulder as she was about 100 yards west of the Terry Road intersection. She saw the truck driver's head as he looked to see if

there was traffic coming. There were no other vehicles between her and the truck. She saw a car go past her very fast to her right as she was approaching the intersection with Terry Road at a green light. She could not describe the car after it passed her. She was traveling 60 miles per hour and thought the car passed her at 85 miles per hour. She stated it was a guess. The truck started to move very slowly from the right lane into the left travel lane. The car started to move into the left lane and realized he could not pass to the truck's left, so he veered to the right and hit the truck in the back because there was no way to avoid it. She saw the plaintiff's brake lights on as he veered to the right. The truck was between the right and the left lane when the impact occurred, partially in the middle lane and partially in the left lane. She continued that had there been enough room, the light colored car could have made it, but he was traveling so "high" that there was no room for him. She stated that the car had not yet passed her when the truck started pulling into the right lane from the shoulder. Seconds passed before the impact occurred less than two seconds. About five to ten seconds passed from when the truck began moving from the shoulder until the accident occurred. She did not stop at the scene. She saw another car stop and saw the truck driver get out of the truck. She later gave a report to the police at the precinct where an officer prepared a report which she signed. She noted the report set forth that the plaintiff was traveling 80 miles per hour, but she thought it was 85. She also gave a statement to a woman from Poland Spring.

Non-party witness Detective John Becker testified that he had no basis to discount the credibility of the two witnesses. He did not know if the two witnesses had any experience in estimating speeds of vehicles. He went through a certification program to estimate the speeds of vehicles. Based upon his training and experience, he came to the conclusion that the accident was caused by the speed of the Taurus wagon and not by any action or inaction of the truck, however, he did not witness the accident, he did not consider himself to be an accident reconstructionist, and he never took any courses in accident reconstruction. He was not able to obtain a statement from the plaintiff. He wrote his report after he learned the plaintiff had no recollection of the accident.

Nonparty witness Gregory Cannon testified to the extent that he is a police officer who became a Crime Scene Officer. He has on-the-job training, and took the initial course in accident reconstruction, but did not take the second or third courses and is not a certified accident reconstructionist. He has never been qualified as an expert witness in accident reconstruction in any court, and does not consider himself to be an expert in accident reconstruction. He responded to the scene of the subject accident, but did not witness it. When he arrived, he saw the Poland Spring truck on the side of the road, and a gray station wagon off the road into some trees. He did not know which direction Terry Road was from the accident scene. He took pictures of gouge marks found on the roadway, which he felt were related to the accident as they appeared fresh and new, and because they were located near the debris field in the lane where the tire marks were leading to. He thought the gouge marks were possibly caused by the metal bottom of the vehicle, and that they could possibly indicate where the impact occurred, but not all the time. He described what he did, including taking photographs and measurements to compile a diagram of the entire accident scene. He also took measurements of tire marks, the fluid trail, gouge marks, and the roadway.

Non-party Sergeant William Wallace testified to the extent that he is a commanding officer in Crime Scene and responds to scenes if it is believed criminality may be involved. Photographs and measurements were taken using Total Station, an instrument which measures distance and angles with a laser. Vehicles are impounded if the detective asks for it. Safety inspections are done. He attended six months on-the-job training to identify certain tire marks, gouges, and what they mean. He has not taken accident reconstruction courses, and has never been qualified as an accident reconstructionist in any court.

Wallace stated that the gouge mark was in the right westbound lane, where he believed the impact occurred. He did not know who the tire marks or fluid trail belonged to. He did not know where the truck was coming from, just that it was westbound. Wallace testified that he did not know what caused the accident, just that it appeared that the Ford collided with the Poland Spring truck. An accident reconstructionist would come to conclusions concerning what actions by any of the drivers may have caused the accident; however, reconstructionists do not get involved in civil cases. He stated that he thought it was an offset rear-end collision, not direct in that it appeared to be the left front of the Ford and the right rear of the Poland Spring truck made contact.

Non-party witness Robert Copozzi testified to the extent that he has been a police officer with Suffolk County for 24 years. He has been in motor carrier safety since 2004, and for one year was with the SITE unit, a specialized enforcement unit that concentrates on high crash locations and targets aggressive drivers. Among other things, he is HAZMAT certified for truck inspections. He responded to the scene of the accident and did part of an investigation. His role is to inspect a commercial motor vehicle for safety at the scene, and to interview drivers. He does not determine fault at an accident, unless, for example, brakes were an issue, then he would give an opinion. He stated that Officer Bustamante did the actual truck inspection and he interviewed the truck driver after the driver had already spoken to Detective Becker and had given one written statement to the Suffolk County Police Department. He interviewed Barker and wrote down his answers. Barker signed each of the pages. He continued that there were violations found during the inspection of the truck, but none of these violations placed the vehicle out of service or made it too dangerous to operate. He continued that basically, the truck was in good operating condition at the time of the accident. He added that they do not inspect passenger vehicles. Capozzi stated that he did not do any accident reconstruction on this case. He did not witness the accident and was at the scene after the fact. He felt that one needs to have some sort of training to determine the speed of a vehicle. Barker told him that the truck had just moved from the right-hand lane, and was entering into the left lane when the accident occurred. He did not see the plaintiff's vehicle at any time before the accident. Capozzi testified that he did not know how the accident occurred. He could not say what the actions of the driver of the truck were. He did not go to the scene to determine fault.

Non-party witness Luis Bustamante testified to the extent that he is a police officer with Suffolk County Highway Patrol, Motor Carrier Safety, and responded to the scene of the accident. His focus during an investigation is to perform safety inspections on commercial trucks, etc. to make sure they are in safe operating condition, and to determine that the drivers are qualified to operate the vehicles. The accident occurred on Veterans Highway and Hallock Avenue, but he then added that it was Route 347, as the road has a few names. The inspection started at 11:15 a.m. on the 2006 two axle Freightliner and ended at 2:10 p.m. He testified as to what his inspection consisted of, and his findings including pre- and post-accident violations. Bustamante did not find that any of these pre-crash violations had anything to do with vehicle handling or its operability. No citations were issued. He did not speak to the two drivers involved in the accident, or to any witnesses. He found no issues with the defendants' CDL class B license or his registration. It is not his job to do an accident reconstruction. He testified that the overall length of the vehicle was 36 feet two inches, and it was eight feet wide and nine feet six inches high. He has never testified in court with regard to anything involving safety of vehicles and has never been an expert witness.

Non-party Christopher Nealis testified to the extent that he has been a detective with the Suffolk County Police Department for 19 years, and a police officer for a total of 27 years. His duties, among other things, involve investigating motor vehicle accidents for criminality that involve fatalities or serious

personal injury. He has never taken a course in accident reconstruction, and did not know if he ever testified in court with respect to any motor vehicle accidents he investigated. He responded with Detective John Becker to investigate the subject accident on Route 347 near Hallock Lane, which is in the vicinity of Terry Road. Becker was the lead detective, and detective Mahon was also involved. He spoke to Eric Barker, the driver of the Poland Spring truck from whom he took a statement. He did not recall speaking to anyone else, including anyone from Crime Scene, or Motor Carrier Safety, and did not gather physical evidence. He wrote the statement obtained from Barker on a Statement Form wherein Barker informed him that he made a water delivery on Route 347, then signaled and made a left turn into the left turn lane, when all of a sudden, out of nowhere, he felt something hit him in the back. He then saw it was a silver station wagon driving fast and it drove off to the side of the road. He stated Barker told him that he was in the process of moving from the right lane into the left lane when the impact occurred, and that he signaled to go into the left lane, and it was when he moved into the left lane, that the impact occurred. After he completed writing out the statement, Barker read it and signed it. He stated Barker did not mention his speed to him when the impact occurred. Based upon what Barker told him, he concluded that the accident was caused by the high rate of speed traveled by the station wagon. He did not know the speed limit on the road. He did not make any estimation of the speed at which the silver station wagon was driving at the time of the accident. He did not remember determining where in the roadway the impact occurred. He did not recall debris, gouges, or skid marks. He did not remember where the vehicles were on the roadway. He did not recall if there was damage to the truck. He stated the day was cold and clear, and that there was snow which had been previously plowed to the side of the road. Visibility was good.

Defendants' expert, John Karpovich, avers that he is a partner of SKE Forensic Consultants, LLC, located in New Jersey. Mr. Karpovich is not a licensed engineer but avers that he is a licensed investigator in New Jersey and is a fully accredited in accident reconstruction. He was a team leader for the fatal accident investigation unit for the Bergen County prosecutor's office, and was employed as a traffic accident reconstructionist for a traffic engineering firm. He stated that he was retained by counsel for defendant on the date of the accident and that he traveled to the accident location on that same date. He set forth that he reviewed all relevant documentation to this case, including but not limited to the pleadings, depositions of all witnesses, exhibits marked during the depositions, photographs of the accident location and the vehicles involved, the Suffolk County Police Accident Investigation file, and stated that he inspected the defendants' vehicle. Mr. Karpovich stated in a brief and conclusory opinion that the accident was caused by the actions of the plaintiff in his failure to obey the posted speed limit, failure to keep proper lane position, and in driving in a reckless manner at high speeds prior to the impact. He concluded that the plaintiff's unsafe speed was supported by physical evidence, by the testimony and written statements of eyewitnesses Gary Luisi and Herta Wulff, the accident investigation of the Suffolk County Police Department, and the testimony of eight Suffolk County Police Department officers.

Kapovich continued that the impact between the vehicles created gouge marks, tire marks, fluid trails, and debris at the accident location. He stated that the gouge marks are caused when a motor vehicle comes into contact with something harder than the roadway, such as the bottom of the car or metal parts from the vehicle, and are used as an indicator as to where the impact occurred. Based upon his measurements of the gouge marks, he stated that he calculated that the plaintiff's vehicle was traveling 64 miles per hour when he forcefully applied his brakes before the impact. Kapovich stated that the accident could have been avoided had the plaintiff driven his vehicle within the posted speed limit, kept a proper lookout in front of him, and not tried to pass around the truck outside of the marked lanes of travel.

Here there are factual issues concerning defendants' expert's conclusion as there has been no evidentiary proof submitted demonstrating that the plaintiff was passing the truck outside the marked lanes of travel. Kapovich makes no mention of the speed which the defendants' truck was traveling, whether he safely entered onto Route 347 from the shoulder, safely changed travel lanes, or whether Barker had any obligation to observe traffic behind his truck for him to safely enter the roadway or safely change lanes. While Kapovich stated that the gouge marks indicated where the impact occurred, Crime Scene Officer Gregory Cannon testified that gouge marks do not always indicate where the impact occurred.

In opposing this motion, the plaintiff has submitted the affirmation of his expert, Joseph Carfi, M.D., a physician licensed to practice medicine in New York State who is board certified in Physical Medicine and Rehabilitation. He set forth his education and training, as well as his experience in practicing medicine. He examined the plaintiff, George Kohler, on April 25, 2012 and prepared a life care plan for him. Dr. Carfi set forth that George Kohler suffered severe and serious injuries in the January 24, 2011 motor vehicle accident, including a head trauma, multiple fractures, and multiple lacerations. He was intubated at the scene of the accident and transported to the emergency department at Stony Brook University Hospital where he was diagnosed with a right acute subdural hematoma (bleeding into the brain), several facial bone fractures including a non-displaced fracture through the sinus, a temple bone fracture, and a sphenoid bone fracture. Dr. Carfi set forth that Mr. Kohler underwent a right decompressive craniectomy and evacuation of a subdural hematoma, a left frontal craniotomy (surgical creation of a hole in the cranium) for insertion of a pressure monitoring bolt. Part of his skull was removed. He also had a left fractured patella (kneecap), and was also diagnosed with pneumonia for which he was placed on a ventilator. He had additional debridement and revision of the posterior craniotomy incision. He also developed deep vein thrombosis, and seizures. The plaintiff has been undergoing physical and occupational therapy, and neuropsychological screening which revealed deficits in several areas of neurocognitive functioning – the greatest being in attention and short term memory. A CAT scan on July 1, 2011 revealed cortical and subcortical encephalomalacia, meaning Mr. Kohler has brain damage to these areas of the brain. He also has blindness in his left eye, weakness in the left hand and wrist, and impaired balance, and multiple scars over his forehead, frontoparietal scalp, right shoulder and right arm. He has cognitive and behavioral deficits.

George Kohler testified at his examination before trial that prior to the accident, he had a pretty good memory, but after the accident, his short term memory went away. He testified that he has no recollection of the accident. He remembered being at Stony Brook Hospital and waking up from a coma. His mother told him that he had been involved in an accident with a Poland Spring truck.

Plaintiff's expert, Robert Genna, averred that he is a member of the Academy of Forensic Sciences, the New York Statewide Traffic Accident Reconstruction Society, the American Society of Crime Lab Directors, and has served as a professional consultant in automobile accident reconstruction for law enforcement agencies and attorneys. He has provided a copy of his curriculum vitae. He was retained by the plaintiff to serve as a forensic consultant in accident reconstruction in this matter. He set forth the materials which he reviewed and stated he inspected the roadway where the accident occurred and the Nestle Waters North America Inc./Poland Spring truck operated by Eric Barker at the time of the accident. He also reviewed the report of defendants' expert John Karpovich dated March 20, 2013. Mr. Genna stated his opinions within a reasonable degree of scientific certainty, and stated he utilized certain mathematical formulas which were applied to known variables to calculate speed, acceleration, distance traveled, and the amount of time traveled by certain vehicles, which formulas are universally accepted in

the field of accident reconstruction as accurate and reliable means for determining the dependent variables at issue.

It is the opinion of Mr. Genna that defendant Barker failed to use ordinary care in the operation of the Poland Spring truck, which failure was a substantial factor in causing the accident with Mr. Kohler, resulting in his injuries. Genna indicated that the defendants' truck was 35.2 feet long and eight feet wide, and that the cargo area of the truck is wider than the cab where the driver sits by four inches. He described the roadway and the measurements which he obtained, and cited to defendant Barker's testimony, including that the truck was fully into the left lane, that merging into the left lane took three seconds; that when the impact occurred, the truck had traveled less than 50 feet from its parked position and was traveling less than 20 miles per hour, and that he never saw the plaintiff's vehicle prior to the impact. Genna continued that photographic evidence reveals that the impact between the two vehicles occurred in the right westbound lane of traffic, as established by the location of gouge marks in the roadway caused by the hard parts of the vehicle being driven into the roadway. The gouge marks were 73 feet west of the middle of the driveway where the truck was parked, and were also between seven and eight feet to the right of the broken white line separating the two westbound lanes of traffic. Tire skid marks provided additional proof that the impact occurred in the right lane caused by the plaintiff's vehicle when he applied the brakes to avoid impact with the truck. The skid marks begin in the left westbound lane, cross the divided white line, continue to the right lane through the area of impact, and lead to where the plaintiff's vehicle came to a rest in the embankment. The debris and fluid trail on the roadway are located close to the gouge marks.

Genna opined that the defendants' truck traveled 73 feet from its parked position on the shoulder of the roadway to the area of impact, in the right westbound lane between seven and eight feet to the right of the broken line. In that the truck was 35.2 feet long and attempting to merge into the left lane from the right lane, the impact occurred when the truck was in both lanes of traffic. Genna states that Barker's testimony that the area of impact occurred when the truck was fully contained within the left lane is inaccurate. Genna continued that the tire marks indicate how the plaintiff was traveling, as the path of the skid marks begins in the left lane and proceeds into the right lane to the area where the vehicle came to rest. Thus, the plaintiff was steering his vehicle to the right at the time of impact. This was supported by the testimony of the two non-party witnesses who testified that the plaintiff was steering his vehicle to the right to avoid the truck which was merging from the right to the left lane, and further testified that the plaintiff first steered his vehicle to the left in an attempt to pass the truck on that side, but then changed the vehicle direction back to the right just before impact. Genna estimates that at the plaintiff's vehicle was moving between 56 and 64 miles per hour at the time he applied his brakes in an attempt to avoid an impact with the truck. Genna explained the basis for this opinion based upon kinetic energy and the length of the skid marks on a dry asphalt surface, placed into a formula. During the pre-impact skid, the Kohler vehicle was traveling approximately 43 miles per hour, and at impact, it was traveling between 25 and 40 miles per hour. The post impact skid marks are 112.8 feet long. Genna stated that the testimony of the two non-party witnesses that the plaintiff was traveling between 80 and 85 miles per hour when he passed their vehicles does not reflect the speed the plaintiff was traveling after he passed them and prior to the impact. He set forth the basis for that statement.

Genna continued that the speed of the truck in the area of the impact was 12.2 miles per hour, and he set forth how he determined such rate which it traveled in 7.8 seconds. Genna opined that because the defendants' truck was traveling in the right lane at a slow rate of speed, the plaintiff reacted by steering his car from the right lane to the left lane to pass the truck on the left while he was traveling at approximately

56 to 64 miles per hour. When Kohler was approximately two seconds, or 163 feet from the truck, Barker continued to steer into the left lane in an attempt to merge into it at 12.7 miles per hour, directly into the plaintiff's path. Kohler was then forced to discontinue his initial movement to pass the truck in the left lane by sharply applying his brakes and steering towards the right lane, skidding a distance of 101.7 feet. The left front panel of the Kohler vehicle then made contact with the right rear panel of the truck in the right westbound travel lane of traffic between seven and eight feet to the right of the broken white line separating the two travel lanes, 7.8 and 73 feet from where the truck was parked. Gemma added that the truck was required to accelerate in the right lane to a speed that was closer to the speed limit of 55 miles per hour before attempting to merge into the left lane.

Gemma concluded that Barker improperly operated the truck in an unsafe manner; attempted to change lanes at an unsafe speed; failed to maintain the truck in a single lane of traffic; failed to yield the right of way to the plaintiff; failed to properly observe oncoming traffic, including the Kohler vehicle; failed to maintain a proper lookout before leaving the shoulder and when attempting to merge from the right to the left lane; failed to comply with Vehicle and Traffic Law, including sections 1128 (a) and 1143; and failed to comply with the New York State Commercial Driver's Manual, including sections 2.4.2, 2.6.5 – Seeing to the Sides and Rear, and Lane Changes and Merges.

Vehicle and Traffic Law § 1143 provides that “[t]he 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*, 28 AD3d 606, 813 NYS2d 527 [2d Dept 2006]). 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* (*Elliott v City of New York*, 95 NY2d 730, 724 NYS2d 397 [2001]; *Ciatto v Lieberman*, 266 AD2d 494, 698 NYS2d 54 [2d Dept 1999]; *Zupnick v Certified Lumber Corp.*, 17 Misc3d 1122A, 851 NYS2d 75 [Sup Ct, Kings County 2007]). Violation of a statute constituting negligence *per se* places a duty on a party to provide a reasonable excuse for its failure to comply with the statutorily imposed standard of care (*Dalas v City of New York*, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]; *Cordero v City of New York*, 112 AD2d 914, 492 NYS2d 914 [1985]). The standard to be applied in deciding a motion for judgment as a matter of law is whether the trial court could find that by no rational process could the trier of fact base a finding in favor of the party opposing the motion (*Burns v Mastroianni*, 173 AD2d 754, 570 NYS2d 629 [2d Dept 1991]). In the instant action, there are factual issues concerning whether or not defendant Barker safely entered onto Route 347 from the shoulder of the roadway. Thus, it cannot be determined as a matter of law that by no rational process could the trier of fact find in favor of the plaintiff in this matter.

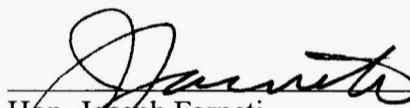
Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Fillippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2000]). A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (*People of the State of New York v Anderson*, 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). There are factual issues concerning whether or not the defendant should have seen the plaintiff's vehicle approaching from behind on the roadway before he pulled onto Route 347 and in changing from the right to the left lane of travel, and whether he should have properly ascertained the positions of the vehicles behind him. Here, all doubt is not eliminated by the record submitted by the defendants, and plaintiff's evidentiary proof shall be considered at trial due to the factual issues presented in the moving papers and in plaintiff's opposition (*Ugarriza v Schmieder*, 46

NY2d 471, 414 NYS2d 304 [1979]; *Sillman v 20th Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]).

Vehicle and Traffic Law § 1128 (a) provides that a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. Here, there are factual issues concerning whether or not the defendant complied with this statute and whether or not his lane change was made with safety. Where only one conclusion may be drawn from the established facts, the legal cause of the accident may be determined as a matter of law (*Rappold v Snorac, Inc.*, 289 AD2d 1044, 735 NYS2d 687 [4th Dept 2001]). In the instant action, multiple conclusions may be drawn from the established facts, and the legal cause of the accident cannot be determined as a matter of law. Here, there are several possible contributing causes of the accident which require jury determination, and it cannot be said as a matter of law that the speed of the plaintiff's vehicle was the sole proximate cause of the accident. It is for the jury to determine whether or not the defendant safely entered onto the roadway; whether the defendant safely made a lane change from the right to the left lane; whether the defendant failed to see what was on the roadway to be seen, namely the plaintiff's vehicle approaching from behind; and whether or not the speed of the plaintiff's vehicle contributed to the cause of the accident. Here, there are conflicting expert opinions which preclude summary judgment on the issue of liability. The plaintiff has rebutted the inference of negligence relating to striking the defendant's vehicle in the rear by adducing evidence that the defendant's vehicle entered onto the roadway from the shoulder and suddenly changed lanes directly in front of his vehicle, causing and contributing to the occurrence of the contact (see *Reitz v Seagate Trucking*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]; *Oguzturk v General Electric Company*, 65 D3d 1110, 885 NYS2d 343 [2d Dept 2009]).

Accordingly, this motion by the defendants for summary judgment dismissing the complaint is denied.

Dated: October 1, 2013



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION