

**Bouche v Haq**

2014 NY Slip Op 30423(U)

February 11, 2014

Supreme Court, Suffolk County

Docket Number: 06-24200

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**COPY**

**P R E S E N T:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 1-16-13  
ADJ. DATE 7-18-13  
Mot. Seq. # 003 - MG

-----X

JUDITH L. BOUCHE, an Incapacitated Person  
by SYLVIA M. ELLIOT, Guardian of her Person  
and Property,

Plaintiff,

- against -

AHSAN HAQ, ISLAM HAQ, FARZANA  
REHMAN and THE TOWN OF  
HUNTINGTON,

Defendants.

-----X

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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 1-26; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 27-44, 45-46; Replying Affidavits and supporting papers 47-51; Other 52-54, 55-56; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant Town of Huntington ("Town"), for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims asserted against it, is granted, and the action is severed, and judgment shall be entered dismissing the complaint and all cross claims asserted against it.

This action arises from a motor vehicle accident which occurred on June 26, 2005 at approximately 12:15 p.m. at the intersection of West Neck Road and Central Street in the Town of Huntington, when a motor vehicle owned and operated by plaintiff Judith Bouche collided with a motor vehicle driven by the defendant Ahsan Haq and owned by the defendant Islam Haq. This action was brought by plaintiff Sylvia M. Elliot, as Guardian of the person and property of plaintiff Judith Bouche, an incapacitated person.

Defendant Town now moves for summary judgment dismissing the complaint, and all cross claims, asserting, *inter alia*, that the Town was not negligent in the design or construction of the subject intersection; that the Town did not have any prior written notice of any alleged defect in the roadway; that the Town was entitled to qualified immunity; and that the notice of claim was insufficient. In support of the motion, it submits, *inter alia*, its attorney's affirmation; the transcripts of depositions of Bradley Kusko, Gary Gil, John R. DeLuca and Peter Wolpensinger, as witnesses for defendant Town; the pleadings, the transcripts of the 50-h hearing and the deposition of the Sylvia M. Elliot on behalf of the plaintiff; the transcripts of depositions of defendants Ahsan and Islam Haq; the affidavit of James Pugh, Ph.D., P.E., sworn to December 11, 2012; the affidavit of Eric J. McFerran, P.E., sworn to December 17, 2012; the affidavit of Bradley Kusko, sworn to December 17, 2012; the affidavit of Suzanne DiPietro, sworn to December 5, 2012; the affidavit of Suzanne Blanton, sworn to December 14, 2012, and a survey of the accident scene. In opposition to this motion, the plaintiff submits, *inter alia*, an attorney's affirmation; the affidavit of Peter Pomerantz, P.E., sworn to March 15, 2013; photographs of the accident scene; a certified copy of the police report of the accident; the affidavits of Jeanne Leonard, Lorraine Murgolo and Vito Murgolo, all sworn January 9, 2006; the deposition transcript of David Weymouth, as a non-party witness, and diagrams of the accident site. Defendants Ahsan Haq, Farzana Rehman and Islam Haq submitted their attorney's affirmation in opposition to the motion.

Plaintiff Sylvia M. Elliot testified that no one had advised her as to how the accident occurred. Plaintiff Judith Bouche indicated to her that she did not recall anything about the accident and did not know how the accident occurred. She had no personal knowledge as to how the accident occurred.

Defendant Ahsan Haq testified that he believed he was traveling at 30 miles per hour as he proceeded northbound on West Neck Road prior to the accident. He did so because that was the speed limit as per the signs on West Neck Road. He has no memory of the accident itself.

Defendant Islam Haq testified that he had no knowledge from any source as to how the accident occurred.

Gary Gil testified that he worked for the Town, from 1977 through June of 2009, as a traffic technician in the Traffic Safety Department. He has an associates degree in Civil Technology. He worked on various matters on Town roadways pertaining to signs, pavement markings and traffic signals. He was involved with West Neck Road and Central Street as part of his work and reviewed traffic sign schedules and laid out pavement markings along both roadways over time. The pavement markings include the double yellow line between opposing directions of travel and the white edge lines. When the Highway Department would advise them that they were paving the road, his department would lay out the placement for lane markings, after which the Highway Department would stripe the road. At some point, the Town hired a contractor to install thermoplast re-striping of West Neck Road, pursuant to guidelines on roadway layout from his department. The double yellow line was placed in the relative center of West Neck Road, to provide an alignment to allow an even flow of traffic along the roadway. West Neck Road has a posted 30 mile per hour speed limit. The subject intersection is controlled by a stop sign on the Central Street approach to West Neck Road. The stop sign was authorized by a Town Board resolution and was posted prior to 1980. The placement of a stop sign at a particular location is performed by the Town pursuant to

the rules contained in the Manual of Uniform Traffic Control Devices (“MUTCD”). MUTCD provides recommendations regarding the placement of stop signs, and, if a stop sign is warranted, it is erected in the location permitted by the manual. The Vehicle and Traffic Law indicates that municipalities, such as the Town, are to use MUTCD regarding sign placement. The stop sign and stop line on Central Street notify the motorist on Central Street approaching West Neck Road that he or she needs to stop and yield the right-of-way. This notification was accomplished by the installation of the stop sign, and was supplemented by the installation of a “stop ahead” sign further back on Central Street. The stop line could not be placed beyond the sidewalk and curb line of West Neck Road, because the stop line has to precede the extension of the crosswalk by 4 feet to accommodate pedestrian traffic. Placing the stop sign or line beyond the path of pedestrian travel could cause a conflict between a vehicle traveling Central Street and a pedestrian crossing over Central Street. A stop sign means that you yield the right-of-way. It is expected that after stopping at the stop line, the driver coming off of Central Street onto West Neck Road would continue to yield the right-of-way. After a car is stopped, the driver can proceed to a point where they have ample sight distance of the roadway. Sight distance at an intersection is measured a distance back from the established lane line. Drivers on Central Street can position themselves on the approach in such a manner that would provide sufficient sight distance. When measuring sight distance at an intersection, you start at the edge line, come back approximately 12 feet, and then from that point you measure sight distance along the roadway. Sight distance is used to determine if there is sufficient space between vehicles to enter the road you are turning onto. Standing at a point 12 feet or more feet back from the edge line of West Neck Road, the site distance is very good. Traffic calming measures were used by the Town on West Neck Road, including, wherever possible, narrowing the travel lanes in some areas to reduce the speed of traffic. There is a relatively wide shoulder along West Neck Road in the vicinity of Central Street, which is a product of the necessary continuity of the lane for moving traffic. No written complaints were received regarding visibility of traffic coming out of Central Street onto West Neck Road. He did not recall any complaints regarding visibility at the intersection of Central Street and West Neck Road and did not recall any complaints regarding speeding at that intersection.

The testimony of Town employee John DeLuca contains no information relevant to the current motion.

Bradley Kusko testified that he began working with the Town in December 2008, as a Traffic Engineer II, assigned to the Department of Transportation and Traffic Safety. He has a bachelor’s degree in engineering and a master’s degree in transportation planning and engineering. He is involved in day-to-day traffic engineering responsibilities concerning traffic signals, roadway markings, signs and pavement markings. He testified that the posted speed limit on West Neck Road is 30 miles per hour. A white edge lane line is present on the road surface of West Neck Road for the orderly movement of traffic. This dictates the outer edge of the lane in which vehicles should remain while traveling in the roadway. At the intersection of Central Street and northbound West Neck Road, the distance from the edge line to the curb of the east side of the street is approximately 17.5 feet. Parking is permitted on both sides of West Neck Road. The placement of a stop sign at a particular location is performed by the Town pursuant to the rules contained in the MUTCD. For a stop sign, the Town only follows the MUTCD. MUTCD provides recommendations regarding the placement of stop signs, and, if a stop sign is warranted, it is erected in the location permitted by the manual. MUTCD indicates the existing conditions that must be present, including

traffic volume, speeds and accident history. Adjacent to the stop sign located on Central Street, at its intersection with West Neck Road is a stop line, which is placed on the road's surface to emphasize that a stop sign is present. The stop line should be placed adjacent to and/or in the vicinity of the stop sign. The Traffic Department also follows the book issued by the American Association of State Highway and Transportation Officials ("AASHTO"). The AASHTO book is utilized with respect to road design. Intersection sight distance is defined by AASHTO as the distance required by a driver on the side street looking either left or right calculated from the end of the traveled way to turn onto a major roadway. Sight distance is not dependent on the placement or location of a stop sign. Intersection sight distance is a mathematical formula and the determination of the sight distance of an intersection is not made from the stop sign or stop line. The driver must initially stop at the stop line and then proceed with caution into the roadway. There is nothing restricting the driver from stopping anywhere else after the stop sign. The intersection of the two roads, for engineering purposes, begins at the edge lane line for moving travel. Where the stop sign and stop line are placed at a given intersection is determined on a case by case basis, depending on how the intersection is laid out. There was no other location where the stop sign on Central Street could have been placed. A stop sign cannot be placed in the intersecting roadway because it would present a hazardous fixed object. Likewise, placing the stop sign within the shoulder of the intersecting roadway would not be done.

Peter Wolpensinger is employed as a Civil Engineer by the Town and has a master's degree in Transporting, Planning and Engineering. He testified that he went to the intersection of Central Street and West Neck Road and described the general conditions as indicating good visibility to both his left and his right. He testified that the Town does not build new roads, private contractors do. Contractors must build them to Town standards. Reconstruction of roads would be handled through the Highway Department, but the Town would not do the actual work. He was not aware of the last time any reconstruction work was done on West Neck Road and the Department of Engineering did not have any records of the reconstruction or repaving of the road. He was not aware of any speeding issues on West Neck Road. He was not aware of any complaints regarding the placement of mailboxes on West Neck Road. He was not aware of any complaints with respect to sight distance concerning minor roads leading into West Neck Road, and there were no sight distance issues raised regarding the intersection of Central Street and West Neck Road.

Defendant Town submitted a survey of the area of the accident drawn by Nelson & Pope, an engineering and surveying company. Said survey is signed and sealed by Paul M. Racz, P.E. and a licensed land surveyor. The survey details the location of the double yellow line, white edge lane line, stop line, stop sign, speed limits signs, curbing and dimensions of West Neck Road and Central Street. An affidavit submitted by Town witness Bradley Kusko states that the survey fairly and accurately depicts the subject intersection as it existed on June 26, 2005. Also annexed is a copy of the survey containing measurements by Dr. James Pugh of the AASHTO 30 mile per hour sight distance and the AASHTO 54 mile per hour sight distance. The Town also submitted a sight distance drawing prepared by Nelson & Pope, which is signed by Eric J. McFerran, P.E.

The Town also submitted the affidavit of Suzanne Blanton, an employee of the Town Clerk's office. The affidavit states that she performed a search of the records of the Clerk's office for any written notice served upon the office or, upon the Highway Department which was forwarded to her office regarding any

complaints as to dangerous conditions, defects or obstructions in the vicinity of West Neck Road at its intersection with Central Street. The search extended back from the date of the accident to October of 1963. The search revealed that the Town had not received any written complaint of any dangerous conditions, defects or obstructions in the area. The Town further submitted the affidavit of Suzanne DiPietro, an employee of the Highway Department. Said affidavit states that she performed a search of the records of the Highway Department for any written notice served upon the office regarding any complaints as to dangerous conditions, defects or obstructions in the vicinity of West Neck Road at its intersection with Central Street. This search revealed that the department had not received any written of any dangerous conditions, defects or obstructions in the area.

Finally, the Town submitted the affidavits of James Pugh, Ph.D., P.E., and Eric J. McFerran, P.E., as expert witnesses herein. Dr. Pugh opined that the Town did not deviate from the accepted standard of care with respect to the ownership, management, control, design, maintenance or construction of the intersection of West Neck Road and Central Street, and that the Town was not negligent in formulating the design and layout of said intersection. It was his further opinion that the design and layout of the intersection were not the proximate cause of the accident herein. He also found that the placement of the stop sign on Central Street was in conformance with the MUTCD, and that the design of the intersection was in compliance with the requirements of the AASHTO. In his affidavit, the Town's other expert Eric J. McFerran, P.E., concluded that any allegations of insufficient sight distance for either of the vehicles involved in the accident on either West Neck Road or Central Street are without merit.

In opposition, plaintiff submitted the affidavits of Jeanne Leonard, Lorraine Murgolo and Vito Murgolo, residents of homes on West Neck Road. None of them were eye witnesses to the accident, but they heard the sound of the cars impacting, observed the site of the accident and took pictures of the scene.

Plaintiff also submitted the transcript of the deposition of David Weymouth. Mr. Weymouth is a Suffolk County police officer and he prepared the accident report (MV1040A) for the accident that is the subject of this action. As part of his employment he had been involved in investigating "many" automobile accidents. He testified that June 26, 2005 was a "fairly nice day." As the result of a call from his dispatcher, he responded to the subject accident. It was his opinion that, based on where the majority of the accident debris was located, the point of impact of the collision was in the southbound lane of travel of West Neck Road. This was so indicated in his accident report. He did not speak to the plaintiff due to her injuries. He spoke to the defendant Ahsan Haq, but Mr. Haq did not know what had happened. He agreed that it is permissible for a vehicle to stop before a stop line and then pull forward beyond the stop sign and stop again before entering the lane of travel and/or before commencing a turn onto a roadway.

Plaintiff also submitted the affidavit of Peter Pomerantz, P.E., as an expert herein. Mr. Pomerantz disputes the opinions of the Town's experts and alleges that the Town had created a dangerous condition at the intersection of Central Street and West Neck Road which was the 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

presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 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 New York Univ. Med. Ctr.*, *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]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Town has established its entitlement to summary judgment herein. It has presented evidence that there have been no prior problems or complaints with regard to any safety issues in the vicinity of West Neck Road at its intersection with Central Street, including the testimony of Gary Gil, an employee of the Traffic Safety Department for more than 25 years at the time of the subject accident. There was testimony that the Town followed the MUTCD when the stop sign was installed on Central Street at its intersection with West Neck Road and, further, that it was only place where the sign could be safely located. Town employees and its experts testified that the design of the subject intersection was in compliance with the requirements of AASHTO. The Town also provided proof that it had no prior written notice of any dangerous condition at the intersection. In response, the plaintiffs set forth only the affidavit of its expert disputing the Town allegations.

As the Court of Appeals has noted, “something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public.” (*Weiss v Fote*, 7 NY2d 579, 588, 200 NYS2d 409 [1960]; *see also Affleck v Buckley*, 276 AD2d 507, 714 NYS2d 108 [2d Dept 2000]).

Plaintiffs herein have an even more fundamental problem. “[W]here there are several possible causes of injury, for one or more of which the defendant is not responsible, the plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which the defendant was responsible” (*Brooks v New York State Thruway Auth.*, 73 AD2d 767,768, 423 NYS2d 543 [1979]; *aff’d* 51 NY2d 892, 434 NYS2d 974 [1980]). Although proximate cause can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury, mere speculation as to cause, where there can be many causes, is fatal to a cause of action (*Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 790 NYS2d 693, [2d Dept 2005]).

The only facts that have been adduced in this case are as follows: the day of the accident was clear and dry; the defendant Ahsan Haq’s vehicle was headed northbound on West Neck Road; the plaintiff Judith Bouche was attempting to make a left hand turn from Central Street onto West Neck Road southbound; the collision occurred in the southbound lane of West Neck Road. Thus, there are other possible causes for the accident herein, beyond the alleged negligence of the defendant Town. These include negligence on the part

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of the plaintiff driver, negligence on the part of the defendant driver, or negligence on the part of both drivers. Furthermore, it is well established that an expert witness may not guess or speculate (*Espinosa v A & S Welding*, 120 AD2d 435, 502 NYS2d 451 [1st Dept 1986]; see also *Kracker v Spartan Chemical Co., Inc.*, 183 AD2d 810, 585 NYS2d 216 [2d Dept 1992]). In addition, it “is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness” (*Hamsch v New York City Transit Auth.*, 63 NY2d 723, 725, 480 NYS2d 195[1984], quoting *Cassano v Hagstrom*, 5NY2d 643, 646, 187 NYS2d 1[1959]; see, also, *Castillo v Wil-Cor Realty Co., Inc.*, 109 AD3d 863, 972 NYS2d 578 [2d Dept 2013]). Thus, based upon the facts herein, the conclusion by the plaintiff’s expert that the Town’s negligence was the proximate cause of the subject accident is nothing but sheer speculation and fails to raise an issue of fact.

Accordingly, the Town’s motion for summary judgement dismissing the complaint and all cross-claims is granted.

Dated: February 11, 2014



J.S.C.

           FINAL DISPOSITION              X   NON-FINAL DISPOSITION