

**Moran v Town of Riverhead**

2015 NY Slip Op 30479(U)

March 27, 2015

Sup Ct, Suffolk County

Docket Number: 11-3357

Judge: Peter H. Mayer

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UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion (#005) by the defendant Town of Riverhead for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the motion (#006) by the defendant Susanne Breitenbach as Voluntary Administrator of the Estate of Gladys A. Breitenbach and Susanne Breitenbach as Administrator of the Estate of Walter E. Breitenbach for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the motion (#007) by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment as to the defendants' liability is denied; and it is further

**ORDERED** that the motion (#008) by the plaintiff pursuant to CPLR 3212 granting partial summary judgment as to the defendants' liability is denied as academic.

The instant action arises from an accident that occurred between a pedestrian and a motor vehicle on July 17, 2010 on Sound Shore Road near its intersection with West Fairview Road, in the Town of Riverhead, New York. The accident occurred at approximately 1:30 p.m. when the vehicle owned by Gladys A. Breitenbach (Mrs. Breitenbach) and operated by her husband, Walter E. Breitenbach (Breitenbach), struck the plaintiff's decedent, Kieran Moran (Moran). At the time of this accident, Breitenbach was working within the scope of his employment with the Town of Riverhead (Town). Sometime after the commencement of this action, and before they could be deposed, the Breitenbachs passed away and the administrator of their estates, Susan Breitenbach, was substituted in their stead (the defendant). Thus, there is a paucity of eyewitness evidence as to the facts surrounding the happening of this tragic accident.

It is undisputed that Sound Shore Road runs east and west with a single lane of travel in each direction separated by a double yellow line, that the road has moderate curves and changes in elevation in the general area of this accident, and that the area is rural in character. Moran's residence was one of a number of residences on the north side of Sound Shore Road which were accessible by way of West Fairview Road, a single lane roadway. The mailboxes for the subject residences were located on the south side of Sound Shore Road at its intersection with West Fairview Road. On the day of this accident, Moran had crossed Sound Shore Road and collected the day's mail when he was struck as he walked back in a northerly direction to West Fairview Road. Immediately prior to striking Moran, Breitenbach was traveling westbound on Sound Shore Road approaching West Fairview Road with Mrs. Breitenbach a passenger in the front seat of the vehicle. Moran passed away approximately 14 months later from the injuries he suffered in this accident. The plaintiff commenced this wrongful death action by the filing of a summons and complaint on January 31, 2011.

The defendant now moves (#006) for summary judgment dismissing the complaint on the grounds that, based upon the emergency doctrine, because Breitenbach was faced with a sudden and unexpected circumstance not of his own making which left him little or no time to deliberate, he cannot

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be found liable, and that the plaintiff can present no evidence establishing the facts of this accident or Breitenbach's negligence herein. The Town moves (#005) for summary judgment on the same grounds as articulated in the defendant's motion (#006) and adopts the arguments and contention made therein. In essence, the sole basis of the Town's motion is that absent a finding of negligence on Breitenbach's part, it cannot be found vicariously liable based on the doctrine of respondeat superior. Under the circumstances, the Court will address the defendant's motion as determinative of the issues regarding both applications for summary judgment.

In support of her motion (#006), the defendant submits, among other things, the affidavits of Breitenbach and Mrs. Breitenbach dated June 8, 2011, the transcript of the plaintiff's municipal hearing testimony, and an unauthenticated copy of the subject police accident report, Form MV-104A. Generally, said report would be inadmissible herein. However, said report will be considered solely for the purposes of determining these motions, and only to the extent that the information therein is admissible, as the record reveals that the plaintiff has submitted a copy of the same document and no preliminary evidence of authenticity is required under the circumstances (Richard T. Farrell, Prince, Richardson on Evidence §9-102 [11th Edition 1995]; see e.g. *Low v Payne*, 4 NY 247, 4 Comst. 247 [1850]). Regardless, the police accident report contains affidavits from Breitenbach and Mrs. Breitenbach dated July 17, 2010, that are admissible independent of the determination to consider other information contained in said report.

In his sworn police statement on the date of this accident, Breitenbach swears that "as I was traveling west on Sound Shore Road ... I came up on a rise in the road. My vehicle speed I would guess was 25-30 m.p.h. I was not going fast. As I reached the top of the rise in the road I saw a man walking across my westbound lane of Sound Shore Road. I hit my brakes but could not miss him. I swerved to my left to miss him as soon as I saw him. I struck him with the right front end of my vehicle."

In his affidavit dated June 8, 2011, Breitenbach swears that, as he "was approaching West Fairview Road, there was a considerable rise in elevation on Sound Shore Road," and as he "proceeded over the rise, I observed a pedestrian, suddenly appear in the front of my vehicle ... walking in the middle of my lane from left to right ... coming out of and/or was partly in the shadows created by the considerable foliage" at the site. He states that Moran "was looking down and appeared to be reading something," and that he was "proceeding at that time in the area of 25-30 m.p.h." Breitenbach further swears that he "attempted to brake and swerve to the left," that he did not recall if his brakes "took hold prior to impact, [but] my vehicle did in fact swerve to the left," and that despite this "an impact occurred between the right front side of my vehicle and the right side of Mr. Moran."

In her sworn police statement on the date of this accident, Mrs. Breitenbach swears that "as we were driving down Sound Shore Road I saw a man walking in the middle of the roadway .... northbound across the road. I saw that he had mail in his hands and his head was looking down as he was walking. It appeared that he was reading. I closed my eyes and I heard a sound of him[,] the man[,] hitting our car." She states that "[w]e were not traveling fast about 25-30 m.p.h."

In her affidavit dated June 8, 2011, Mrs. Breitenbach swears that "as we proceeded over a rise on Sound Shore Road, I unexpectedly observed a pedestrian, who, without warning, suddenly appeared to

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the front of our vehicle ... walking in the middle of our lane from left to right ... coming out of and/or was partly in the shadows created by the considerable foliage” at the site. She states that Moran “was looking down and appeared to be reading mail or some other papers and at no time did he ever look up in our direction,” and that, to the best of her recollection, Moran was wearing “dark clothing.” Mrs. Breitenbach further swears that “[a]fter I observed Mr. Moran, I felt our car swerve to the left,” but due to Moran’s “close proximity to our vehicle at the time, my husband was unable to avoid contact with Mr. Moran. We were proceeding at or about 25-30 m.p.h. prior to my first observation of the pedestrian.”

At her municipal hearing, the plaintiff Bernadette Moran testified that she was married to Moran in 1968, that she was not present to witness the subject accident, and that she did not know of any other eyewitnesses. She stated that Sound Shore Road is a “country road” with no shoulders or curbs, that there are a “few hills,” and that it is straight in the area where the accident occurred.

In his affirmation in support of the motion, counsel for the defendant contends that Breitenbach was faced with an emergency and that his actions under the circumstances were reasonable and prudent, that there is a complete absence of evidence that Breitenbach was negligent, and that there is no evidence to support an award of damages for Moran’s pre-impact terror as alleged in the complaint. In essence, the defendant contends that Moran was the sole proximate cause of this accident, and that the plaintiff will be unable to establish at trial that Breitenbach was negligent or that Moran was aware that he was about to be struck by Breitenbach’s vehicle.

Here, the defendant has failed to establish her entitlement to summary judgment that Breitenbach was not negligent as a matter of law. Merely encountering an emergency does not completely absolve one from liability; it simply requires that one’s conduct be measured against that of a reasonable person confronted with similar circumstances in a similar time frame to react (*see Khan v Canfora*, 60 AD3d 635, 874 NYS2d 243 [2d Dept 2009]; *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 808 NYS2d 120 [2d Dept 2005]; *Quiles v Greene*, 291 AD2d 345, 739 NYS2d 30 [1st Dept 2002]). Thus, “[i]n all but the most egregious circumstances, it is for the trier of fact to determine whether a particular situation rises to the level of an emergency, that is, a sudden and unforeseen occurrence not of the actor’s own making” (*see Makagon v Toyota Motor Credit Corp.*, *supra*; *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 783 NYS2d 648 [2d Dept 2004]).

More importantly, there are multiple issues of fact precluding summary judgment, including, but not limited to, whether Breitenbach could have, or should have, seen Moran at any time before he did, whether the “rise” on Sound Shore Road impaired his ability to observe Moran either at the subject mailbox or walking in the roadway prior to reaching the immediate area of the rise or the point of impact, and the distance of the “rise” from the point of impact. That is, the facts necessary to a trier of fact to determine if the emergency doctrine is applicable, and if appropriate, how to measure Breitenbach’s actions or inactions against the relevant standard of care.

In addition, the evidence submitted by the defendant in support of her motion fails to establish her entitlement to judgment as a matter of law dismissing the complaint on the grounds that the plaintiff’s decedent was the sole proximate cause of the accident, and that her claim for Moran’s pre-impact terror should be dismissed. A defendant fails to demonstrate a *prima facie* entitlement to

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judgment as a matter of law on the grounds that the plaintiff was the sole proximate cause of the accident where he or she fails to demonstrate his or her own freedom from negligence (*see Vanni v Bartman*, 16 AD3d 671, 792 NYS2d 190 [2d Dept 2005]; *Gecaj v DiFiglio*, 303 AD2d 548, 756 NYS2d 463 [2d Dept 2003]; *Levy v Town Bus Corp.*, 293 AD2d 452, 739 NYS2d 459 [2d Dept 2002]). In addition, a defendant moving for summary judgment cannot satisfy its initial burden of establishing his or her entitlement thereto merely by pointing to gaps in the plaintiff's case (*Coastal Sheet Metal Corp. v Martin Assoc., Inc.*, 63 AD3d 617, 881 NYS2d 424 [1st Dept 2009]; *see also Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]; *Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 931 NYS2d 116 [2d Dept 2011]).

Here, the defendant has failed to make a prima facie showing of entitlement to summary judgment and the Court is constrained to deny the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). In addition, the Town's motion (#005) being premised solely on the ground that it cannot be held liable to the plaintiff if Breitenbach is not found to have been negligent herein, has failed to establish its prima facie entitlement to summary judgment for the reasons set forth above. Accordingly, the Town's motion (#005) for summary judgment dismissing the complaint, and the defendant's motion (#006) for summary judgment dismissing the complaint are denied.

The plaintiff now moves for partial summary judgment on the issue of the defendants' liability on the ground that the only proof before the Court at this time is that Breitenbach's speed was the sole proximate cause of this accident. In support of the motion, the plaintiff submits, among other things, the subject police accident report, and the affidavits of two expert witnesses. In his affidavit, Dr. James W. Pugh, P.E. (Pugh), swears that he is a licensed professional engineer with a PhD. in biomedical engineering, who has been retained by the plaintiff to analyze the subject accident. He indicates that he has reviewed Moran's medical records, the materials attached as exhibits to his affidavit, and other enumerated information and materials. He states that it is his opinion that Moran was "moving quickly, perhaps running" with his left leg planted and his right leg not planted, and a significant angle between the two legs, at the time of the impact with the Breitenbach vehicle, that said vehicle was traveling at approximately 40 to 45 m.p.h. prior to braking and attempting to avoid this accident, and that said vehicle's speed at the time of impact was 30 to 35 m.p.h. Pugh further opines that, if Breitenbach had been traveling at 20 to 25 m.p.h. he would have been able to avoid this accident.

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see Hambsch v New York City The respondent. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984] *citing Cassano v Hagstrom*, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see Shi Pei Fang v Heng Sang Realty Corp. supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see Zuckerman v City of New York supra*; *Leggis v Gearhart*, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; *Levitt v County of Suffolk*, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). Here, to the

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extent that Pugh's affidavit attempts to render an expert opinion, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (see *Mestric v Martinez Cleaning Co.*, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Moreover, Pugh's assertions do not set forth his reasoning in making his conclusions, or whether there are verifiable and objective standards by which the trier of fact can weigh the opinions expressed therein. In addition, his opinion that Breitenbach could have avoided the accident is conclusory and is a legal conclusion beyond the proper realm of an expert (see *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 750 NYS2d 277 [1st Dept 2002]; *Colon v Rent-A-Center*, 276 AD2d 58, 716 NYS2d 7 [1st Dept 2000]). Accordingly, Pugh's expert opinion has failed to establish Breitenbach's liability and Moran's freedom from negligence as a matter of law.

In his affidavit, Thomas C. Onions (Onions) swears that he is the president of Crash Technologies, Inc., and that he is qualified as an "accident reconstructionist analyst and forensic analyst." He states that, among other things, he reviewed the subject police accident report with the attached statements, and the testimony of the plaintiff Bernadette Moran. Onions opines that Moran was visible to Breitenbach for a distance of 600 feet, that based on the measurements taken by the police at the scene and by application of the "John Searles Speed Impact Formula" he is able to determine that Breitenbach was traveling at 28 m.p.h. at the time of impact, and that Breitenbach "did not even begin to brake before the impact, thereby indicating that he was within sixty (60) feet ... of [Moran] before he observed [Moran]." Onions further opines that Moran was in the road crossing from left to right in front of the Breitenbach vehicle for "over five (5) seconds" based on his calculation of the width of the roadway and that the "average walking speed for a adult male of approximately [Moran's age] is four (4) feet per second." Attached as an exhibit to his affidavit, Onions provides a copy of his undated expert report which includes a section entitled "physical evidence" indicating that he bases his accident reconstruction analysis on data and photographs contained in exhibits to said report. However, the report does not include copies of said exhibits.

Regardless of the failure by the plaintiff to include the exhibits to Onions' report, the submission of his affidavit and report fail to establish Breitenbach's liability herein and the absence of negligence on the part of Moran. Although acknowledging that there are "moderate hills, curves and valleys" located on Sound Shore Road, Onions fails to address whether the purported "rise" in elevation encountered by Breitenbach prior to this accident had any influence on either Breitenbach's actions or those of Moran. In addition, the record reveals that the police photographs taken on the day of this accident and reviewed by Onions indicate a question of fact as to whether the shadows allegedly created by the foliage at the accident scene contributed to this accident. The issue is not addressed in Onions' affidavit or report. Moreover, Onions fails to establish how he determined the speed at which a man of Moran's age walks, or what Moran was doing and where he was specifically located at any time before the subject accident. Similarly to the Pugh affidavit, Onions' expert opinion has failed to establish Breitenbach's liability and Moran's freedom from negligence as a matter of law.

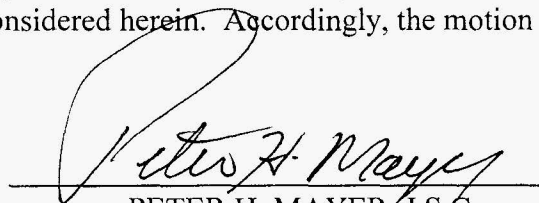
As noted above, the plaintiff contends that Breitenbach was the sole proximate cause of this accident. However, the plaintiff has failed to demonstrate her entitlement to judgment as a matter of law that Breitenbach was the sole proximate cause of the accident as she has failed to demonstrate that

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Moran was free from negligence (citations omitted). In addition, the assertion in the affirmation of counsel for the plaintiff that Breitenbach admitted he was going too fast in his statement to the police is without merit. Accordingly, the plaintiff's motion (#007) for partial summary judgment as to the defendants' liability is denied.

The plaintiff's motion (#008) is an exact copy of the plaintiff's motion #007, without the exhibits or expert affidavits that are attached to the prior papers. Although the latter motion has been assigned a separate motion sequence number, it is determined that the plaintiff has submitted only one motion, that this motion (#008) is superfluous, and that it need not be considered herein. Accordingly, the motion (#008) is denied as academic.

Dated: March 27, 2015

  
PETER H. MAYER, J.S.C.