Giannelis v Borg Warner Morse Tec, Inc.
2017 NY Slip Op 32249(U)
October 25, 2017
Supreme Court, Tompkins County
Docket Number: EF2015-0010
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 26th day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

EMMANUEL P. GIANNELIS, Individually and as Executor of the Estate of HARRIET GIANNELIS, deceased,

Plaintiff,

-vs-

BORG WARNER MORSE TEC, INC., KELLY A. ELLIOTT, NANCY K. ELLIOTT,

Defendants.

DECISION AND ORDER

Index No. EF2015-0010
RJI No.

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the Motion of Defendant Borg Warner Morse Tec., Inc. ("Borg Warner") for Summary Judgment dismissing the claim against that Defendant, on the basis that Borg Warner owed no duty to the travelers on the public roadway adjoining its property, as well as on the basis of proximate cause. Borg Warner's Motion is opposed by Plaintiff Emmanuel P. Giannelis ("Giannelis")[1], who argues that Borg Warner created the dangerous condition which gave rise to the accident, and because the area in question was created for the special benefit of Borg Warner.

BACKGROUND FACTS

Harriet Giannelis passed away on June 12, 2013 after she was struck by a car at approximately 7:20 am while riding her bicycle on Warren Road in Ithaca, New York. The car was owned by Nancy Elliott, and being operated by Kelly Elliott, who had just finished her shift at Borg Warner and was leaving the plant premises via the Borg Warner South Drive onto

[1]Emmanuel P. Giannelis is the Executor of the Estate of Harriet Giannelis, and was issued Letters Testamentary on July 17, 2013.

Warren Road. As Kelly Elliott was exiting South Drive and taking a right to merge southbound onto Warren Road, she struck the right, rear side of the bicycle being ridden by Giannelis, who was traveling south on Warren Road and had just passed the Borg Warner South Drive entrance. Warren Road in that location has four lanes. A northbound lane, southbound lane, a "turn only" lane in between those lanes, and the merge lane coming out of the Borg Warner facility.

The south exit of the Borg Warner facility consists of a control gate and ground sensors in the roadway to activate the gate to open when a vehicle approaches. A short distance after the exit control gate, the road splits into two lanes for the exiting vehicles. One lane is for vehicles going straight or turning left onto Warren Road proceeding northbound. The second lane is for vehicles turning right to proceed southbound on Warren Road, and there is an extended merge lane allowing drivers to gradually merge onto Warren Road. There is a yield sign on the right (southerly) side of the roadway beyond the control gate and at approximately the area where the center lane and merge lane separate.

Plaintiff commenced this action on March 17, 2015, and filed an Amended Complaint on April 8, 2015. Plaintiff alleges that Borg Warner negligently and recklessly designed and maintained the southbound exit, thereby creating a dangerous condition. Plaintiff points to alleged deficiencies in the control gate, greenery and shrubbery obstructing the view of exiting vehicles, as well as the installation of the yield sign, among other things. Defendants Kelly Elliott and Nancy Elliott served an answer with affirmative defenses and counterclaims on May 20, 2015. Borg Warner served an Answer to the Amended Complaint with affirmative defenses and a counterclaim on April 16, 2015. The parties engaged in discovery, including depositions of various witnesses.

Thereafter, Borg Warner made this Motion for Summary Judgment arguing that the accident occurred on the public roadway, and that it had no duty to maintain that public roadway to protect travelers from, or warn of, any hazardous conditions. Plaintiff counters by arguing that

Borg Warner did, indeed, owe a duty of care because it created the dangerous condition and because the South Exit to Warren Road was created for the special benefit of Borg Warner. Plaintiff also asserts that Borg Warner's negligence was the proximate cause of the accident. Borg Warner filed a reply Memorandum disputing Plaintiff's arguments and arguing that any alleged negligence on the part of Borg Warner was not the proximate cause of the accident, and rather, it was the negligence of Kelly Elliott in failing to exercise due caution while merging onto Warren Road, and in violation of applicable Vehicle and Traffic Laws, as well as decedent's own actions.

LEGAL ANALYSIS AND DISCUSSION

SUMMARY JUDGMENT

"On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept. 2014) [*citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Walton v. Albany Community Dev. Agency*, 279 AD2d 93, 94-95 (3rd Dept. 2001)]. If the movant fails to make this showing, the motion must be denied. *Alvarez, supra*. Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

Borg Warner, as the movant, bears the initial burden to submit evidentiary proof in admissible form demonstrating its entitlement to judgment as a matter of law. *Overocker v.*

Madigan, 113 AD3d 924, 925 (3rd Dept. 2014). The proponent of summary judgment may not satisfy its burden by pointing to deficiencies in the nonmoving party's proof. *Id.* Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v N.Y.U. Medical Center, supra.*

DID BORG WARNER OWE A DUTY OF CARE?

"In order to sustain a cause of action for negligence, a court must first determine, as a matter of law, that the defendant owed a duty to the plaintiff." *Daversa v. Harris*, 167 AD2d 810, 811 (3rd Dept. 1990); *see*, *Pulka v. Edelman*, 40 NY2d 781, 782 (1976); *Palsgraf v. Long Is. R. R. Co.*, 248 NY 339 (1928); *Matthews v. Scotia-Glenville School Sys.*, 94 AD2d 912 (3rd Dept. 1983), *lv denied* 60 NY2d 559; *Donohue v. Copiague Union Free School Dist.*, 64 AD2d 29, 33 (2nd Dept 1978), affd 47 NY2d 440 (1979). "In the absence of a duty, there is no breach and without a breach there is no liability." *Pulka* at 782; *Bacon v. Mussaw*, 167 AD2d 741, 742 (3rd Dept. 1990) (citing *Palsgraf*, 248 NY at 342, "It is equally well established that before a defendant may be found liable for its negligence, a duty must exist, the breach of which is the proximate cause of the plaintiff's injury"). "Negligence in the air, so to speak, will not do." *Pulka at 782 quoting* Pollock, Torts (13th ed), p.468. The existence and scope of a defendant's duty in a particular case is a question of law for the court. *Moons v. Wade Lupe Constr. Co., Inc.*, 43 AD3d 501 (3rd Dept. 2007).

Borg Warner owned the property next to the roadway where this accident occurred. "The general rule is that an owner of land abutting [public property] does not, solely by reason of being an abutter, owe to the public a duty to keep the [public property] in a safe condition." *Little v. City of Albany*, 169 AD2d 1013, 1013 (3rd Dept. 1991) (citation omitted); *Melamed v. Rosefsky*, 291 AD2d 602 (3rd Dept. 2002). The courts have recognized "three exceptions to this rule, applicable when the abutting owner 1) uses the area for a 'special purpose', 2) creates the

dangerous condition, or 3) violates a statute or ordinance requiring the abutter to maintain the area." *Oles v. City of Albany*, 267 AD2d 571, 571-572 (3rd Dept. 1999), *citing Margulies v. Frank*, 228 AD2d 965, 966 (3rd Dept. 1996); *see Moons, supra.*

The proof in this case shows that the accident occurred on the public street, and accordingly the burden is shifted to the Plaintiff "to establish a basis for [D]efendant[']s liability as owner and maintainer of the adjacent land." *Fitzgerald v. Adirondack Tr. Lines, Inc.*, 23 AD3d 907, 908 (3rd Dept. 2005); *see also, Harris v. FJN Props., LLC.*, 18 AD3d 1089 (3rd Dept. 2005) (where evidence showed injury occurred on public property, the burden is shifted to plaintiff to establish a basis for abutting landowner's liability). Thus, the inquiry turns to whether any of the three exceptions apply in this case.

1. Did Borg Warner create the dangerous condition?

Plaintiff's Amended Complaint alleges that Borg Warner failed to design the southbound exit to ensure the safety of the travelers on Warren Road. He contends that the control gate did not function properly to control the flow of traffic, and the yield sign was not appropriate or properly located, and that Borg Warner failed to provide instruction to its employees that they should stop and look for pedestrians and cyclists when entering Warren Road. In essence, Plaintiff contends that Borg Warner created this dangerous condition, and therefore had a duty to travelers on Warren Road. Defendant argues that caselaw supports its position that it does not owe a duty to pedestrians, cyclists, or motorists on the public roadway, simply because it owns the land adjacent to the public road. It further contends although it could have installed a stop sign instead of a yield sign, it had no obligation to do so.

Both parties acknowledge the seminal case in this area is *Pulka v. Edelman, supra*, where the Court of Appeals found there could be no liability on a parking garage operator for injuries to a pedestrian who was struck by a car being driven by a patron, out of the garage, and across a

public sidewalk. The Court in *Pulka* found that the garage owner did not owe a duty to the pedestrians on the public street, framing the issue as whether "any garage has a duty to control the conduct of its patrons for the protection of off-premises pedestrians." *Pulka v. Edelman, supra* at 783. Certainly, the Vehicle and Traffic Law imposes a duty upon the driver to act appropriately to protect other motorists and pedestrians. *Id.* at 785. However, the Court in *Pulka* concluded that it would place too heavy a burden on the garage if it had to be responsible for the conduct of its patrons, because "there was no opportunity to fulfill that duty." *Id.* at 784; *see Davis v. South Nassau Communities Hosp.*, 26 NY3d 563, 572 (2015) (critical consideration is whether defendant's relationship with the tort-feasor or plaintiff puts the defendant is best position to protect against the risk of harm); *see also Bacon v. Mussaw, supra* at 744 ("It is necessary to draw a line between competing policy considerations which would provide a remedy to everyone who may sustain injury, and extending virtually limitless exposure to tort liability"). However, *Pulka* juxtaposed the garage owner/patron situation with a master/servant relationship, stating that "one example of a situation in which there is a duty to use care to control another's conduct is the master and servant relationship." *Pulka* at 783-784. That is the situation presented in this case, where Borg Warner is the employer of the person (Kelly Elliott), whose conduct allegedly should have been controlled.

Defendant also cites to *Loconti v. Creede,* 169 AD2d 900 (3rd Dept. 1991) and *Balsam v. Delma Engineering Corp.*, 139 AD2d 292 (1st Dept. 1998) to support its position. However, both of those cases involved attempts to control the actions of third party patrons. In *Loconti*, the accident occurred on the public roadway adjacent to a restaurant. The Third Department held that the restaurant owners:

> as owners of premises abutting a road, cannot, as a matter of law control the conduct of drivers leaving their premises (*see generally, Matthews v Scotia-Glenville School Sys.*, 94 AD2d 912 [3rd Dept. 1983], *lv denied* 60 NY2d 559). Thus, no duty arises from the relationship of the restaurant owners either to its patrons or to motorists where, as here, there was no opportunity for the restaurant owners to stop drivers from disregarding any precautions they might take. The *Pulka* court concluded that the imposition of a duty upon one unable to

> control the tort-feasor would be unreasonably burdensome (*Pulka v Edelman*, *supra*, at 784). Further, it was the view of the Court of Appeals that a duty to exercise care when emerging from a driveway is specifically imposed upon drivers by Vehicle and Traffic Law §§ 1143 and 1173 and the extension of that duty was beyond the limits of public policy (*supra,* at 785).

Loconti, 169 AD2d at 902.

Similarly, in *Balsam*, the court was dealing with an accident that occurred in the public roadway next to a gasoline filling station. The First Department concluded that the filling station did not have a duty to provide a waiting area on its premises for customers waiting to use the pumps. Once again, that situation involved the actions of a third party patron, not under the control of the defendant.

The teaching of the *Pulka* line of cases is that the landowner has no duty, and no ability, to control the behavior of patrons and/or others with whom they have no relationship. However, a duty may arise to control the conduct of another person when a special relationship exists, such as master-servant. *See generally Cavanaugh v. Knights of Columbus Council 4360*, 142 AD2d 202 (3rd Dept. 1988).

Given the special relationship between Borg Warner and Kelly Elliott, it may not be unreasonable, impractical or unduly burdensome to impose a duty upon Borg Warner, even though it is an abutting landowner. Unlike *Pulka*, where the garage owner had no means to fulfill the duty or influence conduct of its patrons, an employer is in a much different position to be able to influence the conduct of it employees. They can do so by training, instruction or simple company communication to employees to exercise due caution, and follow traffic laws so as to ensure the safety of its workers as well as the traveling public. In fact, evidence was submitted that showed Borg Warner did provide various training programs including obeying traffic signs, but not specifically to the Warren Road intersection. Unlike *Pulka*, the employer does not face an unreasonable burden. The exact parameters of what steps might fulfill that duty is not before this Court, but only whether Borg Warner has established an entitlement to summary judgment on the basis that it had no duty, and therefore, no liability.

Deposition testimony from Borg Warner employees has been submitted which indicated that it was not uncommon for bicyclists and pedestrians to travel on Warren Road near the Borg Warner exit, and that Borg Warner had not issued any instructions or warnings to it employees regarding yielding the right of way to pedestrians and cyclists. Furthermore, Borg Warner controlled the flow of traffic from its private parking lot via the control gate. At the south entrance, entry into the Borg Warner premises was by means of a badge reader. Thus, the access would be limited to those who had a badge issued by Borg Warner. To leave via the south exit, the vehicle would trigger the senors to cause the gate to lift. Testimony also showed that the gate did not always operate properly, and could allow more than one car to pass through at a time. Borg Warner had issued instructions or training to employees not to go through more than one at a time. Borg Warner also maintained the shrubs, hedges, grass and foliage in the vicinity of the south exit, and according to Plaintiff, that contributed to the hazards at the intersection.

Borg Warner had also placed a yield sign at the start of the merge lane, and Plaintiff contends that the sign improperly suggested to drivers entering the merge lane that they did not need to come to a complete stop.[2] Similar to the garage owners in *Pulka*, Borg Warner argues that it could not prevent Kelly Elliott, or any other driver, from disregarding a stop sign, any more than it could prevent them from disregarding a yield sign, and therefore, it would be unreasonable to impose that duty upon it. However, as the Court has already noted above, since this case involves an employer employee relationship, the reasoning of the *Pulka* decision does not apply. Furthermore, even assuming that Borg Warner had no duty to place any sign at the merge lane, by providing traffic control assistance at the intersection, it may have assumed a duty

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[2]Plaintiff also advances the yield sign placement as a theory of liability on the basis of violation of a statute or ordinance, but the Court will address it in the context of creating a dangerous condition, because the theory is not that Borg Warner violated a statute or ordinance requiring it to maintain the intersection or roadway. Rather, because Vehicle and Traffic Law section 1173 requires all vehicles entering a public road from a private drive to come to a complete stop before proceeding, Plaintiff contends that the yield sign was not proper as it was in conflict with the statute.

to the traveling public.[3] *See, Balmir v. Pollins,* 131 AD2d 410 (2nd Dept. 1987). As Justice Cardozo wrote "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v. Shepard*, 233 NY 236 (1922) (citation omitted). Thus, even though Borg Warner may not have had a duty to place any signs at the exit, an argument can be made that by placing any sign, Borg Warner assumed a duty to place the proper sign in the proper location, so as to fulfill the purpose of the sign in the first place- the protection of travelers on that stretch of road. Or at least, not make the condition more dangerous by placing an improper sign.

Since this case involves an employer-employee relationship, a special relationship did exist such that Borg Warner may have had some ability to control, or influence, the actions of its employees at the yield, by way of warning or proper signage. The Court concludes that there are questions of fact presented as to whether Borg Warner created the dangerous condition.

2. Was there a special use or special purpose for Borg Warner?

The "special use" or "special purpose" doctrine applies in those cases where the public property has been altered in some way for the exclusive benefit of the abutting landowner. *Melamed v. Rosefsky, supra; Oles v. City of Albany, supra; Little v. City of Albany, supra.* The exception "is not satisfied by the mere fact that a commercial establishment derives some benefit from an adjacent [public area]." *Oles*, 267 AD2d at 572. "The common thread in [special use] cases [is] an installation 'exclusively for the accommodation of the owner of the premises ... in consideration of private advantage.'" *Balsam v. Delma Eng'g*, 139 AD2d at 298 *quoting Nickelsburg v. City of New York*, 263 AD 625, 626 (1st Dept. 1942). Where public property "is constructed for the special use of the adjoining landowner, that special use imposes upon him the obligation to maintain the area of special use so as not to raise the spectre of peril to the traveling public." *Santorelli v. New York*, 77 AD2d 825, 825 (1st Dept. 1980) (citations omitted).

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[3]Vehicle and Traffic Law section 1173 requires all vehicles entering a public road from a private drive to come to a complete stop before proceeding. Plaintiff contends that the yield sign suggested that the statute was somehow abrogated, and that a complete stop was not necessary.

Plaintiff argues that the exit from Borg Warner and merge lane onto Warren Road was created at the behest of, and for the benefit of, Borg Warner. In support of that position, Plaintiff has submitted numerous documents that were obtained in connection with the Morse Chain/Warren Road development project.[4] Plaintiff argues that these documents show that the intersection was created as part of the relocation of the Morse Chain business to this location, and as inducement for the relocation.

The documents show that beginning in early 1973, Borg Warner was involved in discussions with various county agencies concerning the relocation of Morse Chain/Borg Warner building to the Warren Road site. The included correspondence with Tompkins County Area Development Agency (TCAD) stating that "it is very important that we [Morse Chain/Borg Warner] have at least two access roads leading to and from the property," and that a wider road would be needed at the plant entrance. Morse Chain made clear by letter that it would not be relocating until its requests were met. After additional negotiations, the TCAD arranged for Tompkins County to build an entrance from Warren Road free of charge. Plans were also made to widen Warren Road at the plant entrance.

Around 1980, the facility was planning an expansion and around the same time, the State and County were considering improvements to Warren Road. Plaintiff alleges that the redesign of Warren Road and the facility expansion went forward in coordination with each other. The development included adding the merge lane from the Borg Warner south exit driveway to Warren Road.

Plaintiff argues that the improvements which were made involving the merge lane and related improvements to the Borg Warner exit and Warren Road were designed and installed for the special use of Borg Warner. Defendant did not submit any evidence of its own on this issue, but argues that the records show that the re-design of Warren Road was done for the benefit of

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[4]Borg Warner has not raised an objection to the admissibility of these documents, which Plaintiff proffered as both ancient documents and public records.

the community as a whole, and as part of a comprehensive development plan. Defendant claims that even though Borg Warner may have received some benefit, it was not done exclusively for Borg Warner. Further, Defendant avers that there is no evidence that Borg Warner uses this stretch of road differently than the general public.

The Court concludes that the evidence which has been submitted does suggest that the road design and construction was done at the request of Borg Warner, and for its benefit. *See e.g. Melamed, supra* (question of fact whether driveway apron providing gradual grade change between roadway and defendant's parking lot was a special use). While the whole road improvement may not have been for Borg Warner's benefit, the targeted area of the merge lane was only used by Borg Warner. The correspondence related to the development references this particular area of the roadway, and only involves discussion of Borg Warner with respect to that. Notably, no other businesses use the south entrance except for Borg Warner, and in fact, use of the entrance requires a badge. Further, contrary to Borg Warner's claim, it is at least circumstantially evident that the merge lane would be used differently by motorists accelerating from the Borg Warner facility than by motorists already on Warren Road. A merge lane, by its very nature, accommodates traffic attempting to enter the main roadway. The only merging traffic that could be using that stretch of roadway would be coming out of the gated exit at Borg Warner. Although motorists using Warren Road might conceivably use the merge lane to move around left turning cars, or avoid other obstructions[5], even in that instance it could not be said that the traffic coming from Borg Warner uses the merge lane in the same way as the general public.

Affording the Plaintiff every favorable inference, the Court concludes that a question of fact has been presented on the question of whether a "special use" was created for the benefit of Borg Warner. *See e.g. Little v. Albany, supra*; *Dressler v. Socony Mobil Oil Co.*, 22 AD2d 780 (1st Dept. 1964); *see also Du Pont v. Horseheads*, 163 AD2d 643 (3rd Dept. 1990).

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[5]There is some question as to whether such usage of the merge lane by straight through traffic on Warren Road would even be proper, because for at least a stretch of the merge lane, Warren Road travelers would have to cross a solid white line to enter the merge lane.

PROXIMATE CAUSE

Assuming there was a duty that may have been owed by Borg Warner to the traveling public (by creating the condition, or by "special use"), liability would only be imposed if Borg Warner's negligence in the discharge of that duty was the proximate cause of the accident and injuries. "It is axiomatic that proximate cause ordinarily is a question to be determined by the finder of fact." *Decker v. Forenta LP*, 290 AD2d 925 (3rd Dept. 2002), *citing, Meseck v. General Elec. Co.*, 195 AD2d 798, 800 (3rd Dept. 1993). The court should only decide a question of proximate cause when there is no factual dispute, and only one conclusion which may be drawn from those facts. *Feeley v. Citizens Telecoms. Co. of NY, Inc.*, 298 AD2d 745, 745-746 (3rd Dept. 2002). "When faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's burden at trial. Instead, in order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries." *Burgos v. Aqueduct Realty Corp.*, 92 NY2d 544, 550 (1998)

An accident reconstruction report was prepared by Travis A. Webster of the New York State Police following this accident, and was included in Defendant's Motion for Summary Judgment ("Webster report"). The Webster report concluded that the primary cause for the accident was failure of Kelly Elliott to exercise due caution at the intersection, and a contributing factor was driver inattention by Kelly Elliott. The report also concluded a secondary contributing factor was on the part of the cyclist in failing to perceive a hazard at this intersection. Borg Warner contends that the Webster report established, *prima facie*, its entitlement to summary judgment because of its conclusion that Kelly Elliot's negligence in entering the merge lane without yielding, coupled with decedent's actions, were the cause of the accident.

However, even if the Court were to assume that the decedent and driver were both negligent, in order for Borg Warner to succeed on a motion for summary judgment, it would have "to establish [its] 'freedom from comparative fault as a matter of law.'" *McKenna v. Reale*, 137

AD3d 1533, 1534 (3rd Dept. 2016) (*quoting Palmeri v. Erricola*, 122 AD3d 697, 698 [2nd Dept. 2014]). If the movant fails to do that, the motion for summary judgment would be denied regardless of the insufficiency of the opposition papers. *McKenna v. Reale, supra*. There can be more than one proximate cause of an accident. *See O'Brien v. Couch*, 124 AD3d 975 (3rd Dept. 2015); *McKenna, supra*.

In *McKenna, supra*, the Third Department denied summary judgment to the defendant in a car-bicycle accident. The defendant submitted his own deposition, and a police report that determined the cause of the accident to have been the bicyclist's failure to yield the right of way to the defendant's vehicle. The Third Department concluded that the evidence did not establish defendant's freedom from fault, as there was a question of whether he saw what there was to be seen. Accordingly, the court determined that defendant had not made a prima facie case for summary judgment. Thus, although the evidence which had been submitted supported the conclusion that the bicyclist was at fault, the Third Department held that the defendant had not established a prima facie case because he had not ruled out other possible causes. The Court did not even point to any evidence submitted by plaintiff in opposition to the motion, but relied on the defendant's deposition, and concluded that a jury could reasonably find some liability on the part of the defendant.

Similarly, in *Nunez v. Olympic Fence & Railing Co., Inc.*, 138 AD3d 807 (2nd Dept. 2016), the court also denied summary judgment in a car-bicycle accident case. In that case, the plaintiff was riding his bicycle the wrong way on a one way street when he was stuck by a forklift which was exiting a driveway onto the street. The forklift operator's view was blocked by a parked truck. The Second Department found that summary judgment was not proper because "the fact that the plaintiff was riding his bicycle in the wrong direction on a one-way street would not preclude a finding that negligence by defendant's employee contributed to the accident" and that there were "triable issues of fact as to whether the forklift operator failed to exercise due care before proceeding from the driveway onto the street." *Nunez*, 122 AD3d at 808 (citations omitted). The court cited to Vehicle and Traffic Law §1173 dealing with stopping when emerging from a driveway, as a possible theory of liability on the part of the forklift operator.

Again, the denial of summary judgment was appropriate because defendant's contributory negligence had not been ruled out.

The Webster report, relied upon by Borg Warner, assigned fault for the accident to both Kelly Elliott and the decedent. However, absent from the Webster report is any discussion or opinion as to whether Kelly Elliott's "failure to exercise due caution" or "driver inattention" may have been contributed to by an improper design of the exit, and/or merge lane, or the improper placement of the yield sign. Those are the theories being advanced by the Plaintiff. The driver's failure to exercise due caution implies the caution necessary as a result of the situation presented. In this case, Kelly Elliott may have not exercised the caution needed when approaching this intersection with its limited sight lines, and traffic. Further she may not have exercised due caution when confronted with a yield sign in the merge lane. The failure to exercise due caution does not rule out the possibility that design, maintenance or warning at the intersection and/or merge lane, or an improper placement of the yield sign could have also contributed to the accident. The Webster report, while setting forth some proximate causes, does not rule out the contributing causes alleged by Plaintiff against Borg Warner.

The cases cited by Borg Warner do not compel a different conclusion. In *Weber v. City of New York*, 24 AD2d 618 (2nd Dept. 1965), the court dismissed a claim against a gas station owner. The court concluded that the evidence, after a trial, showed "the negligent operation of the automobile ... was the sole cause of the accident." *Weber*, 24 AD2d at 619 (emphasis added). In *Bonsera v. Universal Recycling Services Corp.*, 269 AD2d 483 (2nd Dept. 2000), the Second Department, again after a trial, dismissed a claim against the owner of a pumping station. The court found that there was no causal connection between the design and the maintenance of the premises and the plaintiff's injuries. Instead it was caused by the truck driver's failure to control his vehicle.

Both of these cases cited by Borg Warner involved post-trial situations. The cases had gone to trial and the Second Department found in both cases that there was no evidence of liability on the part of the respective defendants. Those cases support this Court's determination

that the defendant's possible contributory negligence raises questions of fact, which should be determined at trial.

Bearing in mind that this is a summary judgment motion, and that such a motion should only be granted if there are no issues of fact, or other conclusions that could be drawn, the Court determines that Borg Warner has not met its prima facie burden on the issue of proximate cause, because the evidence it relies upon does not establish its freedom from some comparative fault. Accordingly, the motion fails without consideration of the papers in opposition.

Although Borg Warner has raised some valid points with respect to the qualifications of Dr. Stuart L. Phoenix, Ph.D., to provide expert opinion on the matters of roadway design or motor vehicle accident reconstruction, the Court need not address that argument in light of its determination that Defendant's evidence on proximate cause is insufficient to grant Defendant's motion. The proponent of a Summary Judgment Motion cannot satisfy its burden by pointing to insufficiencies in the nonmoving party's proof.

CONCLUSION

Based upon the preceding discussion, Defendant's Motion for Summary Judgment is **DENIED**.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: October 25, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

1) Defendants' Notice of Motion dated April 11, 2017, with attached Affidavit of Thomas D. Keleher, Esq., sworn to on April 11, 2017, with attached Exhibits A-G; Memorandum of Law dated April 11, 2017;
2) Attorney Affirmation from Raymond M. Schlather, Esq., dated June 12, 2017, with attached Exhibits 1-24, in opposition to Defendants' Motion; Affidavit of Dr. Stuart L. Phoenix, Ph.D., sworn to on June 15, 2017, with Exhibits A and B; Memorandum of Law dated June 12, 2017;
3) Reply Memorandum of Law in Further Support of Borg Warner's Motion for Summary Judgment dated July 19, 2017.