

O'Keefe v Wohl

2019 NY Slip Op 34003(U)

April 8, 2019

Supreme Court, Saratoga County

Docket Number: 20162340

Judge: Thomas D. Nolan

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ORIGINAL

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

2019 APR 16 PM 1:17
SARATOGA COUNTY
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FILED

DANIEL J. O'KEEFE and
KAREN O'KEEFE,

Plaintiffs,

DECISION AND ORDER

RJI No. 45-1-2017-0132

Index No. 20162340

-against-

WESLEY M. WOHL and
TOWN OF NORTHUMBERLAND,

Defendants.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: MARTIN, HARDING AND MAZZOTTI, LLP
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This motor vehicle/motorcycle accident occurred on August 7, 2015 at approximately
11:00 a.m. at the intersection of Taylor Road and Colebrook Road in the Town of

Northumberland, Saratoga County. The intersection has been characterized as a skewed "Y" intersection with Colebrook Road running generally north and south and Taylor Road running generally east and west.¹ Colebrook Road ends at the intersection. There is a yield sign at the intersection controlling southbound traffic on Colebrook.

Plaintiff Daniel J. O'Keefe (plaintiff) was operating his motorcycle southbound on Colebrook followed by a motorcycle operated by his adult son, Daniel, Jr. Defendant Wesley Wohl (defendant) was operating his automobile easterly on Taylor Road, and as defendant was turning left entering or intending to enter Colebrook Road, plaintiff's motorcycle struck the driver's side of defendant's vehicle. Plaintiff was severely injured.²

Plaintiff and his wife, derivatively, commenced this action to recover damages for their respective losses against defendant and the Town of Northumberland (Town) which owned, controlled, and maintained Colebrook Road and Taylor Road. Plaintiff timely filed a notice of claim against the Town, and thereafter was deposed as permitted by General Municipal Law §50-h. In that deposition, plaintiff testified that he was a longtime resident of the Town, traveled regularly on these two highways, and was an experienced motorcycle operator for approximately 40 years. Plaintiff testified that although he had no recollection of the impact itself, he recalled that he was intending, once he reached the intersection, to turn right onto Taylor Road. Plaintiff

¹The police accident report (Exhibit N to defendant Town's notice of motion) includes a "not to scale" diagram which appears to depict the two roads as intersecting, not at a 90 degree angle but at a 45 degree angle. Plaintiff's expert labeled the intersection a "skewed Y intersection" of approximately 45 degrees.

²Plaintiff sustained fractures to his pelvis, pubic bones, sacrum, and ribs and suffered internal injuries including a lacerated spleen and colon and had multiple surgeries and procedures. Plaintiff was hospitalized at Albany Medical Center for 70 days and his medical bills exceeded \$600,000.

testified that as he approached the intersection, he slowed and looked to his left to see if there was any oncoming westbound traffic on Taylor and that before he reached the yield sign, "all of a sudden, there was a vehicle in front of me" in his lane on Colebrook, and that impact occurred.

After this action was commenced, plaintiff, in a second deposition, testified that as he approached the intersection, he looked left onto Taylor and saw a lady standing in her yard located on the east side of Colebrook and that he got "just beyond the yield sign when the collision happened. I was not hit at Taylor Road, I was still in my lane." Plaintiff testified that when he saw defendant's vehicle, he applied his brakes, but there was "no time" to lay his bike down, and he had no memory of anything that happened after.

Defendant Wohl testified at his deposition that he was driving his automobile easterly on Taylor Road and that he intended to turn left onto Colebrook Road, that he slowed as he approached the intersection, that he had his vehicle's left directional light on, saw no oncoming westbound traffic on Taylor Road, and as he started his left turn and was in the intersection, he saw the two motorcycles coming towards him and that plaintiff's motorcycle was "right there" and "[he] was struck" by the motorcycle.

In this action, plaintiff contends defendant Wohl "cut [the turn] short" and that the collision took place in the right-hand lane of Colebrook Road occupied by plaintiff apparently just beyond the yield sign. Plaintiff's action against the Town is based on the claim that the intersection was unsafe and in support of this claim, points to an allegedly extensive history of accidents at the intersection and a failure of the Town to modify or change the signage and pavement markings at the intersection and a failure to have conducted a traffic safety study in light of the previous accidents at the intersection.

Discovery is concluded and the action is scheduled for trial.

Defendant Town moves for an order granting summary judgment dismissing plaintiff's complaint against it as well as dismissing the cross-claims of codefendant Wohl. The Town's motion is supported by the notice of claim and the complaint, plaintiff's third supplemental bill of particulars and its own bill of particulars, the 50-h hearing and deposition testimony of both plaintiff and his wife, the deposition testimony of Wohl and of Harold Vance, Jr., the Town's highway superintendent, the police accident report, and the affidavit and report of Michael Tuttmann, a licensed professional engineer.

Briefly, Harold Vance testified, as now relevant, that he assumed office in 2013 and that to his knowledge the Town had never conducted an engineering study of this intersection prior to this accident. The Town's expert, engineer Tuttmann, based on his post-accident inspection of the intersection, his review of the pleadings and depositions and police reports and photographs of the scene, opines that the intersection was both properly signed and that the pavement markings on Taylor Road were adequate and appropriate, that the sight distances for motorists traveling on both roads were adequate, and that based on the accident history, the intersection could not be classified as dangerous. Regardless of whether there is evidence that the intersection was improperly signed or that the roadway was incorrectly marked, the Town contends that any such deficiencies were not a proximate cause of the collision and its negligence, if any, was superceded by the actions of Wohl who apparently failed to heed the existing pavement markings on Taylor Road and also allegedly improperly and negligently cut the corner "short" and entered into the southbound lane of Colebrook Road when executing his left turn where plaintiff was operating his motorcycle instead of correctly making a wider turn

which would have resulted in his vehicle entering the northbound lane of Colebrook. Wohl testified that he did not see plaintiff's and his son's motorcycles before he started to execute his left turn and only saw the lead motorcycle operated by plaintiff when it was "about four car lengths" away.

In opposition, plaintiff relies on the depositions referenced above, the police accident report and several post-accident photographs of the intersection and of Wohl's damaged vehicle, the minutes of a Town Board meeting held August 11, 2015, reports documenting several other prior accidents that occurred at the intersection, and the affidavit of licensed professional engineer Ronald A. Bova. Briefly, plaintiff contends that there were several design and signage deficiencies at this "3-way skewed Y-intersection" which were substantial factors in causing this accident. Most notably, engineer Bova contends that there should have been a stop sign, not a yield sign on Colebrook Road controlling traffic at the intersection, and that the existing double yellow pavement markings on Taylor Road were incorrectly placed and did not conform to highway design standards. Bova also contends, based on the prior history of accidents at the intersection, that the Town should have conducted a traffic study to determine what improvements/modifications should have been implemented to make the intersection less dangerous. Notwithstanding the allegations that defendant Wohl "cut the corner short" and that the accident happened in the southbound lane of Colebrook Road where plaintiff was operating his motorcycle, Bova opines that the "striping" at the intersection provided "misleading visual clues" to motorists traveling on both Colebrook and Taylor Roads and thus the existing striping failed "to provide guidance through the intersection to motorists on how to properly maneuver the turn onto Colebrook Road and naturally causes people to cut the corner onto Colebrook Road

like Wohl did on August 7, 2015 ... and inevitably forced motorists into each other's lane of travel causing an unsafe condition."

In a reply affidavit, the Town's expert, Tutman, avers that "when the intersection is properly navigated and the corner is not 'cut', ... there should not be any conflict between [defendant's] and [plaintiff's] paths of travel" and that "the only reason the two paths intersected was because of [defendant] turning early, illegally crossing the double-yellow line along Taylor Road".

First, the general principles which apply in deciding summary judgment motions in negligence actions. Since summary judgment is a drastic remedy which if granted deprives a party of a full presentation of evidence before a trier of fact, the burden is on the moving party, here the Town, to tender sufficient evidence to demonstrate the absence of any material issue of fact, and in reviewing the motion, the facts must be viewed in the light most favorable to the party opposing the motion, here the plaintiff. Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039, 1043 (2016); Vega v Restani Constr. Corp., 18 NY3d 499 (2012). And in negligence actions, although summary judgment is "rarely granted", the court need not "ferret out" speculative issues to get the case to a jury. Andre v Pomeroy, 35 NY2d 361, 364 (1974). Once the Town meets its threshold burden, the plaintiff must produce "affirmative proof to demonstrate that the matters are real and capable of being established upon trial". Nelson v Lundy, 298 AD2d 689, 690 (3rd Dept 2002). And, when there is conflicting evidence presented over a material issue, the court is precluded from assessing credibility and must leave that task to the factfinder unless it is clear that such issue is feigned. Ferrante v American Lung Assoc., 90 NY2d 623 (1997); Hall v. Queensbury Union Free School Dist., 147 AD3rd 1249 (3rd Dept

2017).

In cases against a municipality based on a claim of negligent highway design or maintenance, the municipality owes the traveling public a non-delegable duty to maintain its roads in a reasonably safe condition, and although a municipality is not an insurer against all accidents, liability may be assessed when the municipality has actual or constructive notice of a hazardous condition and fails to take reasonable steps to alleviate the danger. Schleede v State of New York, ____AD3d____, 2019 NY App Div Lexis 2206 (3rd Dept Mar. 21, 2019)

As an initial matter, since the Town did not complete or initiate a safety study, it cannot advance in this case the defense of qualified immunity, and therefore ordinary rules of negligence apply. Brown v State of New York, 31 NY3d 514(2018)

Here, there is conflicting evidence whether the signage at the intersection, a yield sign on Colebrook Road and the pavement markings in place on Taylor Road, were appropriate and whether the existing sign and markings conformed to the minimum requirements of standard highway design and signage codes, and the record contains some evidence that the Town, at a minimum, could be found to be charged with constructive notice of hazardous conditions at the intersection based on its highway superintendent's prior inspections and prior accidents.

Regardless of the existence of triable issues concerning whether the intersection was hazardous and whether the Town could be charged with notice and found negligent, the real thrust of the Town's motion appears to be that defendant Wohl's negligent operation of his vehicle was the sole proximate cause of the accident. The Town asserts that any negligence on its part in the design, construction, signage, and markings at or near the intersection was not, as a matter of law, a proximate cause of the accident. The Town bases its position on the deposition

testimony of defendant Wohl in which he admitted that he was familiar with both roads and often traveled them and on the deposition testimony of plaintiff likewise admitting his familiarity.

“In negligence cases, the issue of proximate cause is generally a matter left to the trier of fact, provided that the court has been assured that a prima facie case of proximate cause has been established.” Carson v Dudley, 25 AD3d 983, 983 (3rd Dept 2006); Feeley v Citizens Telecommunications Co. of New York, Inc., 298 AD2d 745 (3rd Dept 2002).

In cases based on inadequate or improper signage or warnings, summary judgment in favor of the municipality is appropriate when it is established that the alleged negligent operators were familiar with the highway or intersection. Atkinson v County of Oneida, 59 NY2d 840 (1983); Abair v Town of North Elba, 35 AD3d 935 (3rd Dept 2006); Parmeter v Bedard, 295 AD2d 779 (3rd Dept 2002), lv denied 98 NY2d 614 (2002). However, when the negligent operator was only “somewhat” familiar with the highway, or if proof of familiarity was “not clear”, the municipality’s negligence may be a proximate cause, and will not generally be excused completely as a matter of law by an operator’s conduct. Alexander v Eldred, 63 NY2d, 460, 468-469; Appelbaum v County of Sullivan, 222 AD2d 987, 990 (3rd Dept. 1995). For example, summary judgment based on a claim of lack of proximate cause was denied in an action alleging lack of adequate signage where the intoxicated and speeding driver who lost control and ran off the road had never been on the subject road before. Stiggins v Town of N. Dansville, 155 AD3d 1617 (4th Dept 2017). To withstand a summary judgment motion alleging lack of proximate cause, “a plaintiff need only raise a triable issue of fact regarding whether [the municipality’s] conduct proximately caused plaintiff’s injuries” as opposed to the burden plaintiff will have at trial to “establish by a preponderance of the evidence that the

[municipality's] negligence was a proximate cause of plaintiff's injuries". Burgos v Aqueduct Realty Corp., 92 NY2d 544, 550 (1998).

Here, the conflicting affidavits from plaintiff's expert and the Town's expert regarding signage and markings and prior accidents at the intersection are sufficient to demonstrate an issue of fact regarding the Town's negligence.

Even so, and more importantly, the testimony of plaintiff³ and the testimony of defendant Wohl⁴ established both parties' familiarity with the intersection. The facts here are similar to those in Abair v. Town of North Elba, supra, where the dismissal of plaintiff's complaint against the Town was affirmed by the Third Department when the operator was "intimately familiar" with the road and its physical characteristics, since he traveled it daily. The court concluded that such familiarity precluded any negligence on the part of the Town being a proximate cause of the accident.

Here, the Town's alleged negligence arising from insufficient signage or highway pavement markings is thus not a proximate cause of the accident. Therefore, both plaintiffs'

³During the 50-h testimony (Exhibit B to the Town's notice of motion), plaintiff, when asked by the Town's counsel "and you're familiar with Colebrook and Taylor Road?", answered "absolutely." (p.40) and admitted that he had driven cars and motorcycles on Taylor Road and Colebrook Road before [the accident], (p.40) In his second deposition (Exhibit J to the Town's notice of motion) plaintiff, when asked by the Town's counsel "now you had driven at that intersection, I think you said a few times?", plaintiff answered "a few times, like I said in my other deposition, generally I use Taylor Road which goes right by it. Generally I use Taylor, but occasionally I'll use Colebrook". (p.78)

⁴During his deposition (Exhibit L to the Town's notice of motion) defendant, Wohl testified in part "I know the road and I don't speed on that road" (p.9) And in response to the question asked by plaintiff's counsel "obviously you're very familiar with the intersection of Taylor and Colebrook?" defendant Wohl answered "yes" (p.12) And to the question "And is that a route that you would travel daily?" defendant Wohl answered "not daily, but to get to certain places, yes". (p.12)

complaint and defendant's cross-claim against it fail. Abair v Town of North Elba, supra.

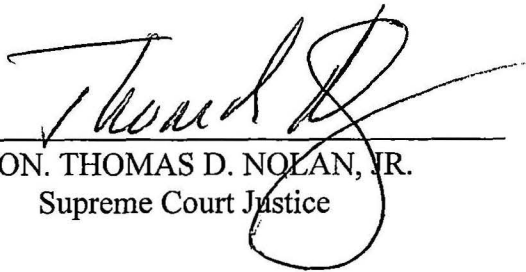
Defendant Town's motion is granted, and defendant's complaint and defendant Wohl's cross-claim against it are dismissed, all without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for defendant Town. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant Town is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

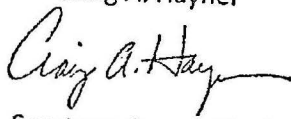
So Ordered.

DATED: April 8, 2019

Saratoga Springs, New York



HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Craig A. Hayner

Saratoga County Clerk

2019 APR 16 PM 1:17
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED