Gurbanova v City of Ithaca
2023 NY Slip Op 35040(U)
August 7, 2023
Supreme Court, Tompkins County
Docket Number: Index No. EF2020-0241
Judge: Elizabeth Aherne
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At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District on 7th day of June 2023.

PRESENT: HON. ELIZABETH AHERNE
Supreme Court Justice

SUPREME COURT: COUNTY OF TOMPKINS
STATE OF NEW YORK

LAZIFA S. GURBANOVA, Individually & as Parent and Natural Guardian of Z.M., an Infant,

Plaintiffs,

v.

THE CITY OF ITHACA, ITHACA YOUTH BUREAU, & CORNELL UNIVERSITY,

Defendants.

DECISION AND ORDER

Index No. EF2020-0241

APPEARANCES:

COUNSEL FOR PLAINTIFFS:	COUGHLIN & GERHART LLP BY: THOMAS BOUMAN, ESQ. P.O. BOX 2039 BINGHAMTON, NY 13902
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COUNSEL FOR DEFENDANT CORNELL UNIVERSITY:	OFFICE OF UNIVERSITY COUNSEL CONRAD R. WOLAN, ESQ. 235 GARDEN AVE 300 CCC BLDG ITHACA, NY 14853

HON. ELIZABETH AHERNE, J.S.C.

PROCEDURAL HISTORY

On June 9, 2020, Plaintiff Lazifa S. Gurbanova filed suit on behalf of herself and her child, Z.M. (hereinafter collectively "Plaintiffs") against Defendants City of Ithaca and Ithaca Youth Bureau[1] (hereinafter collectively "City of Ithaca") (NY St Cts Elec Filing [NYSCEF] Doc No. 1). On October 15, 2021, Plaintiffs filed a motion for permissive joinder and requested permission to amend their complaint (NYSCEF Doc Nos. 12-24). After oral argument on March 8, 2022, Plaintiffs were granted leave to add Defendant Cornell University (hereinafter "Cornell University") as a defendant and to file an amended complaint (NYSCEF Doc Nos. 46 & 48). City of Ithaca filed an answer to the amended complaint on April 19, 2022, and Cornell University filed its answer on April 26, 2022 (NYSCEF Doc Nos. 51 & 53).

Cornell University filed a motion for summary judgment dismissal of the claims against it with a supporting affirmation, exhibits, and a memorandum of law on March 22, 2023 (NYSCEF Doc Nos. 70-76). Plaintiffs filed an affirmation in opposition with supporting affidavits and a memorandum of law on May 24, 2023 (NYSCEF Doc Nos. 146-159). Cornell University filed a memorandum of law in reply on June 5, 2023 (NYSCEF Doc No. 164). The parties were heard before this Court for oral argument on Cornell University's motion on June 7, 2023.

City of Ithaca filed a motion for summary judgment dismissal of the claims against it with a supporting affirmation, exhibits, and a memorandum of law on March 26, 2023 (NYSCEF Doc Nos. 78-122). Plaintiffs filed an affirmation in opposition with supporting affidavits and a memorandum of law on May 24, 2023 (NYSCEF Doc Nos. 131-145). City of Ithaca filed an affirmation in reply with supporting exhibits and memorandum of law on June 1, 2023 (NYSCEF Doc Nos. 160-163). The parties were heard before this Court for oral argument on City of Ithaca's motion on June 7, 2023.

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[1] Ithaca Youth Bureau is a department of the City of Ithaca. Departments which are merely administrative arms of a city, do not have a legal identity separate and apart from the municipality and cannot sue or be sued (see Hall v City of White Plains, 185 F Supp 2d 293, 303 [SDNY 2002]).

BACKGROUND

On July 29, 2019, Plaintiffs were spending time in Cass Park in Ithaca, New York and had parked their vehicle in a parking lot adjacent to a waterfront trail leading toward the park (NYSCEF Doc No. 92, p. 8-12). While Plaintiff Gurbanova was placing her child's bicycle into the trunk of their vehicle, the child, five-year-old Z.M., hung from the top of a tree barrier to the right of the vehicle, a yellow upside-down u-shaped bollard approximately three feet wide and three feet tall (hereinafter the "bollard") (NYSCEF Doc No. 92, p. 18-19 & Doc No. 118, p. 3 & Doc No. 108, p. 50). While Z.M. was hanging on the bollard, it tipped over and fell to the ground, toward the Plaintiffs' vehicle, resulting in an injury to Z.M.'s fingers (NYSCEF Doc No. 92, p. 18-19, 26-31, 39-43).

The parking lot had been constructed in 2005 and 2006 by the City of Ithaca. It was an asphalt parking lot with green areas placed intermittently between groups of parking spaces; each green area contains two trees planted parallel to the parking spots. Alongside the green areas, two bollards were placed on either side of each tree to protect the young trees from vehicles in the parking lot (NYSCEF Doc No. 118, p. 3). The bollards were bolted to the ground through flat metal flanges, with the bolts inserted through the asphalt and into the soil (NYSCEF Doc No. 108, p. 48-51). The construction work for the project, such as laying asphalt and installing the bollards, was completed by the City of Ithaca (NYSCEF Doc No. 108, p. 37-38, 47-51). The subsequent maintenance of the trees and the bollards was completed by the City of Ithaca (NYSCEF Doc No. 108, p. 52-56, 61-64). Cornell University did not participate in any of the construction of the parking lot, nor did it maintain the parking lot, and does not have any ownership of any part of the parking lot.

Cornell University had an advisory role in the parking lot construction project, primarily related to its research conducted in the parking lot, for which it contributed some funds toward the project (NYSCEF Doc No. 108, p. 29-30). The research involved the use of CU-Structural Soil, a soil designed to promote healthy tree growth in urban areas (NYSCEF Doc No. 108, p. 28). Cornell University and City of Ithaca met prior to the construction of the parking lot to discuss the use of CU-Structural Soil; Cornell's representative for the research was Dr. Nina Bassuk of the Urban Horticulture Institute (NYSCEF Doc No. 108, p. 29). The CU-Structural Soil was utilized under the asphalt in the parking lot and in the green areas where the trees were planted (NYSCEF Doc No. 108, p. 25-26). Cornell University advised City of Ithaca that the trees inside of parking spaces

in the interior of the parking lot should be protected by tree barriers to protect them from vehicular traffic (NYSCEF Doc No. 108, p. 37-38). Cornell University did not specify a bollard type tree barrier must be used nor did it choose the bollards or install the bollards (NYSCEF Doc No. 108, p. 37-38, 47-49). The City Forester testified about installing the bollard and how it was similar to bollards and other tree barriers used in other projects in Ithaca (NYSCEF Doc No. 108, p. 38-41).

ANALYSIS

A. Cornell University's Motion for Summary Judgment

Cornell University seeks summary judgment dismissal of Plaintiff's negligence claim. Summary judgment is only to be granted where the moving party can demonstrate prima facie evidence defeating the claim, and the opposing party then fails to establish the existence of material issues of fact which require a trial of the action (see Grant v Temple, 2023 WL 3511130, at *1 [2023]). When considering a motion for summary judgment, this Court must view the evidence in the light most favorable to the Plaintiffs and accord them every reasonable inference from the proof (see Carpenter v Nigro Cos., Inc., 203 AD3d 1419, 1420–1421 [2022]). To prove a cause of action for negligence, there must be prima facie evidence of a legal duty, a breach of said duty, and proof that said breach proximately caused an injury, resulting in damages (see Ellis v Mildred Elley Sch. Inc., 245 AD2d 994, 995 [1997]).

1) Duty of Cornell University to Plaintiffs

Cornell University argues it has no duty to Plaintiffs and, thus, without the requisite duty, the negligence claim must be dismissed. To infer a duty to prevent or cure a dangerous or defective condition on a property, one must prove a party has ownership, occupancy, control or special use of the property (see Turrisi v Ponderosa Inc., 179 AD2d 956, 957 [1992]). A duty to maintain the tree barrier could be proven via evidence that Cornell University owned the park, occupied the parking lot, controlled the parking lot, or was making special use of the parking lot.

i. Control, Ownership or Occupancy

City of Ithaca has proclaimed ownership, control, and operation of the parking lot since the inception of this case and reiterated this sole ownership, operation, and control at oral arguments (NYSCEF Doc No. 51). There is no documentary evidence of ownership of the park or parking lot by Cornell University or any written agreement between Cornell University and City of Ithaca, such as a lease, to permit occupancy. Plaintiffs argue Cornell University's annual visits by a professor to observe the growth of trees at the park for a research study evidences occupation or

control of the park. Plaintiffs cite to precedent where a party's course of conduct evidenced control of a property, such as regularly conducting business on the premises (see Contreras v Randi's Enter., LLC, 126 AD3d 1199, 1200 [2015] (holding regular presence of defendant's employees at premises, defendant's business sign at premises, and defendant's instruction to plaintiff to deliver goods to premises created issue of fact as to control of premises)). Alternatively, Plaintiffs cite to precedent where summary judgment was denied where an oral agreement for use of the land was a material issue of fact (see Downey v R.W. Garraghan, Inc., 198 AD2d 570, 571 [1993] (finding question of fact as to which party had duty to maintain premises pursuant to terms of oral lease)).

The precedent cited by Plaintiffs is not analogous to the very limited contact Cornell University has with the park a few times a year when observing tree growth. There is no evidence before this Court that Cornell University is using this parking lot to such a degree it is responsible for maintenance of the parking lot and its bollards. This Court finds no undetermined remaining issues of material fact that would allow this Court to infer Cornell University has a duty to maintain the bollards based upon Cornell University's control, occupancy, or ownership of the parking lot (see Turrisi v Ponderosa Inc., 179 AD2d 956, 957 [1992]; Zadarosni v F. & W. Restauranteurs of Se., Inc., 192 AD2d 1051, 1052 [1993] (affirming summary judgment where party had no duty to maintain land and no possessory right to the land)).

ii. Special Use Doctrine

Plaintiffs next argue that Cornell University owes a duty to maintain the bollards as a result of its special use of the park property. The special use doctrine is applicable when a private landowner adjacent to a public landowner has been permitted some modification or use of the public land for its own benefit, which is a unique benefit not enjoyed by the general public (see Kaufman v Silver, 90 NY2d 204, 207 [1997]). Cornell University is not an abutting private landowner to the public park owned by City of Ithaca, as required for the application of the special use doctrine (see Giannelis v BorgWarner Morse TEC Inc., 167 AD3d 1185, 1186 [2018]; Sadler v Town of Hurley, 280 AD2d 805, 806 [2001]). This Court does not find that the construction of the parking lot nor the installation of bollards occurred solely for the benefit of Cornell University and there is no dispute the park is enjoyed by the public (see Sadler at 806 (holding no special use doctrine where no special benefit unrelated to public use). Cornell University has no right to exclude others or to sole possession of the park or the parking lot (see Schwartzberg v Eisenson, 260 AD2d 854, 855 [1999]; Goldhirsch v Majewski by Majewski, 87 F. Supp. 2d 272, 277 (SDNY

2000) (finding lack of private use and private access to parking lot evidenced no special use by abutting landowner)). The special use doctrine is not applicable to these parties' circumstances. Plaintiffs have failed to submit evidence that Cornell University had any type of duty to upkeep the bollards or any duty to Plaintiffs generally.

2) Instrument of Harm

Finally, Plaintiffs assert that, even if this Court finds Cornell University had no duty to Plaintiffs, Cornell University can still be held liable if it is determined it failed to exercise reasonable care in the performance of its duties and "launche[d] a force or instrument of harm" (see Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 140 [2002] quoting H.R. Moch Co. v Rensselaer Water Co., 247 NY 160, 168 [1928] (holding service error in fulfilling contract to supply water services to the city was not the basis for a common-law tort to a third person when fire hydrant failed to supply adequate water to quell warehouse fire)). To launch an instrument of harm, a party who is rendering services must negligently create a condition or exacerbate a dangerous condition (see Espinal at 141-142 (finding that there were no facts to support the allegations that defendant's removal of snow pursuant to its contract created a dangerous condition or increased the propensity for a slip and fall)).

Plaintiffs argue that Cornell University had a quasi-contractor relationship to the park project and acted negligently in this role in which it provided services to City of Ithaca. Firstly, this Court takes note that Plaintiffs' precedent in support relates to parties who were contracted to provide services, which is not the case at hand. Additionally, the evidence indicates that the extent of Cornell University's role with the bollards was solely to suggest that tree barriers be put in place to protect newly planted trees. It was City of Ithaca who procured the bollards, who owns the bollards, who installed the bollards, who maintained the bollards, and who claims full responsibility for the park project and the bollards. There is simply no issue of material fact that Cornell University's contributions to the project did not include procuring the bollards as the tree barriers, nor did it instruct nor advise the bollard be installed in asphalt, which is the alleged proximate cause of the negligence claim. As there is no evidence of Cornell University having a duty to maintain the bollard and no evidence of Cornell University having launched an instrument of harm as Cornell University neither participated in nor contributed to any negligent installation of the bollard, Cornell University's motion for summary judgment of Plaintiffs' negligence claims shall be granted.

B. City of Ithaca's Motion for Summary Judgment

1) Prior Written Notice to City of Ithaca

City of Ithaca argues that the claims against it must be dismissed as it had never received any prior written notice of the defective bollard, absolving it from responsibility for Plaintiffs' injuries. Section C-107 of the City of Ithaca City Charter provides:

> *The City of Ithaca shall not be liable for damage or injury sustained by any person in consequence of any street, highway, bridge, culvert, sidewalk, crosswalk, park, playground, stream, pond, lake, reservoir, building or other City-owned property or structure being out of repair, unsafe, dangerous or obstructed by snow, ice or otherwise in any way or manner, including but not limited to protruding pipes, metal plates or covers or other objects, unless written notice of the defective, unsafe, dangerous, obstructed or concealed conditions of said street, highway, bridge, culvert, sidewalk, crosswalk, park, playground, stream, pond, lake, reservoir, building or other City-owned property or structure shall have been given to the City of Ithaca by delivery to the office of the City Clerk at least 24 hours previous to said damage or injury. This section applies to claims of infants and all other persons…*

(NYSCEF Doc No. 121). Such city charter limitations of liability are permissible pursuant to the General Municipal Law § 50-e (4) which provides, in relevant part:

> *nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.*

Plaintiffs argue that Section C-107 of the City Charter is overly broad by requiring prior written notice of defects for any structures aside from those delineated in General Municipal Law § 50-e (4), to wit: streets, highways, bridges, culverts, sidewalks or crosswalks (see Walker v Town of Hempstead, 84 NY2d 360, 367 [1994] (construing GML § 50-e (4) to include only the six specific locations mentioned)). City of Ithaca responds that binding precedent has established that parking lots are encompassed within the definition of highways in the context of GML § 50-e (4), so it is of no import whether the statute may be overly broad (see Groninger v Vill. of Mamaroneck, 17 NY3d 125, 129 [2011]; Lauria v City of New Rochelle, 225 AD2d 1013, 1014 [1996]). Plaintiffs respond that precedent addressing parking lot defects includes only defects to the surface

areas of parking lots, not appurtenances such as stop signs installed in parking lots or a bollard. (citing Doremus v Inc. Vill. of Lynbrook, 18 NY2d 362, 366 [1966] (holding village ordinance language seemed to refer to defects in physical surface of street and not include a defective stop sign); Alexander v Eldred, 63 NY2d 460, 467 [1984] (stating prior-notice laws refer to physical defects such as holes and cracks, not to claims faulting the absence of stop sign at busy intersection)). City of Ithaca argues claims involving physical appurtenances or structures attached to parking lots, such as bollards, have indeed been deemed to require prior written notice (see Poirier v City of Schenectady, 85 NY2d 310, 314 [1995] (holding sign post anchor installed into sidewalk required prior written notice); Vnuk v City of Albany, 191 AD3d 1056, leave to appeal denied, 37 NY3d 909 [2021] (holding injury from traffic signal footing installed into sidewalk required prior written notice); Stride v City of Schenectady, 85 AD3d 1409, 1410 [2011] (requiring prior written notice for injury caused by severed parking meter post)). Plaintiffs responded by arguing that City of Ithaca's cited precedent dealt with appurtenances that were still akin to tripping hazards on surfaces of sidewalks and not similar to the bollard (citing Doremus v Inc. Vill. of Lynbrook, 18 NY2d 362, 366 [1966]).

This Court's examination of precedent has clarified that the focus of whether prior written notice is required is whether a condition is of the type municipalities would not be aware of unless provided prior written notice, not only for surface level defects, but also for other defects (see Monteleone v Incorporated Village of Floral Park, 74 NY2d 917, 918 [1989] (finding low hanging tree branch to be a defect of a sidewalk); Johnstown Leather Corp. v City of Gloversville, 56 AD2d 345, 347 [1977] (holding no requirement a defect be on surface and defect of tree limb obstructing highway required prior written notice and distinguishing Doremus)). Precedent continues to reaffirm that alleged defects or obstructions need not be defects on the actual surface when considering whether prior written notice was required (see Pylarinos v Town of Huntington, 156 AD3d 922, 923 [2017] (ruling town required prior written notice of wooden barricade on street); Laracuente v City of New York, 104 AD3d 822, 823 [2013]) (ruling prior written notice of allegedly defective fence alongside a highway was required); Ferreira v Cnty. of Orange, 34 AD3d 724, 725 [2006] (ruling prior written notice of defective guardrail alongside road required); Donato v Cnty. of Schenectady, 156 AD2d 859 [1989] (ruling prior written notice of defective guideposts required); Toscano v Town of Huntington, 156 AD3d 837, 838 [2017] (finding prima facie evidence of no prior notice of dangerous metal barricade on walkway provided); Benjamin v City

of New York, 55 Misc. 3d 1217(A) [2017], aff'd, 178 A.D.3d 557 [2019] (deciding prior written notice of defective guardrail required)).

City of Ithaca provided evidence via an affirmation from a City Clerk that it did not receive any prior written notice and this was not disputed by Plaintiffs (NYSCEF Doc No. 120). This Court finds that the bollard in the parking lot was part of a highway and is the type of defective structure that requires prior written notice to the City of Ithaca before a claim can be properly made (see Bang v Town of Smithtown, 291 AD2d 516, 517 [2002] (dismissing claim alleging defective guardrail after infant fell over guardrail at edge of park's parking lot where town was not provided prior written notice)). City of Ithaca has provided an affidavit from a city official attesting that no prior written notice regarding the bollard was received which satisfied its prima facie burden as to lack of prior written notice (see Pagano v Town of Smithtown, 74 AD3d 1304, 1305 [2010]). Plaintiffs offered no evidence to raise a question of fact as to defendant's lack of prior written notice.

2) Affirmative Negligence

There are two exceptions to the statutory requirement of providing prior written notice of a defect, to wit: (1) the locality created the defect as a result of its own affirmative negligence or (2) a special use by the locality gives it a special benefit (see Cornish v City of Ithaca, 149 AD3d 1321, 1322 [2017]). Plaintiffs do not allege a special use, but allege it was City of Ithaca's affirmative negligence that created the defective and dangerous bollard. To bypass the requirement of providing prior written notice, Plaintiffs must prove that the City of Ithaca's action resulted in the immediate existence of the dangerous condition that caused Plaintiffs' injuries (see id.). The Plaintiffs must prove that the actions taken by City of Ithaca were actively negligent and not passive actions (see Horowitz v Cnty. of Orange, 215 AD2d 799, 800 [1995]).

City of Ithaca argues that Plaintiffs fail to offer evidence of the requisite immediacy of a dangerous condition, arguing that even if the asphalt was not the proper choice of foundation, there was no danger immediately present after the bollard was installed (see Burke v City of Rochester, 158 AD3d 1218, 1219 [2018] (ruling defendant may have created the sinkhole by improperly excavating and backfilling, but plaintiff failed to proffer evidence that the depression was present immediately after completion of the work)). The affirmative negligence exception does not apply to conditions that develop over time (see id.; Harvish v City of Saratoga Springs, 172 AD3d 1503, 1504 [2019] (granting summary judgment where no evidence sign immediately detached from its

anchor); Yarborough v City of New York, 10 NY3d 726, 728 [2008](holding though defendant's patching of pothole was negligent, dangerous condition was not present until years after with erosion and summary judgment dismissal was proper). Precedent indicates where the evidence demonstrates that a dangerous condition was not present for several years after initial installation, there is no issue of fact as to whether the dangerous condition was immediate (see Fiero v City of New York, 190 AD3d 822 [2021] (finding no issue of fact where parking meter grate was not upended until nine years after installation)).

City of Ithaca provides sworn testimony from the former City Forester that the bollard was assessed for stability after it was installed in 2006 and was stable and secure and when pushed firmly upon, did not move (NYSCEF Doc No. 108, p. 61-62, 78-79, 81-83 & Doc No. 109, p.3). The City Forester assessed the bollard for stability in the same manner for three years after and it was firm and secure with no movement when pushed upon (NYSCEF Doc. No. 108, p. 61-62, 78-79, 81-83 & Doc No. 109, p.3). City of Ithaca provided deposition testimony from another employee who examined the bollards in this parking lot after the 2019 incident. The employee observed the fallen bollard, checked the other bollards and found one other loose bollard (NYSCEF Doc No. 107, p.15-19, 26-27). The employee testified that when he removed all of the bollards they were very difficult to remove, even the loose one, and he had to use a crow bar and tractor (NYSCEF Doc No. 107, p.15-19, 26-27).

Plaintiffs submitted an affidavit from its expert witness, a civil engineer, opining, in relevant part in its entirety:

> *8. Bollards such as these should never be installed directly into an asphalt surface. Asphalt, either porous or traditional, is not a dense enough material to keep the bolts in place and is not designed for that purpose. I am not aware of any published data, on which a designer could reasonably rely, addressing the strength of bolted connections into asphalt for the purposes of properly securing bollards to resist foreseeable loading conditions. Rather, bollards such as these should always be installed into or bolted onto proper concrete bases. For that reason, the bollards were in an unsafe condition from the moment they were installed, and no amount of maintenance would make this manner of installation safe.*
> *9. Improper installation onto an inappropriate surface by the City of Ithaca caused the dangerous condition. The dangerous condition in this instance is a highly unstable, heavy fixture in an area where human interaction with the fixtures was foreseeable and should have been part of the design and planning.*

> *10. It is my opinion, within a reasonable degree of scientific certainty, that the design and construction of the bollards was a breach of the engineering standard of care, and that such breach caused the injuries to Z.M.'s hand.*

(NYSCEF Doc No. 158, ¶¶ 8-10). Expert opinions can raise triable issues of fact as to whether a defendant's negligence created an immediate dangerous condition (see Schiller v Town of Ramapo, 202 AD3d 1022, 1023–24 [2022] (finding expert's opinion that improper use of material for fixing hole in pathway rendered pathway immediately unstable and dangerous established material issue of fact); Bania v City of New York, 157 AD3d 612, 614 [2018] (crediting expert opinion that defendant's repair of a pothole ten days prior to accident, without excavation and backfilling, would begin to fail almost immediately)). Plaintiffs assert said expert opinion satisfies the qualifications for the application of the affirmative negligence exception, or minimally, creates a material issue of fact.

Expert affidavits are only able to establish a material issue of fact when they allege that the alleged defect was immediate and was not the result of environmental effects causing the defect over the passage of time (see Beiner v Vill. of Scarsdale, 149 AD3d 679, 681 [2017] (holding evidence of defect caused by environment over time insufficient to prove liability of defendant); (Torres v City of New York, 39 AD3d 438 [2007]). Additionally, an expert affidavit will not defeat a motion for summary judgment if it is speculative and contains only conclusory statements (see Race v Vill. of Brewster, 185 AD3d 1071, 1072 [2020] (holding expert affidavit was speculative and there was no showing that sidewalk was in a dangerous condition immediately after installation); Mossberg v Crow's Nest Marina of Oceanside, 129 AD3d 683, 684 [2015] (finding expert affidavit insufficient to defeat summary judgment where inspection of accident site was seven months after accident; expert's testing was in dissimilar conditions; and expert failed to identify the scientific basis utilized to reach his conclusions)). Expert opinions should include cites to specific industry standards, codes, rules and regulations violated, as well as any authority, treatise or other corroborating evidence to support the expert opinion. (see Hanley v City of New York, 139 AD3d 800, 802–03 [2016] (finding expert opinions speculative and conclusory); Chunhye Kang-Kim v City of New York, 29 AD3d 57, 61 [2006] (finding no probative value where expert gave no scientific basis or authority for conclusions and failed to cite any authority, treatise or other corroborating evidence and did not state that the work violated any codes, rules,

regulations or industry standards); Romano v Stanley, 90 NY2d 444, 452 [1997] (holding opinion cited not technical support or literature in supporting of expert's opinion).

City of Ithaca faults Plaintiffs' expert affidavit as being conclusory and speculative as it was not based on testing of the density of actual asphalt utilized, the expert did not conduct a site visit or examine the area of the accident, the opinion is not rooted in any published scientific data, nor does it cite any specific engineering industry standard of care that was breached (despite such standards having been requested in bills of particluars). (see Race v Vill. of Brewster, 185 AD3d 1071, 1072 [2020] (dismissing due to no evidence of dangerous condition of sidewalk immediately after work and conclusory expert affidavit)). City of Ithaca cites to the Plaintiffs' expert's witness disclosure statement which provides, in relevant part:

> *The witness is expected to testify that bollards such as the ones located at the Parking Lot should never be installed directly into an asphalt surface. The witness is further expected to testify that asphalt, either porous or traditional, is not a dense enough material to keep the bolts in place, and is not designed for that purpose. Rather, bollards should always be installed into concrete bases. For that reason, the witness is further expected to testify that the bollards were in an unsafe condition from the moment they were installed, and no amount of maintenance would make this manner of installation safe. The witness is further expected to testify that the city's improper selection and installation of bollards to the lot in question created a dangerous condition in that the bollards would not have been stable from the moment of installation. This unsafe condition* ***combined with environmental factors caused the accident and injuries in question.*** *The witness is further expected to testify that the use of a heavy steel bollard, improperly installed, as tree protection is not an appropriate structure, particularly in an area where people congregate, like a parking lot. The witness is further expected to testify, within a reasonable degree of engineering certainty, that the design and construction of the barriers was a breach of the engineering standard of care. The witness is further expected to testify that the Defendants were negligent by improperly installing bollards in a parking lot and further negligent by improperly and inappropriately installing the bollards such that they were not structurally stable and secure. The witness is further expected to testify that the Defendants were negligent in failing to warn all those on the property of the danger the improperly installed bollard presented and allowing the public in or around the danger. The witness is further expected to testify that the Defendants' negligence was the proximate cause of Z,M.'s injuries within a reasonable degree of certainty. The witness may testify generally on engineering methodologies, principles, procedures and standards… All of the witness's opinions, to the extent not specified herein, are based upon a reasonable degree of engineering certainty and subject to change if additional relevant information becomes available. The grounds for Mr. Zemeck's opinions include his review of literature/studies in the fields of civil engineering, his review of photographs of the parking lot and bollards, his review*

> *of deposition transcripts, his review of CU-Structural Soil materials published by Cornell University, his review of select medical records, his review of pleadings and documents exchanged in discovery and his education, training and vast experience. (emphasis added)*

(NYSEF Doc No. 162, p. 2-4).

The contributory impact of environmental factors referred to in Plaintiffs' expert witness disclosure was omitted from the expert affidavit in support of the opposition to summary judgment, but it is clear the expert's opinion included the impact of the environment when identifying the proximate cause of the unsafe condition (see Beiner v Vill. of Scarsdale, 149 AD3d 679, 681 [2017]; Torres v City of New York, 39 AD3d 438 [2007]). The expert witness affidavit contains no reference to supporting scientific data, scientific literature, testing from the accident site, or specific industry standards of care that were negligently violated. This Court finds Plaintiffs' expert affidavit and expert witness disclosure do not provide sufficient, non-conclusory evidence that City of Ithaca's installation of the bollard created an immediate dangerous condition at the time of installation in 2005-2006 (see Caballero v City of New York, 198 AD3d 713, 715 [2021] (holding evidence of repairs to road two years prior was insufficient to raise a triable issue of fact as to whether the City affirmatively created the alleged condition as there was no evidence that a dangerous condition arose immediately after the repair was completed); Fiero v City of New York, 190 AD3d 822 [2021] (holding where evidence demonstrates that a dangerous condition was not present until several years after installation, there is no issue of fact as to whether there was an immediate danger); Hanley v City of New York, 139 AD3d 800, 802–03 [2016] (no evidence of immediate dangerous condition); Price v Vill. of Phoenix, 222 AD2d 1079, 1079 [1995] (granting summary judgment despite conclusion of plaintiff's expert that defendant created a dangerous condition when it constructed the parking lot some 15 years earlier as expert's opinion was speculative)). As there is no issue of material fact that there was no immediate dangerous condition at the time of the installation of the bollard, and prior written notice of the defective bollard was not provided to the City of Ithaca, summary judgment must be granted in favor of the City of Ithaca.

CONCLUSION

And the Court having read and reviewed the aforementioned pleadings delineated herein in the Procedural History section;

Based upon the foregoing, this Court finds as follows:

I. Defendant Cornell University's motion for summary judgment dismissal is GRANTED; and

II. It is hereby ORDERED that the Plaintiffs' complaint against Cornell University is DISMISSED in its entirety; and

III. Defendants City of Ithaca and Ithaca Youth Bureau's motion for summary judgment dismissal is GRANTED; and

IV. It is hereby ORDERED that the Plaintiffs' complaint against Defendants City of Ithaca and Ithaca Youth Bureau's is DISMISSED in its entirety.

The Jury Trial scheduled for the week of September 18, 2023 is hereby removed from the calendar. This constitutes the Decision and Order of the Court and concludes this matter. The filing of this Decision and Order, or transmittal of copies hereof, shall not constitute notice of entry. (see CPLR §5513).

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Dated: August 7, 2023
Ithaca, New York

ELIZABETH AHERNE
Supreme Court Justice

All papers submitted in connection with this motion and the Decision and Order have been electronically filed with the Tompkins County Clerk's Office through the NYSCEF System.