

COURT OF APPEALS
STATE OF NEW YORK

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HAROLD R. SMITH, as Administrator of the Estate of
HAROLD H. SMITH, deceased, and as Administrator of
the Estate of HARRIET M. SMITH, deceased, and
HAROLD R. SMITH, Individually

Plaintiff-Appellant,

-against-

THE COUNTY OF ACME,

Defendant-Respondent.

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BRIEF OF APPELLANT HAROLD R. SMITH

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Plaintiff-Appellant,

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THE COUNTY OF ACME,

Defendant-Respondent.

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BRIEF OF APPELLANT HAROLD R. SMITH

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear the appeal from that portion of the order of the Appellate Division, Eighth Department which granted the motion for summary judgment of Defendant-Respondent The County of Acme (“the County”), under CPLR § 5601(a). An appeal may be taken as of right to the Court of Appeals from an order of the Appellate Division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal. Here, two justices of the Appellate Division, Second Department dissented from the court’s opinion reversing the IAS court’s denial of summary judgment in the County’s favor and dismissing the Plaintiff Harold Smith’s claim on grounds on the basis of municipality qualified immunity. That

portion of the order of the Appellate Division that granted summary judgment to the County is final because it conclusively determined the action by granting judgment to that defendant and left nothing remaining to be done at either the Appellate Division or the Supreme Court, Acme County. This Court has jurisdiction to hear this appeal.

Moreover, this appeal is timely. The Supreme Court, Acme County, IAS Part x (John Jones, J.S.C.) entered a short form order denying the County's motion for summary judgment on January 26, 19xx, and entered on February 2, 19xx. (R 6).¹ The County timely filed a notice of appeal from that order on March 18, 19xx. (R 3). The Appellate Division order dated October 10, 20xx, was served by the County by regular mail on December 15, 20xx. (CA 9). Plaintiff Smith timely filed a notice of appeal on January 11, 20xx.

¹All references are to the Record on Appeal. "CA" refers to the portion of the record on appeal containing additional papers to the Court of Appeals. "R" refers to the remaining portion of the record.

QUESTIONS PRESENTED

- I. Numerous citizens and ABCD's Shopping Center requested installation of a signal light at a dangerous intersection. Not only did ABCD's agree to pay for the signal, but the Defendant Acme County relied upon ABCD's privately-funded traffic study, which concluded that such a signal was necessary for the safety of drivers both entering and exiting the ABCD's shopping center. Did the IAS Court correctly deny the County's Motion for Summary Judgment on the basis of qualified immunity because the County failed to conduct an independent study, proposed remedial measures to ensure the safety of driver's exiting ABCD's, but never addressed hazards in entering ABCD's caused by inadequate traffic gaps?

(Preserved in Respondents' brief before the Appellate Division, pp. 6-9).

- II. Assuming that the County made a prima facie showing of a qualified immunity defense, did the IAS Court correctly deny the County's Motion for Summary Judgment on the basis that material issues of fact existed regarding the adequacy of the County' study and the reasonableness of its traffic plan?

(Preserved in Respondents' brief before the Appellate Division, pp. 10-19).

- III. Did the IAS Court also properly determine that material issues of fact concerning proximate cause precluded summary judgment in the County's favor?

(Preserved in Respondent's brief before the Appellate Division, pp.21-24).

PRELIMINARY STATEMENT

This is an appeal as of right by the Plaintiff Harold R. Smith, both individually and as executor of the estates of his deceased parents, Harold H. and Harriet M. Smith, from an order of the Appellate Division, Second Department. The Appellate Division order reversed the IAS court's denial of summary judgment to the defendant County of Acme on the grounds that Smith's wrongful death and negligence claims were precluded by the County's qualified immunity. The majority opinion of the Appellate Division, if left to stand, has effectively swallowed up and abrogated any duty of care by municipalities to maintain safe roadways – effectively overruling decades of Court of Appeals' precedent. According to the majority opinion, municipalities are entitled to sweeping immunity for any traffic decision **as a matter of law** regardless of the focus, extent, or source of the traffic study, or the weight of the evidence showing the County's inaction to be unreasonable.

If the position of the County and the majority opinion is carried to its logical conclusion, a municipality would never be held liable for failing to remedy a traffic hazard as long as it could claim to have relied upon a traffic study in reaching its “decision” not to act. For example, if a private party paid for an engineering study that concluded hazard signs were necessary on a road to warn of falling rocks and the huge potholes caused by the falling rocks, the municipality would not be liable, as a matter of law, if it decided that falling rock signs were unnecessary and, instead, only posted signs warning of potholes. Yet this is exactly what happened in this case. A private study revealed the hazards to drivers entering

and exiting the ABCD shopping center due to limited sight lines for exiting traffic and inadequate traffic gaps for entering traffic. But, although it purported to rely upon this private study, the County only took remedial steps improving the sight line for drivers exiting the shopping center. It did nothing to improve the inadequate traffic gaps necessary to drivers to safely enter the shopping center. The majority opinion ignores the purpose behind this Court's grant of qualified immunity to municipalities for traffic design determinations – to allow municipalities to carry out their governmental function and at the same time encouraging municipalities to study and remedy traffic problems. The County failed to establish that it conducted a complete, independent study of the traffic hazards at the intersection, that it took any steps to remedy the hazard of inadequate traffic gaps, or that its failure to install a traffic signal was reasonable.

Further, even if the County established a prima facie case for qualified immunity, the record contains a plethora of evidence raising material issues of fact concerning the reasonableness of the County's failure to install a traffic signal. First, the County was aware of a number of turning-type accidents on 56th Avenue. Second, the traffic engineering firm retained by ABCD's, recommended that a signal was needed to combat inadequate traffic gaps. Third, numerous citizen requested installation of stop light. Fourth, ABCD's offered to install the signal at its own expense. All of these factors raise issues of fact regarding the reasonableness of the County's failure to install a signal light. Finally, proximate cause is an issue of fact that should be determined by the trier of fact.

STATEMENT OF FACTS

A. Harold H. Smith and Harriet Smith Die as a Result of a Collision While Turning Left from the Westbound Lane of 56th Avenue Into the Driveway of ABCD's Shopping Center.

On September 11, 1994, Harold H. Smith was driving his car westbound on 56th Avenue in Acme City, New York. His wife, Harriet M. Smith, was riding in the passenger seat as they drove to ABCD's Shopping Center. (R 111-12). As Mr. Smith turned left from the westbound lane of 56th Avenue into the ABCD's parking lot, his car was struck by an approaching car driven by John Johnson on eastbound 56th Avenue. (R 111-12; 203). Mr. Johnson's car struck the passenger-side of the Smith car, which spun into a car driven by Joan James, who was attempting to exit the ABCD's parking lot. (R 111-12; 203). Mrs. Smith died from her injuries that day, Mr. Smith died from complications several months later. (R 235-36; 248).

B. The Smiths' Son, Harold R. Smith Brings Suit Against the County of Acme, Individually and as Administrator of His Parents' Estate.

In his Petition to File a Late Notice of Claim, Smith alleged that Acme County had negligently caused his parents' death because of its failure to allow ABCD's to install a traffic light at its own expense. (R 113-14). The petition was granted, and Harold R. Smith ("Smith") brought suit against Acme County both individually and as administrator of his parents' estate. (R 113-14).

Smith alleged that the County breached its duty to provide safe roadways by failing to install a traffic light at the intersection of 56th Avenue and the ABCD's exit. Although

concerned citizens, including a state Assemblyman, had requested that a traffic signal be placed in front of ABCD's and ABCD's had even offered to pay for the signal, the County refused to allow installation of such a signal. (R 180-93).

C. ABCD's Commissions a Traffic Study, Which Concludes that a Signal Light is Necessary to Ameliorate the Danger to Drivers Entering and Exiting the ABCD's Driveway Caused by Inadequate a Sight Line and Inadequate Traffic Gaps.

56th Avenue carries a large volume of traffic, which tends to travel at a high rate of speed. (R 31). ABCD's increasing concern over the difficulty that patrons and its employees encountered when entering and exiting its parking lot prompted it to commission a private engineering firm, XYZ Engineering, to study the traffic situation on 56th Avenue in front of the ABCD's. (R 31). After amassing a great deal of empirical and anecdotal evidence, PSC recommended that a traffic light be installed.

Specifically, XYZ concluded that drivers exiting ABCD's had an inadequate sight line to see oncoming traffic traveling eastbound on 56th Avenue and that inadequate traffic gaps created problems for drivers entering ABCD's as well. (R 45). Eighteen collisions were reported in the three-year period between January 1, 1990 and December 31, 1992. Eleven of the eighteen collisions were of the turning type – signifying difficulty in exiting and entering the driveway. (R 43). Accordingly, XYZ recommended installation of a signal. The XYZ study also concluded that although removal of trees would improve the inadequate sight line of exiting drivers, it would not “provid[e] the needed gaps in heavy traffic flow on 56th Avenue.” (R 45). This report was submitted to the County on February 23, 1994. (R

16). Based upon XYZ's conclusions, ABCD's offered to install the signal at its own expense. (R 143-44).

D. In Response to Numerous Accidents, Citizens Complain of the Dangerous Intersection and Request Installation of a Signal.

As summarized in the XYZ study, many accidents occurred at the intersection of the ABCD's driveway and 56th Avenue. Many of the accidents involved drivers, like Mr. Smith, turning left into the driveway from the westbound lane of 56th Avenue. (R 92, 90, 94, 97, 98). Numerous citizens requested the installation of a signal at the ABCD's driveway due to numerous accidents, heavy traffic, and speeding. (R 180-93).

E. Rather than Conducting Its Own Traffic Study, the County Relies Upon the XYZ Study, Proposes Remedial Measures to Improve the Sight Line of Drivers Exiting ABCD's, but Does Not Address the Hazards that Inadequate Traffic Gaps Cause to Drivers Entering ABCD's.

The County relied upon the study conducted by XYZ and paid for by ABCD's. (R 226). The County had a policy of requiring private parties to conduct the "necessary survey" to support any request for installation of a signal where a public road intersected a private driveway. (R 15). Vincent Clinton, a County traffic engineer testified during his deposition that "...no, I am not saying the County conducted a standard survey. [A] [s]tandard survey from the County's point of view would include the gathering of all the information and records. In this case, that was done by an outside consultant." (R 151). Other than what was received from ABCD's and their engineers, the County did not make any inquiries as to accident records or collect any accident reports. (R 159). The County

recommended remedial steps such as the removal of trees and a fence “to improve the visibility available to drivers exiting the shopping center.” (R 18). No remedial steps were taken to ameliorate the dangers of entering the driveway caused by inadequate traffic gaps.

F. The County Files a Motion for Summary Judgment Asserting the Defense of Qualified Immunity, which is Rejected by the IAS Court.

The County filed a motion for summary judgment asserting that it was entitled to dismissal of the complaint on the basis of a defense of qualified immunity. (R 10-209). On January 26, 19xx, the IAS court denied the motion, concluding that the County failed to prove its defense as a matter of law, having failed to conduct a study or address the risk of inadequate traffic gaps. (R 6-9). The IAS court’s short form order stated in pertinent part:

In this instant case, there are several issues of fact concerning whether the County lost its qualified immunity from liability with respect to the claims which are the subject matter of the instant action. In view of the number of similar accidents at the location where the instant accident occurred and the fact that Vincent Clinton, a traffic engineer for the Defendant County, testified that the County did not make its own standard survey, but instead relied upon the traffic survey of XYZ Engineering which had recommended the traffic signal, there is an issue of fact as to whether the County had a reasonable basis for its decision not to install a traffic light at the location but rather to remove trees at or near the location and to post signs alerting motorists traveling east on 56th Avenue of the ABCD’s driveway. Moreover, there is also an issue of fact as to whether the Defendant County’s failure to recommend and install a warning or caution sign in order to alleviate the dangerous condition on the other side of the roadway to the motorists traveling west on 56th Avenue (such as Mr. Smith), who intended to make a left turn into ABCD’s Shopping Center; was negligence (as a result of the inadequacy of the plan) causing or contributing to Mr. Smith’s accident.”

(R 7-8). The County appealed from this order. (R 3-5).

G. The Appellate Division Reverses the IAS Court’s Order, Grants the County’s Summary Judgment, and Dismisses Smith’s Claims, and Two Justices Dissent, Echoing the Reasoning of the IAS Court.

On October 10, 20xx, the Appellate Division, Eighth Department reversed the IAS Court’s order, stating that the County demonstrated prima facie entitlement to qualified immunity and that Smith’s evidence did not raise a triable issues of fact. (CA 12). Two justices dissented, concluding that the County failed to prove its defense of qualified immunity as a matter of law because it never addressed nor remedied the risk to drivers entering ABCD’s caused by inadequate traffic gaps:

[T]he report noted that the majority of the accidents that occurred on 56th Avenue were of the “turning type”, which were “indicative of the lack of adequate gaps within the traffic stream”. The report noted that the removal of trees would provide some relief for exiting drivers, but would not provide the needed gaps in the heavy traffic flow on 56th Avenue. The County’s other proposed measures of removing fences and installing intersection warning signs also would not create the necessary traffic gaps. . . . [T]here is a triable issue of fact as to whether the County’s plan, which failed to create the traffic gaps needed to alleviate the difficulties facing the majority of drivers entering the driveway was reasonable. . . . While the measures proposed by the experts of both ABCD’s and the County address the problems of drivers exiting the driveway, the County’s measures **failed to address the difficulties of entering the driveway**, particularly from the westbound lane of 56th Avenue, which the traffic counts indicated was the route most drivers used to enter the parking lot. As a result, there was no conflict of expert opinion as to how to ameliorate the hardships of ingress into the driveway.

(CA 14 - 15) (citations omitted, emphasis added). The dissenting justices also concluded that triable issues of fact existed as to whether the County’s reliance upon the XYZ study

constituted an adequate traffic study necessary to assert qualified immunity. (CA 15). Smith appealed from the Appellate Division's decision and order as of right. (CA 8-11).

ARGUMENT

Standard of Review

The IAS court's denial of the County's summary judgment motion should be upheld, and the Appellate Division's decision reversed. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Cox v. Kingsboro Medical Group*, 88 N.Y.2d 904, 906, 669 N.E.2d 817, 818, 646 N.Y.S.2d 659, 660 (1996). First, the County failed to prove that it was entitled, as a matter of law, to the drastic remedy of summary judgment. The IAS court correctly concluded that Acme County failed to prove as a matter of law that it was entitled to qualified immunity and that material issues of fact existed regarding the adequacy of its investigation, the reasonableness of the remedial measures that it took, and the proximate causation of the accident. The majority opinion of the Appellate Division reached the contrary result, although the dissenting opinion agreed with the IAS court's conclusion that the County was not entitled to qualified immunity having failed to study, address, or remedy the hazards to drivers entering the ABCD shopping center.

Further, the IAS court properly denied the County's motion for summary judgment due to the existence of numerous issues of fact. It is well settled that summary judgment is

a drastic remedy, to be granted only when it appears that no material and triable issues of fact are presented. *Warder v. Board of Regents of Univ. of State of N. Y.*, 53 N.Y.2d 186, 199, 423 N.E.2d 352, 359, 440 N.Y.S.2d 875, 882 (1981), *cert. denied*, 454 U.S. 1125 (1981). Because it is such a drastic remedy, “where there is doubt as to the existence of such issues, or even if the issues are ‘arguable’, summary judgment should not be granted.” *Id.* Moreover, a representative of a decedent’s estate, such as Smith, does not bear as high a burden of proof in the cause of action as the deceased person would have if that person were available to testify. *Noseworthy v. City of N.Y.*, 298 N.Y. 76, 80, 80 N.E.2d 744 (1948).

Notwithstanding the drastic nature of summary judgment, the Appellate Division, Second Department reversed the IAS court’s denial of summary judgment, concluding that Acme County was entitled to qualified summary judgment even though it relied upon a private traffic study, ignored the study’s conclusion that a signal light was needed, failed to conduct its own study in response to citizen complaints and numerous accidents at the intersection in question, rejected ABCD’s offer to pay for installation of the signal light, and only took steps to ameliorate the hazards of egress, and not ingress, into the ABCD’s shopping center. Plaintiff Smith respectfully urges this Court to reverse the Appellate Division’s granting of such a drastic remedy and to affirm the IAS Court’s denial of the County’s motion for summary judgment.

I. QUALIFIED IMMUNITY WAS NOT ESTABLISHED AS A MATTER OF LAW AND THE POLICY SUPPORTING SUCH IMMUNITY IS NOT TRIGGERED UNDER THE FACTS OF THIS CASE BECAUSE THE COUNTY FAILED TO PROVE THAT ALLOWING THIS CASE TO GO TO TRIAL WOULD RESULT IN THE JURY SECOND-GUESSING A REASONED TRAFFIC DECISION BASED UPON THE COUNTY’S TRAFFIC STUDY.

The IAS Court properly denied the County’s summary judgment motion because a qualified immunity defense is not triggered where a municipality fails to conduct an independent traffic study and fails to remedy a known danger. Under New York law, a municipality owes an absolute duty to keep its streets in a reasonably safe condition. *Friedman v. State of N.Y.*, 67 N.Y.2d 271, 493 N.E.2d 893, 502 N.Y.S.2d 669 (1986), *citing Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.2d 409 (1960). But in the field of traffic design engineering, municipalities will benefit from a qualified immunity unless “its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan.” *Friedman*, 67 N.Y.2d at 283-84. As discussed by this Court in *Weiss*, the grant of such qualified immunity preserves a municipality’s control over traffic design planning and implementation:

To accept a jury’s verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that “the king can do no wrong”, serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

Weiss, 7 N.Y.2d at 585-86. Thus, a municipality is entitled to qualified immunity when it proves, as a matter of law, that “a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury.” *Id.* at 588. In other words, a municipality has qualified immunity if it conducts a traffic study addressing a particular traffic hazard and then chooses a reasonable solution for remedying that danger, and a jury cannot second guess if other reasonable methods should have been utilized. But a municipality is not entitled to qualified immunity if, as in this case, it fails to address a problem, conducts an inadequate study, or has no reasonable basis for its traffic plan.

A. The County Failed to Prove Entitlement to Qualified Immunity as a Matter of Law Because It Impermissibly Delegated its Responsibility by Failing to Conduct a Traffic Survey.

The policy behind qualified immunity is not implicated by the facts of this case because the County never undertook an independent traffic study. Where the municipality fails to address a traffic problem, inadequately investigates a problem, or embarks on an unreasonable traffic plan, it is stripped of its immunity and subject to liability. *Friedman v. State of N.Y.*, 67 N.Y.2d 271, 284, 502 N.Y.S.2d 669, 493 N.E.2d 891 (1986). In *Burgess v. Town of Hempstead*, 161 A.D.2d 616, 617, 555 N.Y.S.2d 396 (2d Dep’t 1990), where the Town failed to remedy dangers posed by an unsafe curve, the court concluded that summary judgment was improper because the Town’s engineer only inspected for damaged signs and did not conduct any tests to determine the maximum safe speed for navigating the curve. Here, the County also failed to conduct a traffic survey measuring traffic gaps. Instead, the

County abdicated its responsibility to perform the survey because it claimed to have a policy of not performing traffic surveys concerning possible installation of traffic signals at public-private intersections. (R 15).

As pointed out by the dissenting opinion of the Appellate Division, “the County did not follow its usual procedure, but instead relied upon prior investigation records and the report of the ABCD’s consultant.” (CA 15). Joseph Allen, the Chairman of the Traffic Safety Board for Acme County at the time of the accident, stated in an affidavit that when a traffic signal was requested at an intersection of a public road and private driveway, the private party “would need to perform **the necessary survey**.” (R 15). Vincent Jennings, a traffic engineer with the County, testified during his deposition that the County failed to conduct an independent traffic study in this case:

No, I am not saying the County conducted a standard survey. Standard survey from the County’s point of view would include the gathering of all the information and records. In this case, that was done by an outside consultant.

(R 151). As determined by the IAS court decision below and the dissent in the Appellate Division’s opinion, the County’s failure to conduct its own survey bars it from successfully claiming immunity as a basis to dismiss this case. The County should not be allowed to hide behind its own policies to avoid its responsibility to conduct a traffic survey once notified of an unsafe road condition.

B. The County Does Not Address the Inadequate Traffic Gaps, and Although Relying on the XYZ Study, Which Concluded that a Signal Was Necessary to Increase Driver Safety in Entering and Exiting the ABCD's Driveway, the County Takes No Remedial Measures to Ameliorate Hazardous Ingress to the Driveway Caused by Inadequate Traffic Gaps.

In any event, even if the County can abdicate its responsibility to perform an independent traffic study, it never passed on the problem of inadequate traffic gaps. New York courts have made clear that when a municipality is made aware of a dangerous condition on one of its roads and does not take action to remedy it, the municipality is not entitled to qualified immunity. *Friedman*, 67 N.Y.2d at 286. It is undisputed that the County was aware of the dangerous conditions on 56th Avenue in both entering and exiting the ABCD's driveway as it relied upon the XYZ study which concluded that a signal was necessary to prevent a number of turning accidents resulting from inadequate gaps in the traffic flow. (R 45).

This Court has recently concluded that a municipality is not entitled to immunity when it fails to study or address a specific traffic problem. *See Ernest v. Red Creek Cent. Sch. Dist.*, 93 N.Y.2d 664, 717 N.E.2d 690, 695 N.Y.S.2d 531 (N.Y. 1999). In *Ernest*, a child was struck after exiting a school bus. The plaintiff brought a claim against the county for its failure to install sidewalks in the area, despite repeated requests by school officials. *Id.* at 672-73. The County asserted qualified immunity, which this Court rejected, on the basis of a traffic study. This Court concluded that because the County addressed limited

sight distances rather than student safety issues arising from the lack of sidewalks, it was not entitled to qualified immunity for its negligence in failing to install sidewalks:

Here, in response to a motor vehicle accident between a truck and school bus exiting the driveway, the County conducted a “sight distance” study to determine how close motorists had to be to the school’s driveway to see exiting vehicles. As a result, the speed limit was reduced from 55 to 30 miles per hour. The County might therefore have acquired qualified immunity from liability arising from an automobile accident involving a motor vehicle exiting the school driveway.

Ernest, 93 N.Y.2d at 673; accord *Santiago v. New York City Transit Auth.*, 271 A.D.2d 675, 706 N.Y.S.2d 721 (2d Dep’t 2000) (rejecting application of qualified immunity defense where municipality never “conducted a study, considered and based upon the matter, or adopted a plan regarding the appropriate speed for a train entering a station”). Thus, applying this Court’s precedents to the falling rock hypothetical introduced in the Preliminary Statement, a municipality could not successfully claim the defense of qualified immunity for failing to place falling rock signs to remedy the danger falling rocks pose to motorists where it only addressed the danger of the resulting potholes by posting pothole warning signs.

The reasoning of this Court in *Ernest* is equally applicable here. The County cannot claim the defense of qualified immunity for failing to allow installation of a traffic signal to increase traffic gaps needed for safe entry into the ABCD’s driveway when it only addressed limited sight lines for those drivers exiting ABCD’s driveway. As aptly stated by the dissent in the Appellate Division below, the County is not entitled to qualified immunity as a matter

of law, having never addressed the problem of inadequate traffic gaps leading to the death of Mr. and Mrs. Smith:

...we note that the traffic conditions sought to be alleviated were the difficult ingress into and egress out of the driveway. It is ineluctable that the remedial measures proposed by the County were not reasonable in that, while they partially alleviated problems of exiting the driveway, they did not address the problems of entering the driveway. The proposed acts of removing trees, removing fences, and placing signs to warn eastbound traffic of the driveway were, by their nature designed to alleviate difficulties in leaving the driveway by removing obstructions from the sight line of exiting drivers and warning eastbound traffic of exiting drivers. The removal of such obstructions from the sight line and the placement of warning signs, however, did nothing to improve the sight lines of traffic traveling east and west along 56th Avenue.

(CA 15). The County's remedial efforts only alleviated problems of egress, not ingress as discussed in the XYZ study. Thus, if this case went to trial, a jury would not second-guess the reasonableness of the County's remedial steps as the County failed to propose any measures for ameliorating the dangers posed by the inadequate traffic gaps. Accordingly, the County failed to prove the defense of qualified immunity as a matter of law, and the IAS Court properly denied its motion for summary judgment.

II. IN THE ALTERNATIVE, EVEN IF THE COUNTY MET ITS PRIMA FACIE BURDEN OF PROOF, THE APPELLATE DIVISION DISREGARDED SUMMARY JUDGMENT PRACTICE IN GRANTING THE DRASTIC REMEDY OF SUMMARY JUDGMENT IN THE COUNTY’S FAVOR NOTWITHSTANDING THE EXISTENCE OF NUMEROUS ISSUES OF FACT.

Summary judgment “...deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues.” *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). As discussed in the Appellate Division dissent, the IAS court properly denied summary judgment because numerous issues of fact exist precluding such a drastic remedy. (CA 15).

A. Issues of Fact Exist Regarding Whether the County’s Decision not to Install a Traffic Light was Reasonable and the Product of Reasonable Investigation, Especially When Such Installation was Recommended by a Private Engineering Firm and Requested by Citizens, the County was Aware of Numerous Turning Accidents, and ABCD’s Offered to Pay for the Installation of the Signal Light.

The County failed its burden of proving it was entitled to judgment as a matter of law. Even if a municipality has conducted a traffic survey – which the Plaintiff asserts that Acme County failed to do – the municipality is not entitled to immunity if a person who is injured in a traffic accident can show that the failure to install a traffic control device was (1) negligent under the circumstances, (2) that this omission was a contributing cause of the mishap, and (3) that there was no reasonable basis for the municipality’s inaction. *Alexander v. Eldred*, 63 N.Y.2d 460, 463-64, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984). A

municipality must produce competent summary judgment evidence to demonstrate that it prepared a traffic plan having a reasonable basis. *Id.* at 460. In *Alexander*, this Court concluded that the City's failure to install a stop sign was unreasonable where the City failed to address the merits of installing a stop sign, despite its notice of hazards associated with a lack of such a stop sign. *Id.* at 466. As in *Alexander*, none of the County's actions in this case are reasonable as a matter of law. Here the County:

- ignored the conclusion of the engineering firm report that it based its traffic study on, namely that a traffic light was necessary to increase traffic gaps.
- ignored repeated citizen pleas to install a traffic signal.
- failed to take any remedial steps to improve ingress into the ABCD's driveway from the westbound lane of 56th Avenue, despite numerous collision accidents occurring in the exact same manner as that leading to Mr. and Mrs. Smith's death.
- failed to allow installation of a traffic light, which a private business offered to install at its own expense.

As determined by both the IAS court and the dissenting justices in the Appellate Division, numerous issues of fact exist regarding whether its decision not to install a traffic light was reasonable and the product of a reasonable investigation. (CA 14)

1. The County's Refusal to Allow Installation of the Signal was Unreasonable in Light of Its Reliance on the XYZ Study, which Concluded that Such a Signal was Necessary to Prevent Turning Accidents Caused by Inadequate Traffic Gaps.

First, issues of fact exist regarding whether the County was negligent in relying upon the XYZ study – in lieu of conducting their own independent study – yet ignoring the study’s conclusion that signalization was necessary to safely regulate traffic at the intersection. “[D]isparate expert testimony” from traffic-control experts gives rise to factual questions that must be determined by a finder of fact rather than by a judge on summary judgment motion. *Appelbaum v. County of Sullivan*, 222 A.D.2d 987, 990, 635 N.Y.S.2d 349 (3d Dep’t 1995). Even though the removal of trees would ameliorate the dangers of exiting the driveway, the report also concluded that a signal was necessary to address the dangers of turning into the driveway. XYZ concluded that the removal of trees to improve the sight line for drivers exiting the shopping center would be “**only a partial solution at best**” and that “**signalization should be provided.**” Specifically, XYZ stated in its report that:

As can be seen in the accident history, the majority of accidents which occur on 56th Avenue are of the angle and turning type, indicative of the lack of adequate gaps within the traffic stream on 56th Avenue.

(R 46). XYZ concluded that “[t]raffic volumes along 56th Road and from the driveway are high enough to warrant signalization.” (R 45).

The County was aware of XYZ’s conclusion that most accidents were of the turning type and that a signal was necessary to increase traffic gaps for the safety of drivers entering the ABCD’s driveway. (R 45). Yet the County focused all of its efforts in increasing driver safety in **exiting** the driveway by improving the sight line and warning oncoming motorists

in the eastbound lane of 56th Avenue of the impending intersection. As discussed by both the IAS court and the dissent in the Appellate Division, none of these remedies addressed the difficulties of drivers turning left into the driveway from the westbound lane of 56th Avenue. (R 7-8; CA 14-15).

The majority opinion of the Appellate Division concluded that the recommendations of the XYZ study were immaterial and amounted to a duel of experts insufficient to raise material issues of fact. (CA 12). But the County never conducted its own study, offered any expert evidence disputing the XYZ study, or implemented any remedial efforts addressing the inadequate traffic gaps. Despite XYZ's recommendation that a signal light was needed to prevent turning accidents caused by inadequate traffic gaps, the County only addressed those accidents caused by the inadequate sight line available to exiting drivers. Even in its letter to XYZ, the County never addressed the hazards to drivers entering the ABCD's driveway caused by inadequate traffic gaps. (R 101-02). Thus, the XYZ study and its discussion of inadequate traffic gaps does raise material issues of fact regarding the reasonableness of the County's remedial measures of cutting trees, posting an intersection sign, and moving a fence.

2. The County's Failure to Address the Problem of Inadequate Traffic Gaps was Unreasonable After It Received Numerous Citizen Requests to Install a Light and Became Aware of Numerous Turning Accidents at the Intersection.

Moreover, the recommendations of the XYZ study aside, the County received numerous letter complaints from citizens and local government officials, as well as a request from ABCD's, that the County allow installation of a traffic signal at ABCD's expense. Municipalities are obliged to take into account requests for traffic improvements. The courts of this state have ruled that the failure to adequately study a problem raised by requests for improvements impacts the reasonableness of the municipalities' decision to reject the actions proposed in the requests. *Ernest v. Red Creek Centr. Sch. Dist.*, 93 N.Y.2d 664, 717 N.E.2d 690, 695 N.Y.S.2d 531 (1999). A municipality's "immunity can be overcome by notice of a history of accidents at the site." *Deringer v. City of N.Y.*, 260 A.D.2d 305, 306, 689 N.Y.S.2d 68 (1st Dep't 1999). As evident from the flurry of complaint letters that the County received, the intersection was a problem area with a history of traffic accidents. One letter, written the same month as the double fatality accident in this case, stated:

I would like to call your attention to the need for a traffic light at the entrance to the ABCD's store on 56th Avenue in Carle Place. Not a week goes by without a [sic] accident. . . . Last week another accident occurred and the woman driver was screaming for help for someone to get her out of her car. I live close by and I see all these accidents and the constant screeching of brakes in near accidents and it appears that no one is doing anything about it. (Letter of John P. Ryan, September 25, 1994).

(R 185). Concerned citizens also urged their government representatives to press the necessity of a traffic signal where the accident occurred. County Executive Hon. Thomas

Harrison wrote “[i]t has come to my attention that a serious traffic problem exists on 56th Avenue at the ABCDs [sic] Shopping Center in Acme City.” Harrison urged the County to install a traffic signal:

On behalf of the residents of Acme City, we ask that your Department of Public Works investigate this area thoroughly to see if a traffic light can be installed at the ABCDs [sic] entrance. Although studies may have done previously which indicated there was no need for a light, a continuous problem in this area would indicate the need to re-evaluate this decision. We certainly hope a light can be installed before any further accidents happen.

(R 187). In response to the requests for action, the County explained its measures to improve the sight line for those exiting from the driveway. The County did not propose, nor undertake any steps to increase traffic gaps on 56th and, thereby, improve safety for those turning from westbound 56th **into** the ABCD’s driveway. (R 189, 190, 192). The County steadfastly refused the entreaties of citizens and officials to allow the Shopping Center to install a signal at its own expense.

In *Weiss*, this Court determined that the municipality was entitled to qualified immunity for its decision to set four-second clearance intervals for a traffic signal in the absence of changed circumstances **or accidents** requiring modification. *Weiss v. Fote*, 7 N.Y.2d 578, 588, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); *see also Gregorio v. City of N.Y.*, 246 A.D.2d 275, 677 N.Y.S.2d 119 (1st Dep’t 1998), *leave to appeal dismissed*, 93 N.Y.2d 917, 713 N.E.2d 414, 691 N.Y.S.2d 380 (1999) (concluding that history of three prior accident over an eighteen-month period, along with longstanding knowledge that barrier was unsafe raised material issue of fact regarding the City’s duty to take remedial

steps). Here, both citizen complaints and actual traffic accident reports indicated the difficulty in turning left from the westbound lane of 56th Avenue into the ABCD's driveway, as well as traffic congestion and inadequate traffic gaps up and down 56th Avenue that would have been remedied by a signal at 56th and the ABCD's driveway. Under the County's interpretation of the qualified immunity doctrine, counties could avoid liability for failing to post warning signs or traffic control devices on public roads that intersect with private, commercial driveways by requiring the business to finance a private study which it can reject with impunity despite the history of accidents at the intersection, both entering and exiting the private driveway. The IAS court properly rejected the County's position that it was entitled on this record to dismissal of the Complaint as a matter of law. (R 6-9).

3. Material Issues of Fact Exist Regarding Whether or Not the County's Failure to Install a Traffic Signal was Negligent in Light of ABCD's Offer to Pay for Installation of the Signal.

Finally, material issues of fact exist regarding whether the County's refusal to allow the installation of a traffic light at the intersection was reasonable in light of ABCD's offer to install the light at its own expense. (R 18, 189, 190, 192). In *Cruz v. City of New York*, 201 A.D.2d 606, 607 N.Y.S.2d 969 (2d Dep't 1994), the court concluded that the city was not entitled to qualified immunity for its failure to prepare a pedestrian path, although the city contended that its delay in repairing the path arose from a legitimate ordering of priorities in light of budgetary constraints. *Id.* at 607. But the court found the delay to be unreasonable in the absence of any evidence explaining the various budget constraints.

Likewise, here the County failed to offer any evidence explaining its refusal to allow installation of a traffic signal. The County's failure to install a traffic signal in this case is even more unreasonable and baffling, however, because it is undisputed that ABCD's offered to install the signal at its own expense. (R 143-44).

The merchants in the ABCD's Shopping Center were so concerned with the traffic congestion on 56th Avenue that they offered to pay for installing the traffic light. Incredibly, the County refused the offer. (R 143-44). Such a refusal, without any explanation why private funds were rejected to remedy a danger on a public road, raises issues of fact. The IAS Court properly refused the County's motion for summary judgment because a trier of fact could easily conclude that the County's refusal of ABCD's offer to install the light at its own expense had no reasonable basis.

B. Issues of Fact Regarding Proximate Causation Also Preclude Summary Judgment in the County's Favor.

The IAS court properly denied the County's motion for summary judgment because material issues of fact exist regarding proximate causation. Proximate cause is a question of fact for the jury where varying inferences are possible. *Mirand v. City of N. Y.*, 84 N.Y.2d 44, 51, 614 N.Y.S.2d 372, 637 N.E.2d 263 (1994). Competing evidence was offered of the contributing causes of injury in this case, and the County failed to show that, as a matter of law, that its failure to install a traffic signal was not the proximate cause of the accident. Despite the County's attempt to impugn the deceased by stating that Mr. Smith alone was responsible for his death and that of his wife, the Plaintiff offered an affidavit by

an accident reconstruction expert, concluding that Mr. Smith acted reasonably in turning left. (R 325). It would be difficult for a car stopped at an intersection, facing west to judge the speed of an oncoming car traveling eastbound. This may well explain the other accidents that happened at this intersection in exactly the same manner. There is additional evidence that Johnson was exceeding the 35 mph speed limit, and traveling between 41 and 52 mph before he struck the Smith vehicle. (R 325).

To defeat summary judgment, the Plaintiff was not required to conclusively prove who proximately caused the accident. *See Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980). In *Derdiarian*, this Court concluded that a variety of factors comes into play in determining proximate cause and that “it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established.” *Id.* at 315. To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury. *Nallon v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980), *citing* Restatement, Torts 2d, § 431. Although it is the plaintiff's burden to show that defendant's conduct was a substantial causative factor in the sequence of events that led to his injury,” the showing need not be made with “absolute certitude nor exclude every other possible cause of injury.” *See Nallon*, 50 N.Y.2d at 520; *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 N.Y.2d 203, 205, 225 N.E.2d 527, 278 N.Y.S.2d 826 (1967). “The existence of remote possibilities that factors

other than the negligence of the defendant may have caused the accident, does not require a holding that plaintiff has failed to make out a prima facie case. It is enough that he [or she] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred.” *Cornbrooks v. Terminal Barber Shops*, 282 N.Y. 217, 223, 26 N.E.2d 25 (1940). Here, a trier of fact could have reasonably inferred that if the County had installed a traffic light, that Mr. Smith would not have misjudged the traffic gaps, Johnson would not have sped through the intersection, the Smith vehicle would not have been struck, and Mr. and Mrs. Smith would not have died as a result. *See Ernest v. Red Creek Centr. Sch. Dist.*, 93 N.Y.2d 664, 717 N.E.2d 690, 695 N.Y.S.2d 531 (1999) (concluding that a triable issue of fact existed precluding summary judgment where “a jury could infer that, had the sidewalk been extended to a point opposite the school driveway, students walking home would have crossed the roadway there” avoiding the danger of being struck by a car). Thus, under well-settled standards, the Plaintiff established a prima facie case of causation if he presented facts from which causation may be reasonably inferred.

CONCLUSION

For the foregoing reasons, the order of the Appellate Division, Eighth Department dated October 10, 20xx, should be reversed, and the complaint reinstated against the County of Acme, together with costs and such other and further relief to the Plaintiff as this Court deems just and proper.

Dated: Acme City, New York
March 27, 20xx

Respectfully Submitted,