

130 A.D.2d 481, 515 N.Y.S.2d 64
(Cite as: 130 A.D.2d 481, 515 N.Y.S.2d 64)

FIND Request: 130 A.D.2d 481

Supreme Court, Appellate Division, Second Department, New York.
Ellyn SCHUSTER, Respondent,

v.

The TOWN OF HEMPSTEAD, et al., Appellants,
Patricia Cook, Defendant-Respondent. (Action No. 1)
Patricia COOK, Respondent,

v.

The TOWN OF HEMPSTEAD, et al., Appellants.
(Action No. 2) (and a third-party title and another title)

May 4, 1987.

In negligence actions to recover damages for personal injuries sustained in highway accident, the Supreme Court, Nassau County, Roncallo, J., entered judgment on jury verdict finding that town was 90% at fault and contractor 10% at fault in one action, and entered judgment against contractor in other action, and town and contractor appealed. The Supreme Court, Appellate Division, held that: (1) written notice of highway defect alleged to have caused accident was sufficient; (2) plaintiffs established prima facie case against town for damages for injuries sustained by reason of defective highway; (3) issue of whether contractor with maintenance responsibility on highway where accident occurred was negligent was for jury; and (4) photographs of accident site taken day after accident were admissible.

Affirmed.

West Headnotes

[1] Automobiles 48A ↪272

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak272 k. Notice of Defects or Obstructions. Most Cited Cases
(Formerly 48Ak273)

Prior written notice of alleged defect, required to maintain action against town for injuries sustained by reason of defective, unsafe or out-of-repair highway, need not emanate from private citizen.

[2] Automobiles 48A ↪272

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak272 k. Notice of Defects or Obstructions. Most Cited Cases

(Formerly 48Ak273)

Written notice of highway defect alleged to have caused accident was sufficient.

[3] Automobiles 48A ↪306(4)

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak306 Weight and Sufficiency of Evidence

48Ak306(4) k. Condition of Way. Most Cited Cases

Plaintiffs established prima facie case against town for damages for injuries sustained by reason of defective highway.

[4] Automobiles 48A ↪308(9)

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak308 Questions for Jury

48Ak308(9) k. Negligence of Contractors, Public Utilities, and Others. Most Cited Cases

Issue of whether contractor with maintenance responsibility on highway where accident occurred was

130 A.D.2d 481, 515 N.Y.S.2d 64
(Cite as: 130 A.D.2d 481, 515 N.Y.S.2d 64)

negligent was for jury.

[5] Evidence 157 359(1)

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k359 Photographs and Other Pictures;
Sound Records and Pictures

157k359(1) k. Photographs in General.

Most Cited Cases

Photographs of accident site taken day after accident were admissible, based on witness' testimony that those photographs accurately depicted condition of roadway immediately after accident, with certain minor exceptions.

[6] Appeal and Error 30 1050.1(11)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1050 Prejudicial Effect in General

30k1050.1 Evidence in General

30k1050.1(8) Particular Types of

Evidence

30k1050.1(11) k. Document-
ary Evidence; Photographs. Most Cited Cases

Appearance of driver of car in which plaintiff was a passenger in photographs was not prejudicial, absent contention that verdict as to damages was excessive.

****65 Rivkin, Radler, Dunne & Bayh, Uniondale** (Edward J. Hart, Frank L. Amoroso, David P. Franks and Thomas M. Gandolfo, of counsel), for appellant Town of Hempstead.

James G. Barron (White, Fleischer & Fino, New York City [John Mulcahy] of counsel), for appellant Strata Land Developers, Inc.

Natiss Ferenzo & Barrocas, P.C., Roslyn Heights (Andre L. Ferenzo and Nicholas P. Sarandis, of counsel), for respondent Ellyn Schuster.

Before BROWN, J.P., and NIEHOFF, SULLIVAN

and HARWOOD, JJ.

MEMORANDUM BY THE COURT.

In jointly tried negligence actions to recover damages for personal injuries, (1) the defendants Town of Hempstead and Strata Land Developers, Inc., separately appeal, as limited by their briefs, from so much of a judgment of the Supreme Court, Nassau County (Roncallo, J.), dated August 1, 1985 and entered in Action No. 1, which, upon a jury finding that the defendant Town of Hempstead was 90% at fault and the defendant Strata Land Developers, Inc., was 10% at fault in the happening of the accident, is in favor of the plaintiff in Action No. 1 and against them in the principal sum of \$65,000; and (2) Strata Land Developers, Inc., appeals from so much of a judgment of the same court, dated August 26, 1985 and entered in Action No. 2, as is in favor of the plaintiff in action No. 2 and against it in the principal sum of \$3,500.

ORDERED that the judgments are affirmed insofar as appealed from, with one bill of costs.

[1][2] The Town of Hempstead has the right to require prior written notice of an alleged defect as a condition precedent to the plaintiffs maintaining an action against it for injuries sustained by reason of a defective, unsafe or out-of-repair highway (*see*, Hempstead Town Code § 6-1; *Zigman v. Town of Hempstead*, 120 A.D.2d 520, 501 N.Y.S.2d 718). However, the town's contention on appeal that such prior written notice must emanate from a private citizen is meritless (*see*, *Brooks v. City of Binghamton*, 55 A.D.2d 482, 390 N.Y.S.2d 693; *Scherm v. Town of N. Hempstead*, 45 A.D.2d 886, 358 N.Y.S.2d 162, appeal dismissed 36 N.Y.2d 841, 370 N.Y.S.2d 910, 331 N.E.2d 689; *Ostermeier v. Victorian House*, 126 Misc.2d 46, 480 N.Y.S.2d 1000; *Matter of Big Apple Pothole & Sidewalk Protection Committee v. Ameruso*, 110 Misc.2d 688, 442 N.Y.S.2d 860), as is its contention that the written notice relied upon by the plaintiffs lacked sufficient particularity. Prior notice provisions must be strictly construed against the town (*see*, *Doremus v. Incorporated Vil. of Lynbrook*, 18 N.Y.2d 362, 275 N.Y.S.2d 505, 222 N.E.2d 376), and Hempstead Town Code § 6-1 does not provide any basis for differentiating between the degree of specificity required in the notice depending on the source of the notice. The defect alleged to have caused the accident in this case fell well within the scope of the

130 A.D.2d 481, 515 N.Y.S.2d 64
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defective conditions reported in the written notice relied upon by the plaintiffs, and said notice should certainly have brought the defective condition at issue to the attention of the Commissioner of the Town Highway Department (*see, Brooks v. City of Binghamton, supra; cf. *483Leary v. City of Rochester, 115 A.D.2d 260, 496 N.Y.S.2d 169, aff'd. 67 N.Y.2d 866, 501 N.Y.S.2d 663, 492 N.E.2d 791; Holt v. County of Tioga, 95 A.D.2d 934, 464 N.Y.S.2d 278, appeal dismissed 60 N.Y.2d 701, 468 N.Y.S.2d 1028, 455 N.E.2d 1268*).

130 A.D.2d 481, 515 N.Y.S.2d 64

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[3][4] Contrary to the appellants' assertions, the plaintiffs in both actions succeeded in establishing a prima facie case, and any inconsistencies in the testimony of the plaintiffs in both actions presented factual issues for the jury, the resolution of which this court will not lightly disturb (*see, Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S.2d 184*). Similarly, the defendant town established that Strata Land Developers, Inc., a contractor, had, pursuant to its contract**66 with the town, certain maintenance responsibilities at the location where the accident occurred at the time when it occurred, and the issue of whether or not Strata was negligent in its failure to comply with those obligations was properly left to the jury.

[5][6] Lastly, we note that photographs of the accident site which were taken the day after the accident were not erroneously admitted into evidence, as the plaintiff in Action No. 2, Patricia Cook, stated that those photographs accurately depicted the condition of the roadway immediately after the accident, with certain minor exceptions, and there was no evidence that the road's condition was altered by reason of the accident (*see, Batton v. Elghanayan, 43 N.Y.2d 898, 403 N.Y.S.2d 717, 374 N.E.2d 611; Catanese v. Quinn, 29 A.D.2d 675, 287 N.Y.S.2d 619; Isler v. Starke, 18 A.D.2d 1027, 239 N.Y.S.2d 51*). Proper limiting instructions were given by the court. That the photographs show a barricade type device over the manhole would only be cumulative of the existence of a defect that was well documented in the evidence. The defendants do not contend that the verdict as to damages was excessive, so the appearance of Patricia Cook, the driver of the car in which Ellyn Schuster was a passenger, in the photographs was not prejudicial.

N.Y.A.D. 2 Dept., 1987.
 Schuster v. Town of Hempstead