

2015 WL 4744439
Supreme Court, Appellate Division, Second Department, New York.

George H. **LEICHT**, plaintiff-respondent,
v.
CITY OF NEW YORK DEPARTMENT OF SANITATION, defendant, Mack Trucks, Inc., defendant third-party plaintiff-appellant-respondent; Truis, Inc., et al., third-party defendants-respondents-appellants.

Aug. 12, 2015.

Synopsis

Background: **Sanitation** truck driver, who was injured when he swerved to avoid hitting a child and struck an elevated train support pillar, brought action against city and truck manufacturer, seeking to recover damages for negligence and strict products liability for design defect and failure to warn. Manufacturer filed third-party complaint against distributor and manufacturer of truck's bumper assembly. The Supreme Court, Kings County, [Landicino](#), J., denied manufacturer's motion for summary judgment and third-party defendants' motions for summary judgment. Manufacturer and third-party defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] driver's expert was not qualified to testify as to truck's alleged defect, and

[2] expert's affidavit was speculative and conclusory.

Reversed.

West Headnotes (3)

[1]	Evidence Machinery and Mechanical Devices and Appliances
	Engineer was not qualified to give expert testimony in personal injury action as to whether sanitation truck that was involved in collision, which resulted in injuries to its driver, was defectively designed or manufactured, since expert failed to show that he had any practical experience with, or personal knowledge of, the particular vehicle or class of vehicle at issue. Cases that cite this headnote

[2]	Evidence Knowledge, Experience, and Skill in General
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	An expert is qualified to proffer an opinion if he or she is possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable. Cases that cite this headnote
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[3]	Judgment Matters of Fact or Conclusions
	Summary judgment affidavit submitted by sanitation truck driver's expert, which attributed accident in which driver sustained injuries to truck's defective design, lack of safety devices, and failure to warn, was speculative and conclusory, and thus insufficient to raise triable issue of fact as to whether truck was defectively designed or manufactured, so as to preclude summary judgment in manufacturer's favor in driver's action seeking to recover damages for negligence and strict products liability for design defect and failure to warn. Cases that cite this headnote

Attorneys and Law Firms

Maimone & Associates, PLLC, Port Washington, N.Y. ([Thomas J. Maimone](#) of counsel), for defendant third-party plaintiff-appellant-respondent.

Goldberg Segalla, LLP, New York, N.Y. (Brendan T. Fitzgerald, [Emilio F. Grillo](#), and [Steven C. Capobianco](#) of counsel), for third-party defendant-respondent-appellant Wausau Equipment Company, Inc.

Meyer, Suozzi, English & Klein, P.C., Garden City, N.Y. ([Andrew J. Turro](#) and [Jay A. Wechsler](#) of counsel), for plaintiff-respondent.

[WILLIAM F. MASTRO](#), J.P., [LEONARD B. AUSTIN](#), [SANDRA L. SGROI](#), and [BETSY BARROS](#), JJ.

Opinion

*1 In an action to recover damages for personal injuries, the defendant third-party plaintiff, Mack Truck, Inc., appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Landicino, J.), dated July 10, 2013, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the third-party defendants, Truis, Inc., and Wausau Equipment Company, Inc., separately cross-appeal, as limited by their respective briefs, from so much of the same order as denied their separate motions for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against each of them.

ORDERED that the order is reversed insofar as appealed and cross-appealed from, on the law, with one bill of costs payable to the defendant third-party plaintiff by the plaintiff, and one bill of costs payable to the third-party defendants by the defendant third-party plaintiff, the motion of the defendant third-party plaintiff for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted, and the separate motions of the third-party defendants for summary judgment dismissing the third-party complaint and all cross claims insofar as asserted against each of them is granted.

The plaintiff drove a **sanitation** truck, a Class 8 heavy duty vehicle manufactured by the defendant third-party plaintiff, Mack Trucks, Inc. (hereinafter Mack), for the defendant **City of New York Department of Sanitation** (hereinafter the City). On May 17, 2006, while driving the subject vehicle on Wilson Avenue in Brooklyn and traveling between 15 and 20 miles per hour, the plaintiff saw a child run in front of the vehicle. To avoid hitting the child, he turned the vehicle's steering wheel to the left as hard as he could, causing the vehicle to strike an elevated train support pillar. As a result of the collision, the plaintiff's lower left leg was pinned in the vehicle and crushed, necessitating a below-the-knee amputation.

The plaintiff commenced this action against, among others, Mack, seeking to recover damages, inter alia, for negligence and strict products liability for design defect and failure to warn. Mack commenced a third-party action against Truis, Inc. (hereinafter Truis), and Wausau Equipment Company, Inc. (hereinafter Wausau), the distributor and manufacturer, respectively, of the vehicle's bumper assembly.

[1] [2] [3] The Supreme Court should have granted Mack's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. In response to Mack's prima facie showing of its entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact. Although the plaintiff submitted an expert affidavit from an engineer, the expert failed to establish that he was qualified to render an opinion as to the alleged defective design of the Class 8 heavy duty vehicle. An expert is qualified to proffer an opinion if he or she is "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" (*Matott v. Ward*, 48 N.Y.2d 455, 459, 423 N.Y.S.2d 645, 399 N.E.2d 532; see *O'Boy v. Motor Coach Indus., Inc.*, 39 A.D.3d 512, 513–514, 834 N.Y.S.2d 231; *Miele v. American Tobacco Co.*, 2 A.D.3d 799, 802, 770 N.Y.S.2d 386; *Hofmann v. Toys "R" Us, N.Y. Ltd. Partnership*, 272 A.D.2d 296, 296). Here, the expert failed to present evidence that he had any practical experience with, or personal knowledge of, the vehicle at issue, and the expert also failed to demonstrate such personal knowledge or experience with the design or manufacture of Class 8 heavy duty vehicles in general (see *Rosen v. Tanning Loft*, 16 A.D.3d 480, 481, 791 N.Y.S.2d 641; *Martinez v. Roberts Consol. Indus.*, 299 A.D.2d 399, 399–400, 749 N.Y.S.2d 279; *Hofmann v. Toys "R" Us, N.Y. Ltd. Partnership*, 272 A.D.2d at 296; *Merritt v. Raven Co.*, 271 A.D.2d 859, 862, 706 N.Y.S.2d 233). Moreover, the expert's affidavit, attributing the accident to the defective design of the vehicle, the lack of certain safety devices in the vehicle, and the failure to warn that injury could potentially occur as a result of a head-on collision, was speculative and conclusory and, therefore, insufficient to raise a triable issue of fact (see *Poelker v. Swan Lake Golf Corp.*, 71 A.D.3d 857, 897 N.Y.S.2d 174).

*2 In light of our determination that Mack was entitled to summary judgment dismissing the complaint and all cross claims insofar as asserted against it, the third-party complaint and all cross claims asserted against Truis and Wausau must be dismissed (see *Gdanski v. 5822 Broadway Assoc., LLC*, 116 A.D.3d 658, 983 N.Y.S.2d 79; *DePascale v. E & A Constr. Corp.*, 74 A.D.3d 1128, 1131, 904 N.Y.S.2d 109; *Neidhart v. K.T. Brake & Spring Co.*, 55 A.D.3d 887, 889, 866 N.Y.S.2d 352).

All Citations

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