

STATE OF NEW YORK COURT OF CLAIMS

**MARGGIE BATISTA, an infant by her mother
and natural guardian, RAQUEL ANTIGUA,**

Claimant,

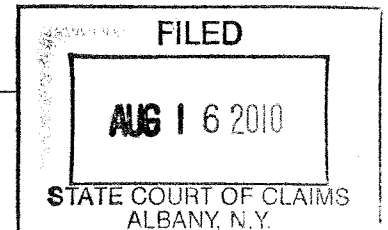
DECISION

-v-

STATE OF NEW YORK,

Claim No. 113299

Defendant.



BEFORE:

HON. FAVIOLA A. SOTO
Judge of the Court of Claims

APPEARANCES:

For Claimant:
Massimo & Panetta, P.C.
By: Frank Panetta, Esq.

For Defendant:
Hon. Andrew M. Cuomo, Attorney General
By: Robert Schwerdt, AAG

This claim, seeking compensation for the injuries sustained by the infant claimant Marggie Batista as a result of a motorcycle accident, was tried before me, on liability only, on April 19, 21 and 22, 2010. The Court received post-trial submissions and, on June 10, 2010, the official transcript. At the trial, Edwin Martinez and Frederick Williams, accompanied by their respective attorneys, Joseph and Ana Serra, Sergeant Jerome Bacchi, claimant's expert Robert T. Hintersteiner, P.E., defendant's expert Bruce Savik, P.E., and Richard Stempel, P.E. an engineer with the New York State Department of Transportation, testified. The Court was

advised that the infant claimant has no memory of the accident, apparently as a result of her injuries, and therefore was not called as a witness at this trial.

This Court finds that defendant State of New York (State) is 100% liable for the injuries sustained by the infant claimant as a result of its breach of its nondelegable duty to maintain its roadways in a reasonably safe condition, which breach proximately caused the accident and claimant's injuries.

Facts

On September 11, 2005 at approximately 8:55 p.m., on a clear and dry Sunday, the motorcycle carrying the infant claimant and driven by Frederick Williams was hit by another motorist, Edwin Martinez. The accident occurred on the Grand Central Parkway (GCP) in the eastbound acceleration lane (also known as an exit ramp/lane or a merge lane) exiting the Mobil gas station located on the center median of the GCP. Also involved in the accident was an unidentified motorist.

The GCP is a six-lane highway, with three eastbound and three westbound lanes, and extends from Queens County to the Nassau County line. It originally was constructed by the State and is owned by the State. Maintenance of the GCP as well as police jurisdiction were transferred to the City of New York (City).

The accident occurred on the eastbound side between 188th Street (Exit 19) and Francis Lewis Boulevard (Exit 20) which exits on the right side on the acceleration lane, leaving the Mobil gas station. The gas station is located on a middle island between the west and eastbound lanes. There is an eastbound entrance ramp (deceleration lane) to the gas station and an acceleration ramp exiting the gas station which merges into the left lane of traffic. This section

of the highway was constructed by the State in 1961, and, as constructed, the acceleration lane measured 1,100 feet. An acceleration lane is built to allow cars to accelerate to reach the highway speed and merge safely into the adjacent moving traffic.

On April 4, 1964 the New York City Department of Traffic (NYCDOT) developed a Striping Plan for this acceleration lane and subsequently painted a channelized island, which was created by painting white hatch marks on the pavement (also called striping), to protect a police turnaround area. This reduced the acceleration lane to 420 feet. A yield sign is the only signage in this area.

On the day of the accident Frederick Williams was traveling on the GCP returning home from Washington Heights to Hempstead, Long Island, after riding with his motorcycle club. He was accompanied by ten other motorcycle drivers. Mr. Williams was a licensed motorcycle driver for over twenty years. He was driving a Suzuki "Jixter" 1000 Motorcycle. The infant claimant, Marggie Batista, his girlfriend's daughter, was riding in the back as his passenger, and both driver and passenger were wearing helmets. He and another driver stopped at the Mobil gas station to wait for another biker who had fallen behind. Mr. Williams waited on the right side and the other driver was on the left. They stopped at the beginning of the acceleration lane just before the yield sign. Mr. Williams then saw a cream-colored Toyota ahead of him in the acceleration lane, "trying to wedge its way into the left lane", hesitating, and pressing the brakes on and off in order to exit. After being stopped for 3 to 5 seconds he heard a big bang and looked back and saw a black vehicle. The next thing he remembers is waking up in the hospital.

The driver of the black vehicle, a 1997 SUV Nissan Pathfinder, was Edwin Martinez. Mr. Martinez was driving eastbound on the GCP. He had left a bar in Rockland County after

watching a Giants' game for approximately four hours, where he had consumed several beers. He had been driving for a half-hour prior to the accident and had traversed several bridges and tolls, and was on his way home to Long Island. In the area before the acceleration lane exiting the gas station, the vehicle in front of him slammed on its brakes as a result of a car darting out of the acceleration lane just before the striping marks entering the left lane. To avoid hitting the car in front of him, Mr. Martinez, in response, hit his brakes and moved to the left, entered the acceleration lane and hit Mr. Williams' motorcycle dead center. After contact, his SUV came to a stop past the channelized island at the end of the acceleration lane, leaving a 500 foot debris trail.

After the accident, Mr. Martinez exited his vehicle and spoke to Joseph and Ana Serra, whose vehicle had stopped behind his SUV. When the police arrived, Mr. Martinez told them that he had been drinking. He was placed under arrest and was found to have a blood alcohol level of .12. He pleaded guilty to VTL §1192.2 and was sentenced to a fine, 30 days in jail and three years probation, and a suspension of his driver's license.

Joseph Serra, the driver, and his wife Ana also were traveling eastbound on the GCP. They had left the Bronx that evening and were on their way home to Floral Park. They had been driving behind Mr. Martinez in the center lane, traveling at highway speed for several miles before the accident. Both were traveling 50 - 60 miles per hour. He did not see Mr. Martinez driving erratically. According to Mr. Serra, Mr. Martinez's vehicle was cut off by another driver in a lighter colored car who pulled out of the acceleration lane very abruptly, into the path of Mr. Martinez, cutting off the SUV. At the time of the impact Mr. Serra did not see the motorcycle, but he did see a body in the air and sparks flying, and saw Mr. Martinez's vehicle finally coming to rest at the end of the acceleration lane near the hatch marks.

Mr. Serra, being a good samaritan, pulled over and, from his car, saw Mr. Martinez exit his SUV to inquire if he and his wife were fine. Mr. and Mrs. Serra did not smell alcohol on Mr. Martinez's breath and did not see any evidence of his intoxication. They had no idea that Mr. Martinez was intoxicated, did not discern any erratic pattern in his movements, and did not detect any slurring of words or alcohol on his breath.

Police Officer Jerome Bacchi was the first officer to arrive at the scene. He was traveling on the GCP back to his base after working a detail at the U.S. Open, and was driving a marked pickup truck. As he parked in the acceleration lane, he saw the victims lying on the ground, and saw Mr. Martinez's SUV located at the end of the acceleration lane.

From information obtained from Mr. Serra, Officer Bacchi's police report states as follows:

“VEH[ICLE] 1 [the SUV] was traveling in the left lane when an uninvolved vehicle cut in front of VEH 1. The operator of VEH 1 swerved to the left to avoid that vehicle. VEH 1 collided into the rear of VEH 2 [the motorcycle) which was traveling in the left acceleration lane from the Mobil Gas Station on the center median. Both riders of VEH 2 were ejected off the motorcycle.”

In 2009, the New York State Department of Transportation (State DOT) had milled and resurfaced the lanes of traffic of the GCP, but did not include this acceleration lane. In preparation for this project the State DOT prepared a Draft Design Report, which appears undated, and a Final Design Report, dated July 1999. These reports specifically reference the GCP eastbound lane at the Service Area. The Final Design Report states:

“Eastbound Roadway”

“Particularly troublesome reference markers along the eastbound roadway, in order of priority, are summarized below:

X5M13112-G.C.P. Eastbound At the Median Service Area

The very high accident rate, which is four times that of the state average, appears to be attributable to the tight reverse curve geometry of the roadway, the left lane exit to the service area coupled with the right lane exit to Francis Lewis Blvd., slippery pavement conditions, and stoppages during peak hour conditions. Advance signing, indicating lane assignments, is not provided, and many vehicles change lanes abruptly for both left and right lane exits, resulting in frequent collisions. High wet-weather accident rates appear to indicate pavement friction and super-elevation deficiencies.”

The Final Design Report included an Accident Analysis and stated the following for Eastbound at Service Area:

“ Specific Level A improvements recommended for ramps are summarized in Table 9 on page 74 in Chapter V, which states

Ramp from the Service Area to the Grand Central Parkway eastbound:

- Non-standard shoulder widths.
- Non-standard crest curves along the mainline.
- Non-conforming acceleration lane and taper lengths due to striping for police turnaround.
- Non-conforming guide rail.
- Dense tree canopy reduces lighting effectiveness.
- Evidence of transverse pavement joint spalling and cracking.”

It is clear that the State had inspected the area and had notice that its roadway had been redesigned, that the acceleration lane had been shortened and that this was a high accident location.

It is undisputed by both experts and Richard Stempel, an engineer with the State DOT, that this acceleration lane was of an insufficient length and did not meet the appropriate industry standard. The State's expert agreed with claimant's expert that the "striping shouldn't be there" and Mr. Stempel even added that "in order to avoid an accident you should drive over the hatch marks".

The American Association of State Highway and Transportation Officials (AASHTO), which publishes guidelines for safe highway construction, and is considered the industry standard, states that a safe ramp length for this left exit ramp is 660 for merging traffic at 50 miles an hour and 1,100 feet for merging traffic at 60 miles an hour. The AASHTO standards, published in 1957, remain applicable. Both experts opined that based on the standards and taking the actual speed of traffic into account, 1,100 feet is the appropriate length for the acceleration lane, although Mr. Savik opined that 660 feet is the appropriate length for the acceleration lane. On this issue, while the Court overall found the testimony of both experts and Mr. Stempel credible, I find, on this conflicting testimony, the testimony of Mr. Hintersteiner and Mr. Stempel more persuasive, and find that this acceleration lane should be 1,100 feet long.

Mr. Savik, the State's expert, inspected the scene of the accident and testified that the State's original design, planning and construction of the acceleration lane complied and conformed with the standards and regulations that were in place at that time. Mr. Hintersteiner, claimant's expert, agrees as to the original acceleration lane. But both Mr. Savik and Mr. Hintersteiner agree that the length of the acceleration lane was interrupted by the striping marks placed by the City by the channelized island. Mr. Savik stated that the "striping shouldn't be there", and that this had "redesigned the acceleration lane".

The Court finds that the shortened acceleration lane prevents cars from building enough speed to safely enter the left lane, and constitutes a dangerous condition.

Applicable Law and Discussion

Claimant argues that the State has an absolute and nondelegable duty to maintain its roadways in a reasonably safe condition and its failure to do so was the proximate cause of injuries to the infant claimant.

Claimant also argues that the State violated its continuing duty to reevaluate the roadway in light of the roadway's actual operation and implemented changes, and that regardless of which entity redesigned the roadway, the State had an obligation to maintain its roadways in a reasonably safe condition for the benefit of the traveling public and failed to do so.

The State argues that as it is not disputed that when it planned, designed and constructed the roadway it did so in compliance with industry standards in place at the time, and as it was the City that shortened the length of the acceleration lane, it is not liable here.

The State further argues that the acceleration lane is not a dangerous condition, and that the prudent thing to do was to drive over the hatch marks and thus avoid a potential accident. Additionally, the State argues that the reduction in length of the acceleration lane was not the proximate cause of the accident. It contends that the accident was the result of the unknown driver's failure to yield, the motorcycle driver's stopping where he did, or Mr. Martinez's intoxication.

Conclusion

The State of New York has a nondelegable duty to maintain its roadways in a reasonably safe condition, and breach of this duty will result in liability to the State for injuries caused thereby. *Friedman v State of New York*, 67 NY2d 271.

The State is not an insurer of the safety of its roadways, however, and the mere fact that an accident occurred does not render the State liable. *See Tomassi v Town of Union*, 46 NY2d 91; *Brooks v New York State Thruway Auth.*, 73 AD2d 767, *affd* 51 NY2d 892. To establish that the State is liable for a claimant's injuries, there must be proof that the State created a dangerous condition or had actual or constructive notice of a dangerous condition, that it failed to properly act to remedy the condition or warn of the danger, and that such failure was a proximate cause of the claimant's injuries. *See Brooks*, 73 AD2d 767, *affd* 51 NY2d 892; *Bernstein v City of New York*, 69 NY2d 1020; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *Wingerter v State of New York*, 79 AD2d 817, *affd* 58 NY2d 848.

The State's expert states and the Court finds that the striping placed by NYCDOT on the exit ramp shortened and redesigned the acceleration lane and that the acceleration lane does not meet industry standards.

Here, the condition of this acceleration lane clearly departed from the standards of the AASHTO Design Manual, and the State, which had notice and time to remedy the dangerous condition, failed to do so.

While this highway was designed and constructed based on an adequate plan, the City altered and redesigned this area of the highway in violation of industry standards, thus creating a dangerous condition by the improper diminution of the length of the acceleration lane and the

resulting unsafe entry of vehicles onto the GCP before the vehicles had the opportunity to accelerate to reach highway speed and to merge safely into the adjacent moving traffic.

Contrary to the State's assertions, the claimant demonstrated that the State's breach of its nondelegable duty proximately caused the accident and injuries. The Court finds that the State did not demonstrate here that Mr. Martinez's alleged negligence caused the accident. Mr. Martinez was faced with an emergency and acted without an opportunity to consider the alternatives. He was facing a sudden condition which he could not have anticipated and his response was reasonable.

The Court also finds nothing in this record to support the contention of Mr. Martinez's negligence. Although he had consumed alcohol, there is no evidence that it was the proximate cause of the accident. He had operated the car safely for a period of time and did not exhibit any signs of intoxication. Nor has the State demonstrated here that the other factors it lists proximately caused the accident.

Claimant demonstrated here, beyond a preponderance of the evidence, that the State had notice of this dangerous condition, that the State failed its non-delegable duty to maintain the highway in a reasonably safe condition and that the State's breach of its duty was a proximate cause of the accident.

As a result of the foregoing, the Court finds that defendant is 100% liable for claimant's injuries. Trial on the issue of damages will be scheduled as soon as practicable. Any motions not previously decided are denied.

A conference is scheduled for October 18, 2010, promptly at 10:00 a.m., to schedule

discovery on damages and the damages trial.

Let Interlocutory Judgment be entered accordingly.

New York, New York
July 19, 2010



FAVIOLA A. SOTO
Judge of the Court of Claims