

STATE OF NEW YORK COURT OF CLAIMS

VINCENZO PALUMBO,

Claimant,

DECISION

-V-

**THE STATE OF NEW YORK,
Defendant**

Claim No.: 90713

**BEFORE: HON. TERRY JANE RUDERMAN
 Judge of the Court of Claims**

**APPEARANCES: For Claimant:
 EDWIN N. WEIDMAN, ESQ.**

**For Defendant:
 HON. ELIOT SPITZER
 Attorney General for the State of New York
 By- Michael Rosas, Assistant Attorney General
 Richard Lombardo, Assistant Attorney General**

Claimant seeks damages for the injuries he allegedly, sustained on October 23, 1994, when he was driving his Kawasaki motorcycle northbound on Route 121 in Westchester County and lost control, colliding with an oncoming southbound minivan. Claimant contends that there were potholes and cracks in the pavement that caused him to lose control of his motorcycle. Defendant disputes claimant's description of the roadway and maintains that claimant's driving in excess of the 25 mph speed advisory sign was the sole proximate cause of his accident. The trial of this claim was bifurcated and this Decision pertains solely to the issue of liability.

Route 121 is a winding, curving road with one northbound and one southbound lane separated by a double yellow line. The road was scheduled for resurfacing pursuant to Contract No.

D256275 dated August 29, 1994; however, as of the date of claimant's accident, the road had not been resurfaced. The Engineer's Daily Project Diary indicates that paving operations began on October 24, 1994, a day after claimant's accident. Claimant's color photographs (Exs. 2-5) depict a series of potholes and white hash lines that are not evident in the black and white police photographs (Exs. K, O, P) taken on October 23, 1994, the day of claimant's accident. It was undisputed that white hash lines are indicative of some construction activity; however, there was no evidence describing the nature of the construction activity undertaken in the interval between the two photographs.

Claimant testified that, at approximately 10:00 a.m. on October 23, 1994, he was, driving his motorcycle northbound on Route 121 following behind two other motorcyclists. Claimant stated that he was unfamiliar with the road because he had never driven on Route 121. After traveling on Route 121 for 20 minutes, claimant approached a right curve with a 25 mph advisory speed sign. Claimant testified that he reduced his speed to 40 mph as he traveled into the curve. He stated that his rear wheel hit a pothole and he lost his balance. Claimant proceeded across the road and into the oncoming traffic. Claimant lost consciousness.

Claimant's testimony had several inconsistencies. Claimant identified the potholes on exhibit 2 as illustrative of those he had observed before losing control of his motorcycle. On cross-examination, however, claimant stated that he had not observed the potholes and did not know what had caused his rear wheel to leave the roadway (T:43-44). At trial, he testified that his speed, one mile prior to the accident, was "[l]ike 40, 50.40." (T:54). He denied the possibility that he could

have been traveling at a speed of 60 mph (T:54). At his EBT, however, he stated that his speed, one mile prior to the accident, was 40 to 60 mph (T:55-56). At trial, he testified that his speed within a half mile of the accident was "about 40 mph" (T:57); however at his examination before trial ("EBT"), he said that his speed at that location was 50 to 55 mph (T:57). Claimant conceded at trial that he could have been traveling 50 to 55 mph (T:57). At trial, he did not recall seeing a right arrow sign before the curve; at his EBT, he testified that he did see the sign (T:58). Furthermore, he stated at trial that, after observing a curve warning sign, he applied both brakes and slowed to 40 mph; at his EBT, he maintained that he applied only his front brakes and that he did so lightly (T:61-62, 64, 66-67).

Eric Lecoq, claimant's friend who was driving behind claimant, testified that he observed claimant's rear wheel pop up, followed by a period of struggling, culminating in claimant proceeding across the double yellow line and hitting an oncoming minivan. Lecoq described the roadway as having a channel of potholes ranging from three to five inches deep and five to 20 inches wide. Lecoq testified that he and VanIngen, the lead motorcyclist in their group, returned to the scene the next day. Lecoq stated that they photographed rulers inside the potholes to demonstrate the depth of the potholes, however, none of the photographs in evidence depicted rulers. When asked on cross-examination about such photographs, Lecoq responded, I know I took some pictures, but I don't know if all of them came out good, so what we have must be what we have" (T: 15 5).

Cross-examination revealed that Lecoq's trial testimony differed from his two prior written statements (Exs. N, 12) and his EBT testimony. Lecoq attempted to rationalize these inconsistencies by stating, "[f]or all the technical stuff, what I said that day probably will be the most accurate thing because that was really sooner than it is now" (T: 101). For example, Lecoq testified

at trial that he was traveling at a distance of 20 to 30 feet behind claimant as they approached the curve where the accident occurred (T:77-78, 100). At his EBT, he testified that the distance was 40 to 60 feet (T: 100- 102). At trial, he stated that it could not have been 60 feet (T: 101 - 102). In his written statement, he recorded the distance as 200 feet (Ex. 12). Lecoq conceded that he was confused and then estimated the distance to be 60 to 200 feet (T: 112-114). .

At trial, Lecoq testified that he observed claimant's wheel strike a pothole (T: 116). At his EBT, he testified that he did not "especially focus on the person driving in front of [him]. What made me focus is when suddenly [claimant's] wheel went up" (T: 117-118). At trial, Lecoq admitted that he did not see what claimant struck before his rear wheel lifted (T: 119-120).

Lecoq testified that claimant's rear wheel "made a slight jump up' off the road approximately five inches (T:79, 94, 143). However, at his EBT, Lecoq stated the rear wheel lifted 10 to 18 inches (T: 144). Additionally, in his written statement dated October 23, 1994, Lecoq described the lift as "tiny"(Ex. N). At trial, Lecoq said, "it's a total of five, twenty inches, to me it's still tiny but I guess it's not so tiny indeed" (T: 146).

At trial, Lecoq described the roadway condition as a series of potholes. In his written statement, Lecoq described the alleged defect as a "cold patch * * * about the entire length of the curve and one inch in height and irregular in its surface" (Ex. 12, p. 3). There is no reference to any potholes in the written statement.

When asked, on cross-examination, whether the photographs (Exs. 2-5) were taken a day after the accident, Lecoq was not sure (T:85). He was then confronted with his EBT testimony that the photographs were taken within a week and a half of the accident (T:86). Lecoq then stated

that they were taken "immediately after" (T:86). Later, he conceded he did not know when they were taken (T: 15 5).

Judson VanIngen, who was employed as a police officer in Greenwich, Connecticut, testified that on October 23, 1994 he led four motorcyclists, including claimant, who were traveling together. VanIngen drove through the accident site prior to claimant, without incident, at a speed of approximately 50 mph. When asked if he had any difficulty passing through the area, he could not recall. He did not, however, observe any dangerous condition and did not stop to warn the others behind him about any possible danger.

VanIngen testified that he returned to the scene, either the next day or the day after the accident, to take photographs (Exs. 2-5). He further stated that he took measurements of the holes, but did not record the results. VanIngen also prepared a written statement about the accident (Ex. Q). In this statement, there is no indication that he observed any potholes. Instead, VanIngen refers to numerous patches "which appeared to be newly put down black asphalt. It appeared that the road was under repair or about to be repaired" (Ex. Q, p.1). He described a "cold patch" the length of the curve, about a foot in width and irregular in depth from one to two inches (Ex. Q, p.2). VanIngen testified that the white hash lines in exhibits 2 to 5 were not present on the date of claimant's accident.

Yuzuru Teratani, the husband of the minivan driver who collided with claimant, testified that he was a passenger in the minivan at the time of the accident. The Teratani's lived a half mile from the accident site and had driven almost daily, on the area of the roadway at issue. Mr. Teratani testified that he did not recall the road's surface exactly, but he did not remember seeing any big cracks or bumps and he characterized the road as smooth. Teratani observed claimant from

a distance of 30 feet as claimant entered the curve. Teratani estimated claimant's speed at 45 to 60 mph.

New York State Police Trooper Cornelius Meritt testified that he responded to the scene and prepared an accident report. Meritt had investigated approximately 300 to 400 motor vehicle accidents and had received training in accident reconstruction at the New York State Police Academy. From 1988-1994, Route 121 was part of his routine road patrol. During this time period, he was not aware of any other motorcycle accidents in the vicinity of this accident.

Meritt testified that he walked the roadway, one tenth of a mile preceding the accident site, to inspect the road's surface. He observed dry patch spots that had previously been applied. He did not observe potholes or anything else that, in his experience as a police officer, could be described as a dangerous condition. Had he noticed any defect, he would have documented it in his report, photographed the defect and advised the New York State Department of Transportation ("DOT"). He testified that exhibits 3 to 5 were not an accurate representation of the roadway condition on the day of the accident. Specifically, he noted that there were no potholes and that exhibits 3 to 5 show a defective condition along with white hash marks that were not present. He further testified that exhibits K, O and P accurately depicted the roadway as he had observed it on the day of the accident (T:374-75). He concluded that claimant's speed was unreasonable and the proximate cause of his accident (T:483).

Joseph Champagne, a professional engineer, offered expert testimony on behalf of claimant. Champagne has experience as a traffic engineer and an accident reconstructionist, and, from 1958 to 1960, he was employed by DOT in a design section.

Champagne testified that in 1994, Route 121 was rated in poor condition according to the Highway Sufficiency Manual and was scheduled for a resurfacing project (Ex. 6). He stated that the color photographs (Exs. 2-5) depicted significant defects in the pavement which would pose a danger to a motorcyclist driving in the center of the lane. He explained that the series of potholes shown would be a competent producing cause of instability for a motorcycle and posed an even greater problem due to the curve because a motorcyclist should lean into the curve. Champagne estimated that the condition of the road existed from the spring of 1994 because potholes are generated by the spring thaw of frozen water that had seeped into the pavement. According to Champagne, the condition depicted warranted placement of signs warning of the rough road. The absence of such signs violated a motorist's expectation of a relatively smooth road. Champagne maintained that the potholes could have been filled with hot or cold patches as an interim measure until the road was resurfaced. The failure to take such action, Champagne contended, violated DOT's Highway Maintenance Guidelines which require a smooth riding surface at all times (Ex. 13, § 1. 110).

Champagne opined that the defective pavement caused claimant to lose traction, become unstable and cross the center line. Champagne testified that, even though the advisory speed was 25 mph, a speed of 40 to 45 mph was reasonable for the curve. An advisory speed, he maintained, is recommended to take into account unusual events such as wet conditions, rather than rough pavement. He determined that a motorcycle could have negotiated the curve at 55 to 60 mph if the pavement had been in good repair.

Champagne compared the black and white police photographs (Exs. 0, P) to claimant's color photographs (Exs. 2-5) and concluded that the roadway conditions depicted were

the same. He marked the police photograph (Ex. 0) where he maintained the potholes, which were clearly depicted in exhibits 3 to 5, were located². Champagne explained that, because of the quality of the black and white photographs, viewing them alone, it was impossible to render an opinion as to the depth of the rutting. He conceded that the white hash marks in claimant's color photographs were indicative of some construction activity. He insisted that the patching shown in exhibits 3 to 5 was not new.

Everett Clark, Jr., DOT's Resident Engineer in the Northern Westchester Residency from 1979 to 1995, testified on behalf of defendant. Clark was responsible for maintenance of the roads, including paving in the area of the accident. He examined exhibit 0, the police photograph, and concluded that, although the patching was a little rough, it was not a dangerous condition. In his view, the patching depicted in claimant's color photographs was not consistent with the police photographs and the color photographs appeared to be taken at a later date.

Richard Hermance, a certified accident reconstructionist, testified on behalf of defendant. Hermance has practiced in his field for 20 years and has also taught at the University of Florida. He has also had a motorcycle license for 17 years. He visited the site and drove on the roadway for the four to five miles preceding the accident site. He described Route 121 as a continuous winding road, that requires a motorcyclist to be more careful than a driver of other vehicles.

Hermance examined the police photographs (Exs. 0, P) and concluded that they did not depict potholes, but rather patches that were fairly flat. He opined that the cause of claimant's

² The area shown in exhibit 2 was farther south from that shown on exhibits 3 to 5.

accident was operator error and concluded that claimant should have followed the advisory speed of 25 mph rather than proceed at a speed of 40 to 60 mph. He determined that the sight distance before the curve was 500 feet. Accordingly, the patches were visible on approach and, if claimant had anticipated a problem, he could have moved either to the right or left of the patches. In Hermance's view, particularly, since there was evidence of a patch prior to the site of the accident (Ex. 2), claimant should have anticipated that there might be patching ahead and adjusted his driving accordingly.

It is well established that the State has a nondelegable duty to adequately design, construct and maintain its roadways in a reasonably safe condition (see, Friedman v State of New York, -67 NY2d 271; Weiss v Fote, 7 NY2d 579,584; McDevitt v State of New York, I NY2d 540). The State, however, is not an insurer of the safety of its roadways and the mere happening of an accident on a State roadway does not render the State liable (see, Brooks v New York State Thruway Auth., 73 AD2d 767; affd 51 NY2d 892; Tomassi v Town of Union, 46 NY2d 91).

Claimant has the burden of establishing that the State was negligent and that such negligence was a proximate cause of the accident (see, Bernstein v City of New York-, 69 NY2d 1020,1021-1022; Marchetto v State of New York, 179 AD2d 947; Demesmin v Town of Islip, 147 AD2d 519). Liability will not attach unless the State had either actual or constructive notice of a dangerous condition and then failed to take reasonable measures to correct the condition (see, Brooks v New York State Thruway Auth., supra; Harris v Village of East Hills, 41 NY2d 446,450; Rinaldi v State of New York, 49 AD2d 361, 363). Proof of prior accidents at the same place under substantially similar circumstances, or the absence of prior accidents, may be offered on the issues of foreseeability of danger and notice (see.e.g., Brady v Manhattan R. Co., 127 NY 46-, Lafflin v

Buffalo & Southwestern R.R., 106 NY 136; Goldstein v C.W. Post Center of Long Is. Univ., 122 AD2d 196; Hyde v County of Rensselaer, 73 AD2d 102 1, affd 51 NY2d 927; 1 NY PJI 2d 2:12, 2:90).

Moreover, "[w]here the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury" (Ingersoll v Liberty Bank, 278 NY 1, 7).

This Court finds that, upon review of all the evidence including listening to the witnesses testify and observing their demeanor, there is a lack of credible evidence that the alleged defect, which supposedly caused claimant's accident. existed for such a period of time that defendant either knew or should have known of it, and that such defect was a proximate cause of claimant's accident. Notably, it was undisputed that the white hash lines depicted in claimant's color photographs were indicative of some construction activity and VanNgen admitted that the hash lines were not present on the date of claimant's accident. Lecoq's testimony, as to when the color photographs were taken, was contradictory and uncertain. Meritt, the trooper who responded to the scene and prepared an accident report, further established that the hash lines were not present on the date of claimant's accident and that the color photographs did not accurately depict the roadway as it existed according to his inspection on the date of the accident. Specifically, Meritt testified that there were no potholes on the date of claimant's accident. Thus, the Court concluded that claimant's color photographs, while admitted into evidence, were of no value in determining the nature of the alleged roadway defect and its contribution to the cause of claimant's accident.

Indeed, the evidence seems to indicate that claimant's color photographs were taken at a time after the date of the accident when some construction activity was undertaken. In addition to Meritt's testimony, Teratani, who drove on the area of roadway almost daily, testified that he did not recall seeing any significant defects in the roadway and he characterized the surface as smooth. The Court rejects the testimony of claimant's expert as to the existence of a series of potholes since the spring of 1994, as speculative and unsubstantiated. Additionally, it is noted that the expert's opinion was based upon claimant's color photographs and was therefore unfounded. In SLIM, the Court finds that claimant failed to establish that, on the date of the accident, there was any significant roadway defect in the nature of a channel of potholes.

Further, the testimony of claimant and Lecoq, regarding the manner in which the accident occurred, was riddled with inconsistent statements and did not provide a credible account. It is also noted that VanIngen, the lead motorcyclist, traveled over the area of roadway without incident and did not find the need to warn the other motorcyclists of any possible danger in driving over that area. Moreover, neither Lecoq nor VanIngen referred to potholes in the written statements given shortly after the accident (Exs. N, Q).

Accordingly, the Court finds that claimant failed to establish that there was a significant roadway defect of which defendant had either actual or constructive notice. Thus, there is no basis for finding defendant negligent. Even assuming, arguendo that there was a defect, the credible evidence did not establish proximate cause.

Defendant's motion to dismiss, upon which decision was reserved, is now
GRANTED.

LET JUDGMENT BE ENTERED DISMISSING CLAIM NO. 90713.

White Plains, New York
February 28, 2001

TERRY JANE RUDERMAN
Judge of the Court of Claims