

THEOHARAKIS v. THE STATE OF NEW YORK, #2000-010-074, Claim No. 93715

Synopsis

Motorcyclist alleged accident was due to obscured speed advisory sign. The Court held that there were other visible aids to enable motorcyclist to safely navigate through the curve and the cause of his accident was not attributable to any negligence of defendant.

Case Information

UID: 2000-010-074

Claimant(s): ARISTIDIS THEOHARAKIS

Claimant short name: THEOHARAKIS

Footnote (claimant name) :

Defendant(s): THE STATE OF NEW YORK

Footnote (defendant name) :

Third-party claimant(s):

Third-party defendant(s):

Claim number(s): 93715

Motion number(s):

Cross-motion number(s):

Judge: Terry Jane Ruderman

Claimant's attorney: DRAKE, SOMMERS, LOEB, TARSHIS & CATANIA, P.C.
By: Steven Milligram, Esq.

Defendant's attorney: HON. ELIOT SPITZER
Attorney General for the State of New York
By: Michael Rosas, Assistant Attorney General

Third-party defendant's attorney:

Signature date: November 20, 2000

City: White Plains

Comments:

Official citation:

Appellate results:

See also (mult-captioned case)

Decision

Claimant seeks damages for the injuries that he allegedly sustained on August 20, 1995 when he was driving his motorcycle westbound on Route 118 in the Town of Yorktown, Westchester County, and lost control of the motorcycle in a 90 degree right curve of the roadway. Claimant contends that defendant negligently maintained the sign assembly, posted approximately 250 feet prior to the curve, on the right side of the roadway. The sign assembly comprised a yellow diamond sign, indicating a right angle curve, posted above a yellow square sign, advising 15 mph (Exs. 4, X). Specifically, claimant asserts that the sign assembly was obscured by foliage and that, therefore, claimant was not made aware of the upcoming curve and was not afforded the opportunity to reduce his speed prior to the curve.

Route 118, between its intersection with Route 100 and Route 129, is a rural, curvy road, with one eastbound lane and one westbound lane, separated by a double yellow line. Before reaching the 90 degree curve, a westbound motorist encounters a series of curves and passes two yellow chevron signs, with arrows indicating a right turn, posted on the left side of the roadway. There is also a guiderail on the left side of the roadway that begins near the second of a series of yellow chevron arrow signs. The speed limit for the series of curves, prior to the curve in issue, is down posted from 55 to 45 mph. The sign assembly prior to the curve in issue advises a 15 mph speed limit. Defendant contends that, despite the partial obstruction of the sign assembly, the curve sign was unobstructed and the visible road configuration gave claimant adequate warning of the curve. Thus, defendant argues that the sole proximate cause of the accident was claimant's failure to observe that which was there to be seen and to adjust his driving accordingly.¹ Additionally, claimant sought to preclude evidence that he was ticketed and convicted of driving with an expired learner's permit, an unregistered vehicle, and an expired inspection. The trial evidence was unclear as to whether claimant had pled guilty to the charges or was convicted in traffic court. A plea is admissible as an admission of the acts charged with the provision that the one who pled can explain the reasons for the plea and the fact finder is then free to determine the weight to accord the plea (*see, Ando v Woodberry*, 8 NY2d 165; *McGraw v Ranieri*, 202 AD2d 725). A conviction of a traffic violation, however, is not given collateral estoppel effect in a subsequent civil trial (*see, Gilberg v Barbieri*, 53 NY2d 285, 293), should not be used for impeachment purposes (Vehicle and Traffic Law § 155) and has been excluded for any purpose (*see, Augustine v Village of Interlaken*, 68 AD2d 705, 709-10; *Montalvo v Morales*, 18 AD2d 20). Accordingly, given the ambiguity of evidence as to whether it was a plea or a conviction, the Court GRANTS claimant's application and such evidence was not considered by the Court.

Claimant testified that on August 20, 1995, he was driving his Harley Davidson motorcycle, that he had owned since 1993. Claimant had been driving motorcycles since 1991, when he first obtained a learner's permit. Claimant, who lived in New York City, was visiting his girlfriend in Ossining. Although he had been to Westchester County on prior occasions, he had never previously traveled on Route 118. Claimant was following his girlfriend's father, Andrew LaSala, who was also driving a motorcycle. It was a sunny day. Claimant described Route 118 as nice, wide and clear (T:32).² The road, however, had two major curves before the one at issue.

Claimant testified that there was an S curve with a 45 mph advisory speed sign and that, accordingly, he was traveling at a speed of "about 45 miles an hour" (T:32). As claimant emerged from the S curve, the road sloped upward and it seemed to claimant that LaSala "started to disappear" (T:33). At this point, claimant was traveling at about 40 mph (T:33). Claimant then observed the two yellow chevron arrow signs, posted on the left side of the road. Claimant stated that he did not see the sign assembly on the right side of the road. Claimant estimated that he was traveling between 35 to 40 mph when he reached the crest of the hill and observed the guiderail (T:61). When claimant realized that he was in a 90 degree curve, he attempted to lean into it and turn to the right. Claimant, however, lost control of his motorcycle, applied his brakes and went across the road, impacting with the guiderail. Claimant testified that, by the time he realized the sharpness of the curve, he was traveling too fast to negotiate it without losing control.

On cross-examination, several inconsistencies between claimant's trial testimony and his deposition testimony were elicited. At his deposition, claimant testified that he was traveling at a speed of "maybe 30" mph when he entered the curve (T:141-42). At trial, however, claimant

maintained that he was traveling at a speed "just below 40" mph when he entered the curve (T:141). Claimant explained that, since the accident and one week before the trial, he had returned to the scene and determined that he had to have been breaking only slightly (T:142-44). Additionally, claimant testified at his deposition that, when he observed the chevrons, he applied his brakes and reduced his speed to 15 to 20 mph before impacting with the guiderail (T:147). At trial, however, he maintained that he had not reduced his speed to that extent (T:150).

At trial, claimant testified that he never saw the sign assembly indicating a right curve (T:114). However, at his deposition, he stated that he had noticed the curve sign and slowed down as he approached the chevrons because he had observed the curve sign (T:114-15, 130-31). On cross-examination, claimant conceded that he had noticed the curve sign, but he maintained that he did not know it was a curve sign because it was partially obscured (T:115). He stated that, it was not until he was very close to it that he realized that it was a curve sign indicating a 90 degree right turn. Claimant maintained that the 15 mph speed advisory sign was completely obscured by foliage.

Claimant testified that a series of photographs, taken eight days after the accident, were a fair and accurate representation of the road conditions on the day of the accident (Exs. 1-6, 11-16). These photographs, taken at progressively shorter distances approaching the sign assembly, show foliage partially blocking the sign assembly (Exs. 1-6).

Town of Yorktown Police Officer Timothy Tausz recalled observing the sign assembly on the right side of the road and the chevrons on the left side. He maintained that, while there was vegetation around the sign assembly, it was not obscured. Tausz explained that he had an independent recollection of the accident because he knew LaSala and had conversations with him and claimant subsequent to the accident.

James Spratt, a licensed professional engineer, testified on behalf of claimant. Spratt had been employed by the New York State Department of Public Works and had served as the Dutchess County Commissioner of Public Works. He testified that, as a motorist approaches the sign assembly, the road straightens and then goes down a steep hill that has a ten percent grade. Twenty feet below the crest of the hill, the right angle curve begins. Spratt maintained that, as a motorist passes the sign assembly, there is no indication of the direction of the road and the drop. Spratt described the curve as having a 150 foot radius that was approached from an uphill grade before entering a ten percent down slope. This combination of conditions, Spratt opined, necessitated a larger curve warning sign. In his view, the drop from 45 mph on the prior S curve to the 15 mph advisory on the curve in issue also warranted a set of blinking lights. He also noted that the first chevron was grass high, rather than seven feet high, as it should have been. Spratt also suggested that a hill sign could have been posted in the area.

Spratt concluded that defendant's lack of maintenance of the foliage limited visibility of the sign assembly and hampered a motorist's ability to negotiate the curve. He opined that, the lack of information caused claimant to be surprised by the curve and impaired his ability to steer through it.

Richard **Hermance**, an accident reconstructionist, testified on behalf of defendant. **Hermance** described the area as a ten percent downgrade leading into a sharp curve. **Hermance** evaluated the extent of the curve and determined that a motorist traveling at 45 mph from the crest of the hill could come to a complete stop 230 feet before the curve, regardless of the signage (T:256-57). He explained that the crest of the hill was 300 to 400 feet from the site of the accident and that, once claimant was at the crest of the hill, the curve was visible (T:257).

William Fitzpatrick, who is employed by the New York State Department of Transportation as the Director of Traffic, Engineering and Safety for Region 8, which covers Westchester County, testified on behalf of defendant. He described Route 118 as a rural, curvilinear road, typical of northern Westchester. From Route 100 to the accident site, there is a series of curves and foliage. Based upon the photographs in evidence (Exs. 1-6, 11-12), he opined that the sign assembly was sufficiently visible to an approaching motorist. He determined that the sign assembly was approximately 300 feet before the curve commenced. He testified that a motorist would first

observe the chevron from a distance of 400 feet. In his opinion, it would take a motorist, traveling 35 mph, four seconds to decelerate to 15 mph. Therefore, from the 15 mph sign, a motorist would go approximately 147 feet in those four seconds. The motorist would then have approximately 150 feet before the curve began.

Fitzpatrick maintained that a hill sign or a larger sign would be inappropriate in the subject location. He further opined that flashing lights would be used only if warranted by the accident history. Although he was confronted with accident printouts from 1987 to 1990, and 1990 to 1994, that showed 19 and 13 accidents respectively, Fitzpatrick explained that six to eight accidents were counted twice. In addition, two thirds of these were wet weather accidents. In 1993, the advisory speed on the curve had been reduced from 20 to 15 mph. Even more significant, there were no accidents after other repavement, shoulder, guiderail, drainage and foliage trimming projects had been undertaken.

Fitzpatrick acknowledged that Section 201.7 of the Manual of Uniform Traffic control devices provides that "weeds, shrubbery, and trees should not be allowed to obscure signs" (Ex. 36). He conceded that, at various distances, the sign assembly was partially obscured. However, he maintained that the sign assembly was not the only warning of the curve. Fitzpatrick conceded that the chevrons did not indicate the severity of the curve, but they did indicate the alignment of the curve.

Fitzpatrick testified that, a motorist encounters at least four curves prior to the right angle curve. One of the prior curves was similar to the curve in issue; except that the prior curve had a visible tree line that a motorist could follow. When asked if a motorist should expect a 90 degree curve based upon the prior similar curve, Fitzpatrick replied that a motorist should anticipate a curve, but not a particular type of curve.

It is well settled 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). The State, however, is not an insurer of the safety of its roadways and the mere happening of an accident on its roadway 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). 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, 1021-22; Marchetto v State of New York, 179 AD2d 947; Demesmin v Town of Islip, 147 AD2d 519).

This is not a situation where there was no posted warning of the roadway condition (see, Freund v State of New York, 137 AD2d 908; Koester v State of New York, 90 AD2d 357). Rather, this case is like Stanford v State of New York, 167 AD2d 381, where the State had erected a sign assembly, consisting of a left arrow curve sign and, a 35 mph speed advisory sign, and the speed advisory sign became obscured by foliage. In Stanford v State of New York, the claimant proceeded at an excessive rate of speed, was unable to negotiate the curve, and an accident ensued. Claimant alleged that a proximate cause of his accident was the State's negligence in permitting foliage to cover the speed advisory sign. The Second Department held that the obstruction was equivalent to the absence of a speed advisory sign. However, the Court held that the alleged negligence in failing to trim the foliage was not a proximate cause of the accident. The Court reasoned that "[a] motorist exercising due care would have observed the arrow sign as well as the curving guardrail and telephone poles, making him aware of the contours of the roadway;" thus, "the visible physical conditions and the unobstructed curve sign gave the claimant adequate warning that it was necessary for him to reduce his speed as he prepared to enter the curve" (Id. at 382). Accordingly, the Court concluded that "the only negligence shown to have caused or contributed to the accident was that of the claimant in failing to operate his vehicle with due care" (Id.).

Here too, in addition to the unobstructed curve sign, which claimant conceded on cross-examination that he did observe, there were visible physical conditions, such as the guiderail and the two yellow chevron arrow signs that claimant admittedly saw when he reached the crest of the hill. Claimant was bound to see that which should have been seen with the proper use of his

senses (see, Weigand v United Traction Co., 221 NY 39; Sapleton v Metropolitan Suburban Bus. Auth., 140 AD2d 684). Given the visible physical conditions and the fact that claimant had just emerged from an S curve on the same road, claimant was "obligated under such conditions to operate [his motorcycle] at a rate of speed and in such a manner of control as was commensurate with the known dangers" (Tenczar v Milligan, 47 AD2d 773, 774) "and to use reasonable care under the circumstances to avoid an accident" (Oberman v Alexander's Rent-A-Car, 56 AD2d 814, 815).

Upon listening to claimant testify and observing his demeanor as he did so, the Court finds that he was not forthright in his testimony and that the discrepancies between his testimony at his deposition and at trial detracted from this credibility. Specifically, the Court finds that claimant's testimony regarding his speed was calculated and not believable. Thus, claimant's argument that the absence of the 15 mph sign caused or contributed to the happening of the accident was not persuasive (see, Cimino v City of New York, 54 AD2d 843, affd 43 NY2d 966 [the absence of a traffic light that had been ordered, but not yet installed, did not contribute to the happening of the accident, rather it was the drivers' error and the case should have been dismissed for lack of proof of causation]). Additionally, the Court did not find persuasive the need for additional signs or blinking lights in the area (see, Ball v State of New York, 96 AD2d 1139 [State's failure to erect additional warning signs cannot be deemed a proximate cause of the accident]).

This Court finds that claimant was provided with sufficient visible aids to enable him to safely navigate through the curve and that the cause of his accident was not attributable to any negligence of the State (see, Hearn v State of New York, 157 AD2d 883, 886 [insufficiency of signs and any negligence of defendant was irrelevant because claimant's inattentiveness to the signs and the actual condition of the highway was the sole proximate cause of claimant's accident]). Thus, this Court concludes that the sole proximate cause of the accident was the manner in which claimant operated his motorcycle (see, Wang v County of Rockland, 179 AD2d 977 [despite the posted curve warning sign and 25 mph speed advisory sign, claimant testified that, he did not see any signs, he did not know how fast he was traveling, the curve was unexpected and he lost control of his car, and had an accident. The Court concluded that, under the circumstances presented, the manner in which claimant operated his vehicle was the sole proximate cause of his accident]).

Thus, defendant's trial motion to dismiss, upon which decision was reserved, is now GRANTED.

LET JUDGMENT BE ENTERED DISMISSING CLAIM NO. 93715.

November 20, 2000

White Plains, New York

HON. TERRY JANE RUDERMAN

Judge of the Court of Claims

1. At trial, claimant moved to preclude any evidence of claimant's culpable conduct on the ground that defendant failed to serve a bill of particulars on this issue. The Court hereby DENIES claimant's application. Notably, there was no showing that claimant had made a good effort to resolve this discovery issue prior to trial, nor that defendant's non-compliance was either willful or contumacious (see, Kovacs v Castle Restoration & Const., 262 AD2d 165 [error to preclude testimony of plaintiff's alleged culpable conduct where there was no showing that defendant's failure to serve a bill of particulars on the affirmative defense was willful or contumacious]).

2. All references to the trial transcript will be preceded by the letter "T."