

Synopsis

Claimants did not establish State's negligence as the result of failure to paint crosswalk markings or to post pedestrian crossing signs; Claim dismissed.

Claimant(s): FRED GREENSPAN, as father and natural guardian of TAMARA ANNE GREENSPAN, an infant over the age of 14 years, and FRED GREENSPAN, individually

Claimant short name: GREENSPAN

Defendant(s): THE STATE OF NEW YORK

Claim number(s): 98992

Judge: FERRIS D. LEBOUS

Claimant's attorney: BARON & PAGLIUGHI, ESQS.

By: Peter Baron, Esq., of counsel

Defendant's attorney: HON. ELIOT SPITZER, ATTY GENERAL

By: Ronald Turbin, AAG

Defense Experts: Bruce Savik, P.E., Highway Engineer

Richard Hermance, Accident Reconstructionist

Signature date: October 7, 2002

City: Binghamton

Decision

Claimant, Fred Greenspan, brings this Claim both individually and as father and natural guardian of Tamara Anne Greenspan, an infant over the age of 14 years who, on October 25, 1996, sustained serious personal injury as a result of a motor vehicle/pedestrian accident which occurred on Route 231, also known as Deer Park Avenue, in the Town of North Babylon, Suffolk County, New York. This Claim was tried on October 9 and 10, 2001. The trial was bifurcated, consequently this Decision addresses the issue of liability only.

Route 231 or Deer Park Avenue in the Town of North Babylon, Suffolk County, is a commercial or arterial highway. Route 231 consists of two lanes traveling in a northbound direction and two lanes traveling in a southbound direction separated by a grassy median with appropriate signals and turning lanes allowing left and right hand turns when traveling in both directions. Commack Road has its origin at Route 231. When traveling north on Route 231 one need only veer to the right approximately 45 degrees to proceed in a northeasterly direction on Commack Road. At this point, Commack Road is a single northeast travel lane for what appears to be approximately 200 feet. The southwest lane of Commack Road intersects with Route 231 by forking directly to the west and meeting Route 231 at almost a 90-degree angle approximately 150 feet north of the origin of the northeast travel portion of Commack Road as it intersects with Route 231. As a result a triangular piece of property remains situate between Route 231 north on its eastern boundary on one side; Commack Road at its origin in a northeasterly direction on one side; and Commack Road in a southwesterly direction on the remaining side. This triangular parcel is often referred to as Fireman's Memorial. The posted speed limit is 40 m.p.h. There is a paved sidewalk along the western side of Fireman's Memorial which allows pedestrians to travel in a north/south direction along Route 231. At the southern most point of Fireman's Memorial is a handicap accessible curb cut which allows pedestrians traveling along the walkway to cross Commack Road, at its point of origin with Route 231, and to proceed across Commack Road to a curb cut on the other side which allows pedestrians to then continue traveling either in a northerly or southerly direction along Route 231, or to proceed northwest along a sidewalk on the eastern boundary of Commack Road. These handicap accessible curb cuts were installed by the New York State Department of Transportation (hereinafter "DOT") in order for these public walkways to remain in compliance with the Americans with Disabilities Act (hereinafter "ADA"). However, Commack Road is not a State highway. Rather, it is owned and maintained by Suffolk County. Consequently, the State's only involvement was to install the pedestrian curb ramps.

Claimant Tamara Anne Greenspan and her friend Anna Dorsey were walking southbound along the sidewalk located on the eastern side of Route 231 on Friday evening October 25, 1996, at approximately 8:00 p.m.¹ While on this route they approached Fireman's Memorial. At that time, Claimant and her friend were planning on meeting with some friends in a parking lot located on Route 231,

south of Fireman's Memorial. In order to continue in that direction it was necessary for the Claimant and Ms. Dorsey to cross the intersection of Route 231. After crossing the intersection they would then find themselves on the east side of Route 231 and would be able to continue walking south along the sidewalk. As the two women prepared to cross the intersection at the southern most point of Fireman's Memorial, Claimant was standing to the left of Anna Dorsey. Ms. Dorsey testified at trial that she looked left and right, checking for northbound vehicles on Route 231 turning onto Commack Road. From this vantage point pedestrians have an unimpeded view in a southerly direction of Route 231. Ms. Dorsey testified that she saw no approaching traffic. According to Ms. Dorsey, the Claimant also looked to her right in a southbound direction prior to crossing the roadway.

After checking for traffic the Claimant and Ms. Dorsey started to cross the street together. They took about five steps into the intersection, however Ms. Dorsey stopped walking because her pager went off. Unfortunately for the Claimant she continued to walk across the street and was about two feet in front of Ms. Dorsey when a car traveling northbound on Commack Road "came out of nowhere"² and struck the Claimant. Claimant was projected up and over the front end of the vehicle, thrown forward, and came to rest on the pavement near the corner of Commack Road and Eddie Avenue, approximately 43 feet from the point of impact. (Claimant's Exh. 1).

Jason Levin was the operator of the 1986 Pontiac Grand Am which struck the Claimant on this evening. He testified that he was coming home from work in Merrick, Long Island, and heading toward his home located at 37 Commack Road, which is only about fifty yards from the accident site. He was driving northbound in the left lane of Route 231 and moved into the right-hand lane in anticipation of turning onto Commack Road. He testified that as he approached Commack Road he saw about seven to ten people standing on the grassy portion of the island of Fireman's Memorial with some of them crossing onto the road from the grassy area. He also saw about seven to ten people on the opposite side of Commack Road near its intersection with Eddie Avenue. It is undisputed that the roads were dry and the visibility was good. There are also numerous streetlights in the vicinity of this intersection so it appears that lighting was not an issue. Mr. Levin did not see Tamara Greenspan until he was only a couple of car lengths away. More specifically, he testified that he was not looking in the direction of the point of impact and did not see the Claimant before making contact with her. He further testified he was not looking at the entrance of the fork from Route 231. He testified that his speed was somewhere between 40 and 45 m.p.h. and he braked slightly as he started to enter the fork of Commack Road. He further stated that he saw no painted crosswalk between the pedestrian crossing from Fireman's Memorial to the sidewalk across Commack Road and he testified that he was not aware that there was a pedestrian crossing in that area. He further testified that he saw no warning signs advising him of a pedestrian crossing ahead. Mr. Levin, however, was extremely familiar with the intersection where this accident occurred since he had been living at the Commack Road address for a year or two prior to the same. By his own statement at trial he has driven or walked past that intersection hundreds or thousands of times and has made the same turnoff onto Commack Road hundreds of times and is very familiar with the intersection.

Claimant contends that the State of New York (hereinafter "State") was negligent in at least two major ways: (1) the failure to paint, install, or maintain, painted crosswalks and road markings at the curb cuts at the location of the pedestrian ramp at the southern most portion of Fireman's Memorial running to the east side of Commack Road; and (2) failing to post a sign warning motorists traveling northbound on Route 231 as they approached Commack Road of the presence of the pedestrian crossing.

At trial, both the Claimant and the State called Kent Edwards, who has been employed as the DOT manager of landscape architecture in the environmental section since 1991. Mr. Edwards testified that the sidewalk curb ramp on the east side of Commack Road was installed in connection with a lawsuit filed under the ADA. He testified that his DOT division completed the design and location plans for the installation of this particular ramp which was then forwarded to the Traffic and Safety Division for review and approval. The same was approved and returned to Mr. Edwards for implementation and placed out to bid for construction and installation by various contractors. Mr. Edwards conceded that neither hatch marks, crosswalk lines, nor warning signs were included in the design plan. Mr. Edwards testified that if the Traffic and Safety Division deemed hatch marks and/or warning signs to be appropriate then they would have included the same upon their return of the plans. Mr. Edwards acknowledged that this was an unusual or difficult intersection at which to place a pedestrian crossing and could not identify the standard used by the Traffic and Safety Division in determining whether to include hatch marks and/or warning signs. However, Mr. Edwards noted that the County could also have installed or painted crosswalk stripes and hatch marks at any time because the crosswalk is on Commack Road which is owned and maintained by Suffolk County. He defended the decision to place the crosswalk at its point on the southern most tip of Fireman's Memorial and on the adjoining east side of Commack Road in order to ease and not confuse pedestrian traffic. Finally,

Mr. Edwards opined that with or without painted markings the same is legally a crosswalk as defined under Vehicle and Traffic Law § 110.

Claimant also called Robert Liss, a professional engineer licensed in New York for the past 31 years and also licensed in 25 other states. Mr. Liss has previously worked for the DOT and testified that in preparation for testimony in this case he reviewed all the pleadings, accident photos, police report, and the accident history of this location. Based upon the foregoing, Mr. Liss was of the opinion that DOT departed from good engineering standards with regard to this crosswalk in two respects, namely the absence of a pedestrian crossing warning sign, as well as the lack of painted hatch lines. With respect to the former, Mr. Liss opined that the 40 m.p.h. speed limit at this shallow right curve invites drivers to exit Route 231 north onto Commack Road with little or no slowing or stopping. Furthermore, Mr. Liss said if this configuration is coupled with very large traffic volume (approximately 52,000 vehicles per day) it creates vehicular/pedestrian conflict without advance warnings of the potential upcoming hazard. Second, he opined that hatch lines automatically cause drivers to slow down. The absence of which here failed to trigger Mr. Levin's visual acuity to slow his vehicle, a situation which was made worse by the nighttime conditions. Mr. Liss testified that signs and hatch marks would have been illuminated by headlights allowing a driver to have better visual acuity of the potential upcoming hazard. Nevertheless, Mr. Liss conceded that speed was a proximate cause of this accident as well. He acknowledged that Mr. Levin saw a group of people standing on each side of the roadway in advance to his entrance onto Commack Road from Route 231, but asserted that the lack of signs and road markings failed to give him additional and vital visual cues.

To counter Claimant's position, the State called Bruce Savik, a professional civil engineer, licensed in New York State, whose area of expertise includes highway design and construction. Mr. Savik explained that in preparation for his testimony he reviewed the accident report, the Uniform Manual of Traffic Control Devices, the Highway Design Manual, the contract proposal for the handicap curb ramp construction, police report containing photographs and maps, as well as a visit to the accident site. The witness also testified he lives in this area and had traveled past this route on hundreds of occasions. According to Mr. Savik, neither the Manual of Traffic Control Devices or the Highway Design Manual mandated hatch lines and/or warning signs at this crosswalk. Rather, according to Mr. Savik, Highway Design Manual § 18.06.13 clearly indicates that the Department of Motor Vehicles does not have warrants for installing marked crossings since studies have not adequately established the safety value or the benefit of marking pedestrian crossings. While that section clearly recognizes some advantages to marked crosswalks, it equally notes disadvantages associated with the same. The foregoing section indicates marked crosswalks are useful in the following four specific areas:

1. Locations with pedestrian activated signals.
2. Established school crossings with signals or crossing guards.
3. Intersections with vehicular signals in central business districts and other areas with significant volumes of pedestrians crossing the highway.
4. Locations in both urban and non-urban areas where development on both sides of a highway results in concentrated pedestrian volumes crossing the highway where there is no highway intersection....

To the contrary, Mr. Savik testified that pedestrian traffic at this location is relatively low. In Mr. Savik's opinion, the placement of hatch marks and the posting of warning signs, under these circumstances, were left to the sound engineering judgment of the Traffic and Safety Division. He noted the accident history in this area between January 1, 1993 and December 31, 1996 listed eight accidents involving northbound traffic making a lefthand turn, but no accidents of a similar nature involving a pedestrian/vehicular accident at this crosswalk. Additionally, Mr. Savik asserted the placement of the crossing at Fireman's Memorial to the east side of Commack Road was the best placement location since it provided the best sight distance.³ Also, the placement of the handicap crossing was also the shortest distance across Commack Road that point measuring 25 feet in total or 18 feet from marking line to marking line. (See Points B & C on Cl. Ex. 1). Moreover, placement of a crosswalk warning sign several hundred feet south on Route 231 would not have been advisable because, according to the witness, the same would have caused confusion since the actual crossing was at the origin of Commack Road and not further north on Route 231. As such, Mr. Savik opined that a warning sign would have caused confusion to drivers not knowing whether to anticipate a crossing at some point north of the sign on Route 231 or, as is the case here, immediately at the origin of Commack Road with Route 231. In short, the witness concluded that placement of hatch marks and warning signs was not warranted or required at this location. Furthermore, Mr. Savik stated that their placement at an unwarranted location would only result in an inappropriate overuse of these warning signs ultimately leading drivers to disregard them at other more appropriate locations.

The State also called Richard Hermance, an accident reconstruction expert. In preparation for his testimony he visited the accident site, reviewed

numerous pleadings and court documents, the police accident report, and the statements of various witnesses at the scene. Mr. Hermance concluded that this accident most likely occurred as a result of the combined negligence of the driver, Jason Levin, and the pedestrian Claimant herself, Tamara Greenspan. With respect to Mr. Levin, Mr. Hermance found that the longest skid mark left by the Levin vehicle measured 107 feet. If the Levin vehicle had stopped at the end of that skid, it would indicate a ground speed of 48 to 49 m.p.h. However, in this case from reviewing the evidence it appears that Claimant was carried approximately 43 feet to where she came to rest downrange of the 107-foot skid marks. According to Mr. Hermance that would indicate that at the end of the skid the Levin vehicle continued to move at a rate of 25 to 30 m.p.h. Calculating back from this and incorporating the distance of the skid marks and the distance traveled by the car after it hit the Claimant, Mr. Hermance opined that the speed of the Levin vehicle at the moment it went into the skid was approximately 56 to 57 m.p.h., well in excess of the posted 40 m.p.h. speed limit. In addition, Mr. Hermance relied on the statement of Anna Dorsey that the Levin vehicle seemed to "come out of nowhere". Further, Mr. Hermance testified that a vehicle being driven at 40 m.p.h. would need a sight distance of roughly 200 feet to avoid hitting the Claimant in similar circumstances. However, all of the parties who testified at trial including Mr. Hermance, Mr. Savik, and Mr. Liss, testified to a sight distance which is much greater. Since there was at least a 300-foot sight distance at the point the girls were crossing the roadway, this led Mr. Hermance to conclude that the Levin vehicle approached the two of them in a very rapid fashion. Additionally, the Levin vehicle sustained very little damage which indicated to Mr. Hermance that the Claimant was lifted over the hood, as demonstrated by damage to the car antenna, which is also consistent with the car being driven at a high rate of speed.

Additionally, Mr. Hermance opined that Claimant herself failed to yield the right-of-way to the oncoming Levin vehicle in compliance with Vehicle and Traffic Law § 1151 which states that pedestrians shall not "walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield". Moreover, Mr. Hermance concluded that due to the vast sight distance in a southerly direction on Route 231, it was pedestrian error to miss the car headlights rapidly approaching them prior to commencing their cross of Commack Road. In short, Mr. Hermance concluded that this accident was caused primarily by the driver Mr. Levin and secondarily by the pedestrian Tamara Greenspan, but not the design of the roadway. Consequently, Mr. Hermance concluded that the State's failure to provide hatch marks and/or a posted pedestrian crossing warning sign were not proximate causes of this accident.

It is well-settled that the State has a non-delegable duty to adequately design, construct and maintain its roadways in a reasonably safe condition. (*Friedman v State of New York*, 67 NY2d 271, 283). Inherent in this duty is the obligation to construct, design, and maintain highways in a reasonably safe condition taking into account such factors as existing traffic conditions, terrain and pedestrians. (*Gutelle v City of New York*, 55 NY2d 794). The State's duty extends to the design and maintenance of traffic control devices and warning signs at intersections of the roadways and crosswalks under its control. (*Meyer v State of New York*, 51 AD2d 828; *Wood v State of New York*, 112 AD2d 612). However, the State is not an insurer of the safety of its highways and the mere occurrence of an accident on a State highway does not render the State liable. (*Tomassi v Town of Union*, 46 NY2d 91; *Brooks v New York State Thruway Auth.*, 73 AD2d 767, *aff'd* 51 NY2d 892). In order to prevail on a negligence claim, Claimant has the burden of establishing that the State was negligent in its duty and that such negligence was a proximate cause of the accident. (*Bernstein v City of New York*, 69 NY2d 1020, 1021-1022). Additionally, the State must have had actual or constructive notice of a dangerous condition and then failed to take reasonable measures to correct the condition. (*Rinaldi v State of New York*, 49 AD2d 361).

As previously indicated, Claimant asserts that the State was negligent in failing to properly place hatch marks and/or a pedestrian crossing warning sign in relation to the crosswalk between Commack Road and Route 231. However, the Court credits the testimony of the State's expert, Bruce Savik, whose interpretation and opinion on these facts carries greater persuasive weight. For instance, the Court agrees with Mr. Savik that none of the four factors referenced in the Highway Design Manual are applicable to this crosswalk. Additionally, the Court agrees with Mr. Savik that a sign several hundred feet south on Route 231 could lead a motorist driving northbound seeing it to think that it was posted for an intersection crossing Route 231 north of the Commack Road intersection where there is also a crosswalk. As such, it would confuse drivers and definitely not draw his/her attention to the intersection of Commack Road. Furthermore, the volume of pedestrian traffic at the crosswalk in question appears to be extremely low. The volume of pedestrian traffic is a factor which is used to determine whether or not a warning sign for a pedestrian crossing should be posted. Consequently, the Court agrees with Mr. Savik that the posting of a pedestrian warning sign at this location was not warranted. As is always the case in highway signage and marking cases, the Court further agrees with Mr. Savik that to use traffic devices and/or warning signs in areas where they are either not appropriate or perhaps confusing, only leads drivers to pay less attention to those traffic control devices in other areas where they in fact may be warranted. In sum, the Court is not satisfied that pedestrian crosswalk markings or the posting of a pedestrian warning sign were

appropriate in this case and, as such, the lack thereof did not constitute a dangerous condition.

Moreover, with respect to prior accidents, the Court finds that for the four year period preceding Claimant's accident, namely January 1, 1993 to December 31, 1996, there were no other pedestrian accidents. (St. Ex. K). In attempting to establish notice from prior accidents, it was Claimant's burden "[t]o prove that prior accidents of a similar nature were caused by the same or similar contributing factors which caused the instant accident [citations omitted]". (*Hough v State of New York*, 203 AD2d 736, 737). Even assuming *arguendo* the existence of a dangerous condition, in view of the absence of any similar prior accidents at this location, there is no evidence that the State had actual or constructive notice thereof.

The Court agrees with the State's assessment that, "[w]here a driver is familiar with the road, and its right of way and possible obstructions, or where the driver fails to obey the rules of the road or fails to exercise reasonable care, the State is relieved from liability as its conduct cannot be deemed a substantial factor in bringing about the accident." (State's Post-Trial Memorandum of Law, p 21, citing *Atkinson v County of Oneida*, 59 NY2d 840, *rearg denied* 60 NY2d 587; *Tomassi v Town of Union*, 46 NY2d 91). Mr. Levin had more than adequate sight distance, and had actual notice of people milling on both sides of Commack Road. By his own admission he was also meeting or exceeding the 40 m.p.h. speed limit, despite these visual cues, at the time he entered Commack Road. Furthermore, Mr. Levin testified regarding his vast familiarity with this roadway and location. There is no doubt that Mr. Levin bears the brunt of responsibility for this accident. **The Court also credits the testimony of the State's expert, Richard Hermance, especially with respect to Claimant's actions. The duty of a pedestrian is the responsibility to look for traffic before entering a crosswalk.** (*Thoma v Ronai*, 82 NY2d 736, *affg* 189 AD2d 635). Whether Claimant's line of vision was blocked by Anna Dorsey on her right or whether she was simply not paying attention, the happening of this accident leads to the inescapable conclusion that Claimant did not yield the right-of-way to the oncoming vehicle since neither road conditions nor sight distance was problematic.

It is Claimant's burden to show that the State's conduct was a proximate cause of this accident. (*Gayle v City of New York*, 92 NY2d 936). Based upon the evidence presented at trial, the Court is satisfied that there were two substantial factors which resulted in this unfortunate accident. Namely, the conduct of the driver, Jason Levin, and the unfortunate conduct of Claimant herself, Tamara Greenspan. However, the Court agrees with Mr. Hermance's conclusion that there was nothing out of the ordinary with the roadway or the absence of pavement markings or warning signs which had anything to do with the cause of this accident. The Court concludes that this accident was attributable primarily to the driver and secondarily to the Claimant and not the design of the roadway. In sum, the Court finds that Claimant has failed to establish that any action or inaction by the State in relation to the crosswalk between Commack Road and Route 231 was a factor, let alone a substantial factor, in causing injury to this Claimant. Based on the foregoing, the Court need not address the State's remaining argument regarding the applicability of qualified immunity to the facts at hand.

Several objections at trial warrant discussion as well. At trial Claimant attempted to exclude the testimony of Mr. Hermance based upon the State's failure to provide expert disclosure pursuant to CPLR 3101 (d). In the alternative, Claimant argued that if Mr. Hermance were allowed to testify that he not be allowed to testify from the Suffolk County Police Department Report (Claimant's Exhibit 12) or the enlargement of a portion thereof (Claimant's Exhibit 13).

The history of this expert disclosure commenced on May 21, 1999, when Claimant filed a Notice of Discovery and Inspection demanding from the Attorney General the names, qualifications, and the substance of the expected testimony of the State's expert witnesses. On or about August 18, 2001, the State transmitted by facsimile a four page document pursuant to CPLR 3101 (d) (1) (i). However, in the course of the fax transmittal of that document to both the Court and Claimant's counsel, the two middle pages (numbered 2 and 3 respectively) were omitted. It was this portion of the document that identified the potential testimony of Richard Hermance as the State's accident reconstruction expert. The Court agrees with the State that the fact that two pages were omitted was self-evident. In fact, upon this Court's receipt of its copy of the disclosure document it was immediately obvious that pages 2 and 3 were missing. Consequently, chamber staff was directed to contact the Attorney General's Office and have the missing pages transmitted as soon as possible. Those pages were subsequently received in chambers on August 23, 2001 again by fax transmittal. The Court did not assume that an error was made in the transmittal to the Claimant.⁴ When the case was ultimately transferred to Assistant Attorney General Ronald Turbin for trial, Mr. Turbin was unaware of the two missing faxed pages.

Even a cursory reading of the document by Claimant's counsel's office would have revealed that pages 2 and 3 had been omitted as demonstrated by the fact that pages numbered 1 and 4 were transmitted, together with the curriculum

vitae of the proposed witnesses, including Mr. Hermance. The Court believes that this was not a willful attempt to surprise Claimant, but rather was merely human error. The Court is mindful that the purpose of CPLR 3101 is to promote full disclosure of expert witness testimony in order for there to be a fair exchange of information. Moreover, the Court also notes that penalty for failure to comply with CPLR 3101 is clearly within the Court's broad discretion. In this case the Court is satisfied that the Attorney General's Office did not willfully or intentionally withhold information for the purpose of prejudicing Claimant's case. In fact, had Claimant's counsel reviewed the document when received, as did the Court, they clearly would have noticed the error and moved to correct the same. Under these circumstances the Court believes that precluding the testimony of State's expert Mr. Hermance on these facts is not only harsh, but unwarranted. Consequently, Claimant's motion to strike and preclude the testimony from the State's accident reconstruction expert, Richard Hermance, is denied.

In the alternative, Claimant also moved to strike the testimony of Mr. Hermance to the extent that the same is based upon review of the Suffolk County Police Report, Claimant's Exhibits 12 and 13. Claimant alleged that these documents are inadmissible and that any of Mr. Hermance's testimony concerning the vehicle's speed based upon a review of those two documents should be stricken. At first glance the Court notes that the Claimant's expert, Robert Liss, indicated during his testimony that his opinions were based, in part, upon review of, among other things, the Suffolk County Police Department Report as well. (T. p 440). Claimant also relied on a portion of the Suffolk County Police Report (Cl. Ex. 12), containing the statement given by Anna Dorsey to the Suffolk County Police Department during the course of their investigation. That document was received by the Court without objection from the State. The Court further notes that the full Suffolk County Police Department Report (Cl. Ex. 12) was produced by a subpoena issued by Claimant's attorney to the Suffolk County Police Department Record's Bureau. Each page of the document so provided pursuant to said subpoena has a stamped certification of Sergeant James Sullivan of the Central Records Section stating that he has legal custody of the original records and attests and certifies that the annexed records are correct copies of the originals on file in his office. While not precisely the language the Court would like to see pursuant to CPLR 4518, the Court is nonetheless satisfied that the Suffolk County Police Department records are true and accurate records made by the Suffolk County Police Department in the ordinary course of business and that it was in the ordinary course of business of the Suffolk County Police Department to make and keep such records. Furthermore, Claimant's Exhibit 13 is nothing more than an enlargement of one of the pages contained in Claimant's Exhibit 12. As previously noted, Claimant has relied on Exhibit 12 not only for portions of its expert's testimony, but also for portions of the testimony of one of the witnesses to this accident, Anna Dorsey. Since Claimant has relied on this document for portions of their case, the Court cannot in good conscience rule that the State should not have the same opportunity. Particularly when Claimant had previously represented to the State that it would call as a witness on its case the police officer responsible for the creation of Exhibit 13. Therefore since this record and document was subpoenaed by Claimant and has been found in other respects to be reliable for their purposes, the Court finds that Claimant's Exhibits 12 and 13 are reliable for use by the State and its expert in providing a portion of the basis upon which he formulated his expert opinions. In any event, the absence of Mr. Hermance's testimony with regard to the speed of the Levin vehicle would not have altered this Court's ultimate conclusion in view of the remaining evidence including Mr. Levin's admission relative to the speed of his vehicle and Claimant's own inattentiveness. Based upon the foregoing, Claimant's argument that Exhibits 12 and 13 are inadmissible is hereby denied and Claimant's Exhibit 12 and 13 are deemed admissible and therefore received into evidence.

Based upon the foregoing, Claim No. 98992 is hereby DISMISSED

Any and all motions on which the Court may have previously reserved or which were not previously determined, are hereby denied.

ENTER JUDGMENT ACCORDINGLY.

**October 7, 2002
Binghamton, New York**

**Hon. FERRIS D. LÉBOUS
Judge of the Court of Claims**