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COURT OF APPEALS

STATE OF NEW YORK

SHERMAN,

Appellant,

-against-

No. 56

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

20 Eagle Street
Albany, New York 12207
March 24, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Next on the
2 calendar is number 56, Sherman v. The New York State
3 Thruway Authority.

4 MR. BLOCK: Good afternoon, Your Honors.
5 Norman Block for claimant-appellant Rodney Sherman.
6 Could I reserve two minutes also for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. BLOCK: Thank you very much.

9 There is really no reason why the First
10 Department's decision in Powell should not apply
11 statewide. It's - - - reasonably balances the interest of
12 the property owner, to make sure they're not shoveling
13 snow or clearing ice while it's - - -

14 JUDGE ABDUS-SALAAM: How about it might
15 conflict with the First Department's other decision
16 of later decision, Weinberg (sic). That might be a
17 reason for not applying Powell.

18 MR. BLOCK: Why - - - I scratched my head
19 over Weinberg (sic). And I'm thinking, we had the
20 same Chief Judge in Weinberg (sic) and Vosper, and
21 they seemed to come to conflicting conclusions. When
22 you look at Levene, though, which counsel has brought
23 to our attention, I think you understand the issue.

24 In Weinberg (sic), the storm was probably -
25 - - and they say the storm was - - - the icy

1 condition was being caused by the storm. They cite
2 that case in Levene where there was a freezing rain
3 at the time of the storm. Now, Weinberger wasn't
4 clear about what was a really going on. I think the
5 implication - - - it must have been freezing rain at
6 the time. So I don't see it conflicting.

7 JUDGE ABDUS-SALAAM: Even so, I'm a little
8 confused by the Weinberger decision myself. I wasn't
9 on that panel, but I'm just a little confused whether
10 it was saying that the storm that originated - - -
11 the snowstorm that originated was the cause of the
12 icy condition, or the rain that continued, or
13 developed after the snow fell, caused the icy
14 condition.

15 And my understanding of the storm-in-
16 progress doctrine is that the storm - - - the
17 original storm must cause the icy condition, although
18 I may be incorrect about that. So I'm not really
19 sure what Weinberger is saying, but that is why I'm
20 saying -- but we might look at Weinberger and think
21 that that's the reason not to apply Powell.

22 MR. BLOCK: Except you have Vosper right
23 afterwards, and Vosper seemed to come back and adopt
24 Powell and say, when you have a rainy condition at
25 time, that's not a storm in progress.

1 JUDGE STEIN: But even in assuming that
2 that's the First Department rule, I'm concerned about
3 how you would apply such a rule. For example, you
4 have a storm, and it starts as snow and then it goes
5 to a wintry mix, and then it turns to rain for a
6 little while, then it turns back to a wintry mix,
7 then it's freezing rain, then it's snow again; don't
8 we have to wait until the precipitation ends before
9 we know, A, that the storm is over, and B, that going
10 out there and trying to do something will be - - -
11 will have any practical utility - - - to use a phrase
12 from the last case - - - because if you put down the
13 salt and the sand, and the rain washes it away, and
14 then it freezes up again, it doesn't do any good.
15 And to me, that's the purpose of the storm-in-
16 progress rule.

17 So, I know that was a very long question,
18 but - - -

19 MR. BLOCK: Right. No, I understand.

20 JUDGE STEIN: - - - how would you respond
21 to that?

22 MR. BLOCK: The issue of a lull in the
23 storm is certainly an issue that there was a lot of
24 jurisprudence about. And the length of that lull was
25 certainly important. If you have a three-hour lull

1 in the storm, and you have a busy commercial
2 property, a property like the state trooper barracks
3 - - -

4 JUDGE STEIN: But how does a person know,
5 if the person is responsible for maintaining the
6 property, how long the lull is going to be? That's -
7 - -

8 MR. BLOCK: Well, the question then is,
9 when should a person, if there is no further storm,
10 know it's time to clear the ice?

11 I mean - - -

12 JUDGE STEIN: But here, it's still
13 precipitating; the storm is - - - is still arguably
14 ongoing.

15 MR. BLOCK: Correct.

16 JUDGE STEIN: So to me, you look at that
17 and say, yeah, the storm is not over yet; I don't
18 know what's going to do in a few minutes, but it's
19 still happening.

20 MR. BLOCK: But it's not - - -

21 JUDGE STEIN: It's just a matter of whether
22 the temperature goes up or down.

23 MR. BLOCK: It's - - - it's not creating a
24 slippery condition, which is the situation in this
25 case.

1 JUDGE STEIN: Oh, you don't think that rain
2 on - - - on previous snow or ice can create a
3 slippery condition?

4 MR. BLOCK: Ice itself is slippery. Rain
5 itself, without ice, is not slippery.

6 JUDGE PIGOTT: Would you - - - would you
7 have a different standard, then, for a homeowner?

8 MR. BLOCK: The question about a homeowner
9 is really how long after the storm ends - - -

10 JUDGE PIGOTT: No, I'm just - - - I'm just
11 thinking of Mrs. Murphy who may have sleet or
12 something on her steps, it's raining out; she says,
13 well, I'm going to wait until the rain stops before I
14 go out to clear my sidewalk. And you would be saying
15 that's - - - that's creating a problem for her,
16 because she has got to get out there, and she has got
17 to clear out the sleet and the snow, whether it's
18 raining or not, because it's no longer a storm in
19 progress.

20 MR. BLOCK: Your Honor, I'm not arguing
21 that she has to run out as soon as the rain starts
22 and clear the snow.

23 JUDGE PIGOTT: No, but you do say that the
24 fact that it was raining does not mean that it was a
25 storm in progress.

1 MR. BLOCK: Correct. But she has a
2 reasonable time after the storm ends. After it
3 changes to - - -

4 JUDGE PIGOTT: But - - - but you're saying,
5 if it's raining, the storm is over. The fact that
6 it's raining - - -

7 MR. BLOCK: Correct.

8 JUDGE PIGOTT: - - - she has got to go out.

9 MR. BLOCK: In a reasonable time after a
10 change from ice to snow.

11 JUDGE PIGOTT: Right now the storm - - -
12 well, never mind. Okay.

13 JUDGE GARCIA: Right. Because I guess to
14 follow up on that point, clearly there is ice out
15 there, because he falls. So I think to Judge Stein's
16 point, it's raining on top of the ice, and Judge
17 Pigott saying, it's raining - - - we all agree it's
18 raining here. So why would they have to go out while
19 it's still raining on top of the ice and do
20 something?

21 MR. BLOCK: Because the storm itself is
22 over.

23 JUDGE PIGOTT: If you define it only as
24 appreciable accumulation of something - - -

25 MR. BLOCK: Correct.

1 JUDGE GARCIA: - - - right?

2 MR. BLOCK: I mean, look, that's what the
3 v. Miller says very clearly, we have to - - - the
4 property owner has an obligation to keep his property
5 safe.

6 JUDGE GARCIA: Right.

7 MR. BLOCK: That's the law of the state.

8 JUDGE GARCIA: But if we don't apply
9 appreciable accumulation test, do you lose?

10 MR. BLOCK: If you say there is any - - -
11 if you say - - -

12 JUDGE GARCIA: You say rain on top of ice,
13 you don't have to go out until after it stops
14 raining.

15 MR. BLOCK: Then I would lose. But I - - -

16 JUDGE RIVERA: Do you think summary
17 judgment would have been appropriate even under a
18 different rule; is that what you're saying?

19 MR. BLOCK: No.

20 JUDGE ~~PIGOTT~~RIVERA: Okay.

21 MR. BLOCK: I believe that once it changes
22 from - - - and this is what Powell is saying, and
23 this is what the courts in the Third and Fourth
24 Department are saying, is once it changes from a
25 condition that causes an appreciable accumulation,

1 then the time - - - the time that you have to clear
2 that condition is measured from that point. How long
3 depends upon the situation. Homeowner obviously has
4 much more time than, in this case, the Thruway
5 Authority.

6 JUDGE PIGOTT: So you're saying it's a
7 question of fact on this thing.

8 MR. BLOCK: It's absolutely a question of
9 fact. That's what Powell says.

10 JUDGE FAHEY: So the question of fact then
11 is after appreciable accumulation ends - - - this is
12 the rule you're asking for, after appreciable
13 accumulation ends, then how long do they have
14 afterwards, even though there may be precipitation in
15 some form?

16 MR. BLOCK: That's fact-specific issue.

17 JUDGE FAHEY: Right. So, you're arguing
18 it's a question of fact.

19 MR. BLOCK: Right. And in this case, we
20 had six people who were out there, came in from the
21 roads by 5:45, 6 o'clock. They had nothing else to
22 do except go pick up garbage in the yard. The
23 trooper barracks was right there, nobody bothered
24 going to the trooper barracks - - - even though it
25 was one of their priorities, nobody bothered going

1 there to treat the icy condition. That's what they
2 were there for.

3 JUDGE STEIN: Well, wasn't it still - - -
4 wasn't it still a wintery mix, by your client's
5 report, until 7 o'clock? At least - - -

6 MR. BLOCK: At - - - before he said it was
7 wintery mix, but he also said - - - and this was
8 pointed out in the respond - - - in the respondent's
9 brief - - - he also said that at the time he walked
10 out of his car and walked into the trooper barracks,
11 there was no snow or ice on the sidewalk.

12 So the wintery mix that was occurring was
13 not causing appreciable accumulation; it was just a
14 wintery mix in the air.

15 Look, last weekend, we had a perfect example of
16 what happens in the snow.

17 JUDGE STEIN: So then where did the ice
18 come from?

19 MR. BLOCK: Where did the ice come from?
20 Interesting question. One might look at the
21 temperature twenty-four hours before.

22 JUDGE STEIN: But you just said there was
23 no slippery condition when he went to work.

24 MR. BLOCK: There were two - - - okay,
25 there were two entrances to the trooper barracks.

1 And this isn't really in the record, but there are
2 two entrances to the trooper barracks. There's a
3 south entrance, where the troopers park their cars
4 when they're coming in their civilian cars, and north
5 entrance, where the cruisers are located.

6 This Trooper Sherman went in the south
7 entrance when he came in that day, which had no ice.
8 He left to go to his - - - to the cruiser through the
9 north entrance where there was ice. So that's where
10 the ice was, it was at the north entrance, not the
11 south entrance.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. BLOCK: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel.

15 MR. ZAJAC: Good afternoon, Your Honors.

16 My name is Andrew Zajac and I'm appearing this
17 afternoon for the respondent, New York State Thruway
18 Authority.

19 Your Honors, I respectfully submit that this
20 case is controlled by this court's prior decision in
21 Solazzo v. the Transit Authority. There is virtually no
22 difference between this case and Solazzo. If anything,
23 the conditions here were worse. In Solazzo, this court
24 described the weather conditions as snow, sleet, and rain,
25 on and off all day. Here, it was - - -

1 JUDGE ABDUS-SALAAM: What kind of rain was
2 it? Do we know what kind of rain it was in Solazzo?
3 I couldn't tell from that decision; was it light
4 rain, was it freezing rain, or just rain?

5 MR. ZAJAC: It was on and off all day. It
6 was just a nasty day all day long. It had to be
7 below freezing if it snowed, and if it created the
8 slush on which the plaintiff fell in that case, or
9 had to be at or around freezing. Here, there was a
10 major ice storm all night long and a cold rain was
11 still falling at the time of the accident.

12 In fact, the claimant here was an
13 experienced state trooper who was up and down all
14 night because he was worried about the weather. The
15 storm-in-progress doctrine as set out in Solazzo
16 works, and there is no good reason why this court
17 should accept the appellant's invitation to change
18 the law. The standard that the appellant proposes is
19 completely unworkable and wasteful.

20 I, for one, could - - -

21 JUDGE PIGOTT: Well, it's tricky, because
22 for example, as you say, if there is an on - - - if
23 there is a really bad ice storm going on, and then
24 the ice storm stops and it gets to a drizzling rain,
25 it could be argued there's an obligation there,

1 because you now know that there is an ongoing ice
2 storm that has ended, the ice is still there, it's
3 raining, but you have to weigh the danger to your - -
4 - to your people, versus somebody putting on a
5 slicker - - -

6 MR. ZAJAC: This is - - -

7 JUDGE PIGOTT: - - - and going out - - -

8 MR. ZAJAC: This is - - -

9 JUDGE PIGOTT: - - - and putting some ice
10 down - - -

11 MR. ZAJAC: This is true - - -

12 JUDGE PIGOTT: - - - or some salt down.

13 MR. ZAJAC: - - - but this could be a lull
14 in the storm, and a lull in the storm - - - property
15 owners have a defense during a lull in the storm, and
16 as in - - - as this court said in Solazzo, on and off
17 all day. On - - -

18 JUDGE PIGOTT: But that argument - - - the
19 only reason I was making that argument is that I
20 think your opponent is arguing it's a question of
21 fact. Let's put this in front of a jury and let them
22 decide, you know, where the - - - where the situation
23 lies.

24 MR. ZAJAC: Well, I think that the amicus
25 brief of the Transit Authority lays out pretty well

1 that - - - I think the courts are able to deal this
2 in a - - - deal with this on summary judgment in a
3 fair and even - - -

4 JUDGE FAHEY: The - - - the problem is the
5 factual determination. You know, I'm from Buffalo
6 and it's - - - we get a lot of snowstorms. It's
7 sometimes hard to tell when they end. And I don't
8 think that because you're from Buffalo or upstate,
9 that somehow you have an inherent ability to discern
10 that as a matter of law. It would seem that it's
11 kind of a classic question of fact as to when a storm
12 ends.

13 MR. ZAJAC: Well, it's - - - again, going
14 back to the appellant's proposed standard of no
15 appreciable accumulation - - -

16 JUDGE FAHEY: Uh-huh.

17 MR. ZAJAC: How - - - I'm not supposed to
18 be asking the questions - - -

19 JUDGE FAHEY: No, I understand - - -

20 MR. ZAJAC: Purely rhetorical.

21 JUDGE FAHEY: I understand the desire - - -

22 JUDGE PIGOTT: It was rhetorical.

23 MR. ZAJAC: Rhetorical. How am I supposed
24 to divine that at that moment in time, it's no longer
25 appreciably accumulatiinged?

1 JUDGE FAHEY: See, I don't think you can, I
2 don't think I can, maybe - - - well, I'm not sure
3 about me, but I don't think that - - - generally it's
4 harder for someone to say that is a matter of law,
5 because then we're saying there's no factual dispute.
6 So it's difficult for me to see how this wouldn't be
7 a factual dispute.

8 MR. ZAJAC: Well, again, there was a storm
9 in progress going on at the time - - -

10 JUDGE FAHEY: Yeah.

11 MR. ZAJAC: - - - at the very time.

12 JUDGE PIGOTT: That's a legal conclusion,
13 your opponent is saying. And - - - and he is saying,
14 yeah, it was raining.

15 JUDGE FAHEY: Yeah.

16 JUDGE PIGOTT: Does it factor in that you
17 got emergency people - - - personnel in that - - - in
18 that building, so that you have to be conscious of
19 the fact that they may have to go out at any time.
20 So regardless of the severity of the storm, you got
21 to weigh each one of these factors.

22 MR. ZAJAC: Well, the claimant was also one
23 of the people who could spread the salt, and they did
24 do that. Okay.

25 But, putting that aside, again, there was

1 an ice storm all night long, and it was still raining
2 at the time. So basically what the duty that the
3 claimant is looking to impose on my client is to go
4 out there while it's still raining, and cover each
5 and every square inch - - -

6 JUDGE PIGOTT: No, I think what he's saying
7 is, don't do anything. But if that's the wrong
8 decision, maybe you should respond in damages, or do
9 something. But it's a question of fact that a jury
10 should decide. Maybe you're absolutely right. But
11 why should - - - why should seven judges decide that
12 instead of - - -

13 MR. ZAJAC: I think it would eviscerate the
14 storm-in-progress doctrine if - - - if we're going to
15 be asking juries to decide if - - -

16 JUDGE RIVERA: Well, what's the summary
17 judgment evidence that shows that the storm was in
18 progress, in the record?

19 MR. ZAJAC: The plaintiff said that there
20 was a significant ice storm all night long. As he
21 was driving to work that morning - - - it was a ten-
22 minute drive - - - he said it was snow, ice, sleet,
23 and rain. Okay. He - - - when he got to work, he
24 said it was still a wintery mix of snow, sleet, and
25 rain, although he himself didn't see any ice. And,

1 while he was in the barracks, one of his fellow
2 troopers came in and said - - - fifteen minutes
3 before the accident, says, be careful, it's slippery
4 out there. Okay.

5 And when he left to - - - to perform his
6 duty, it was still raining outside, and it was a cold
7 rain - - - it was a cold rain all day long, the
8 weather records in the record indicate that it wound
9 up turning to snow later on that afternoon; the storm
10 was still in progress at the time.

11 JUDGE RIVERA: What was the temperatures?
12 What was the - - -

13 MR. ZAJAC: Low thirties - - -

14 JUDGE RIVERA: - - - the (indiscernible)
15 temperatures?

16 MR. ZAJAC: Low thirties.

17 JUDGE RIVERA: Where they above freezing?

18 MR. ZAJAC: Excuse me?

19 JUDGE RIVERA: Were they above freezing?
20 When you say low thirties, were they thirty-three?

21 MR. ZAJAC: The - - - the weather records
22 from the Newburgh Airport, which was - - - which is
23 about five miles away, don't have it as below
24 freezing. Although the claimant himself, in his
25 papers in the lower court said, well, those were - -

1 - those were - - - that was five miles away, the
2 weather conditions could have been different.

3 My - - - my adversary is kind of all over the
4 map with - - - as far as his theory of liability is
5 concerned. At one time - - - at one point he says, well,
6 there is - - - you know, there is no evidence that this
7 ice was the result of this storm in progress. But he
8 finishes his reply brief by saying, notice is not an issue
9 in this case because of the significant ice storm that was
10 going on.

11 There was a storm in progress here. There is no
12 reason to change the law. I would also ask this court to
13 take into account that property owners, and especially
14 municipal defendants like my client and the amicus Transit
15 Authority, have limited resources.

16 I don't think it's a good idea, and it's
17 expedient to go out during an ice - - - during a storm and
18 spread ice (sic) over each and every square inch of every
19 walkway, especially in a situation like here, where the
20 claimant himself said that he didn't see any ice in or
21 around the barracks.

22 Lastly, I would like to say that I don't see any
23 difference between the Appellate Divisions here. I think
24 the Second Department decision is squarely in accord with
25 Weinberger, and my appel - - - my adversary says, this

1 court should adopt Powell. Powell is the gold standard
2 here.

3 Well, there, the First Department said that the
4 duty arises once there is a period of inactivity after the
5 cessation of the storm. Well, here, there was no such
6 period of inactivity as there was an ongoing a cold rain.

7 Judge Abdus-Salaam discussed Weinberger before;
8 it squarely - - - it squarely comports with the decisions
9 of the Second Department. The Second Department is not an
10 outlier here. The Appellate Divisions are in accord here.
11 There is no good reason to change the law. And with that,
12 I'll ask the court for an affirmance. And thank you very
13 much.

14 CHIEF JUDGE DIFIORE: Thank you, sir.
15 Counsel.

16 MR. BLOCK: Thank you, Your Honor.

17 I wish I could reserve more than two minutes.

18 Regarding Solazzo, I think I've dealt with that
19 clearly in my brief. Solazzo is an interior sl - - -
20 floor fall, there was water accumulating on - - - inside
21 the subway; it's not a case like this, where there is ice
22 or snow, and exterior area.

23 Major storm? He never said that. He said, I
24 woke up in the morning, there was an ice storm outside;
25 never said major storm. And in fact, when you look at the

1 record, when you look at the truck driver activity logs
2 that are in the record, you see that the truck drivers
3 themselves made note of the weather conditions through the
4 night.

5 Four of them said it was raining the entire
6 night. One of them said, it rained until 2:45, there was
7 snow from 3:20 to 5:45. Finally went back to the
8 barracks. So tells you it was a snow like we had last
9 week and it melted right away. One, Mr. Jarond (ph.), who
10 was more detailed said, it rained at 12, it snowed at
11 2:45, sleet at 3:35, freezing rain 4:30, and then it rain
12 at 5:45.

13 Now, by the admission of the Thruway Authority
14 workers themselves, there was not a major ice storm during
15 that night, and whatever was going on was not causing an
16 appreciable accumulation of anything. Emergency personnel
17 - - -

18 JUDGE STEIN: In your - - - is your
19 argument then that there was never any storm at all,
20 so there is - - - there should be no storm-in-
21 progress - - -

22 MR. BLOCK: In order for them - - -

23 JUDGE STEIN: - - - doctrine in the first
24 place?

25 MR. BLOCK: In order for them to make - - -

1 to succeed in the summary judgment motion, they have
2 to show, as a matter of law, there was a storm in
3 progress. If they can't do it, my burden is over.

4 JUDGE STEIN: Did - - - did you argue that
5 though?

6 MR. BLOCK: Pardon me?

7 JUDGE STEIN: Did you argue that - - - have
8 you ever argued that before, that there was ne - - -
9 that there was never a storm on the - - -

10 MR. BLOCK: I've noted that the - - - that
11 what they've shown, the data that they came up with
12 shows there was no icy storm. Their data shows it
13 rained the entire night with temperatures above
14 freezing.

15 JUDGE RIVERA: So - - - I'm sorry, so what
16 is it you wanted them to address, if there was no
17 storm? I'm - - - I'm, now I'm very confused as to
18 what your argument is.

19 MR. BLOCK: I'm s - - -

20 JUDGE RIVERA: You're saying there was no
21 storm at all?

22 MR. BLOCK: No.

23 JUDGE RIVERA: So what conditions were they
24 supposed to address if there was no storm at all?

25 MR. BLOCK: There was - - - there was ice

1 there. Whether or not there was - - -

2 JUDGE RIVERA: Where did the ice come from?

3 MR. BLOCK: Whether or not that there was a
4 storm is a question of fact. My client said there
5 was ice storm during the night, and one of the
6 workers even said there was an ice storm during the
7 night. So there was certainly ice someplace, and it
8 was there, it could've come from the storm, and it
9 could've come from twenty-four hours earlier, when
10 you had single digit temperatures in the area. And
11 certainly caused for freezing - - - for freezing
12 conditions.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. BLOCK: Thank you, Your Honors.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Sherman v. New York State Thruway Authority, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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Date: March 29, 2016