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COURT OF APPEALS

STATE OF NEW YORK

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ANTHONY TURTURRO,

Respondent,

-against-

NO. 196

CITY OF NEW YORK,

Appellant.

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20 Eagle Street  
Albany, New York  
November 15, 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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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is number 196, the matter of Turturro  
3 v. the City of New York.

4 Counsel?

5 MS. GREENBERG: Your Honor, may it please the  
6 court, Susan Greenberg for appellant, the City of the New  
7 York. Three minutes for rebuttal, please?

8 CHIEF JUDGE DIFIORE: Certainly.

9 MS. GREENBERG: Your Honors, at bottom, this  
10 lawsuit seeks to hold government liable for not stopping a  
11 driver's refusal to follow the rules of the road. That's a  
12 theory of liability that's never been recognized by this  
13 court, that has broad ramifications for a municipal  
14 liability, and that is, on this record, impermissibly  
15 speculative.

16 JUDGE STEIN: So in this case, we have someone  
17 that pleaded guilty to a crime, right, in the - - -

18 MS. GREENBERG: Correct, Your Honor.

19 JUDGE STEIN: Okay. So what about in - - - in a  
20 different case where that didn't happen? And - - - so is  
21 there - - - are you saying that the - - - that the  
22 government, that the City, is not responsible for  
23 maintaining its roads in a reasonably safe condition for  
24 pedestrians or bicycle riders?

25 MS. GREENBERG: What we're saying is that - - -

1 that the tort duty extend to insuring that a roadway is  
2 reasonably safe, presuming to - - - that - - - that drivers  
3 and pedestrians obey binding controls, and that - - -

4 JUDGE FAHEY: So is it limited only to people who  
5 have obeyed the law? What - - - what of those who don't  
6 obey the law? What if I'm going forty miles an hour in a  
7 thirty-mile-an-hour road? The city has no responsibility  
8 for design or maintenance?

9 MS. GREENBERG: Your Honor, certainly the City  
10 has a responsibility, but we're saying that it's a public  
11 duty that runs to the public at large. The City has a  
12 responsibility - - -

13 JUDGE FAHEY: Well, now, now, well, slow down,  
14 slow down. The public duty that runs the public at large,  
15 it - - - but you have no responsibility to the people that  
16 use the road legally?

17 MS. GREENBERG: Not - - - not a tort duty. But  
18 we're saying also - - - certainly that is true. But we're  
19 also saying that this is such an extreme case, that the  
20 court doesn't even need to reach that issue. Here, the  
21 driver Pascarella pled guilty to a felony assault. That's  
22 not even a driving-specific crime. And the City has a  
23 responsibility to prevent that type of crime, not just on  
24 6,000 miles of road, but on the sidewalks, in the subway  
25 tunnels, in people's houses, in the piers, and this court

1 has recognized over and over again, that society is best  
2 served when public employees decide how to best protect the  
3 public - - -

4 JUDGE ABDUS-SALAAM: Okay, so in this case, when  
5 public employees were asked to look at the situation  
6 because there had been so many complaints about speeding on  
7 this, what essentially appear - - - appears to me to be a  
8 straightway, and the City undertook some studies, but  
9 didn't actually, apparently look at the speeding issue  
10 itself - - -

11 MS. GREENBERG: Just - - - just to clarify - - -

12 JUDGE ABDUS-SALAAM: - - - the City has no  
13 responsibility?

14 MS. GREENBERG: Just - - - just to clarify on  
15 that point, and then I'll return to the question about  
16 duty. The studies that the City did were not studies of  
17 speeding along the length of a roadway. They were studies  
18 that were responsive to complaints about speeding on the  
19 length of the roadway.

20 JUDGE STEIN: But isn't that the issue, whether  
21 it was responsive to the complaints?

22 MS. GREENBERG: The eviden - - - the trial  
23 evidence showed very clearly that it was for four key  
24 reasons, Your Honor. First of all, first and foremost, the  
25 reason that the community is requesting traffic lights and

1           that the Department of Transportation is studying whether  
2           to provide them, is because traffic lights provide  
3           pedestrians and bicyclists a safe place to cross. So the  
4           fact that a car - - -

5                    JUDGE STEIN: Well, but that's the point here, is  
6           that the - - - the complaints were about speeding, and if  
7           they thought that the answer to that was traffic lights,  
8           but it turns out that that's not the answer to speeding, do  
9           - - - does that end the - - - the City's duty to - - -

10                   MS. GREENBERG: The City referred it for policing  
11           and for police enforcement. And - - -

12                   JUDGE STEIN: And the complaints continued,  
13           right?

14                   MS. GREENBERG: And they studied it again, so the  
15           trial evidence was - - -

16                   JUDGE FAHEY: But you're not contesting that - -  
17           - it seems like all the experts agree that, at least, at  
18           trial that there was a - - - a - - - the traffic studies  
19           weren't done.

20                   MS. GREENBERG: I'm sorry?

21                   JUDGE FAHEY: The traffic studies weren't done.

22                   MS. GREENBERG: There were - - -

23                   JUDGE FAHEY: That there were four studies done  
24           by ICU, and - - - and they - - - they weren't - - - they  
25           did not address the problem.

1 MS. GREENBERG: Certainly, Your Honor, we're  
2 saying that the evidence shows that they were a rational  
3 response to the problem, and - - - and that's exactly what  
4 I'm getting at. So the fact that a car may speed up in  
5 between the lights, does not mean that a traffic light is  
6 not responsive to the complaints about speeding.

7 JUDGE FAHEY: Well, it's not just a traffic  
8 light. It's a - - - I think it's the whole - - - what  
9 should be done is a whole separate question, but the fact  
10 that the study itself wasn't done, at least at the trial  
11 level, seems to be pretty conclusive.

12 MS. GREENBERG: The - - - the evidence was the  
13 study - - - the City chose to conduct one study, and not a  
14 different type of study. Bear in mind also, of the  
15 fourteen letters, twelve of those fourteen specifically  
16 dealt with the area by the school, and many of them raised  
17 questions and concerns about the school crossing. And the  
18 intersection control unit is the only unit that decides  
19 whether to put in a school crossing.

20 Similarly, there were concerns, right, about  
21 traffic accidents. You've got the bisecting side streets  
22 in northern Gerritsen Avenue, and so a traffic light  
23 prevents a dangerous right-angle - - -

24 JUDGE RIVERA: But - - - but the - - - but the  
25 City can't - - - can't say it's not aware from those

1 complaints that there is a speeding problem. There is a  
2 drag racing problem. That this is, as we often hear on the  
3 news, right, one of these boulevards of death. That  
4 there's really a problem on this particular road.

5 MS. GREENBERG: But the - - -

6 JUDGE RIVERA: And so - - - and - - - let me  
7 finish.

8 MS. GREENBERG: Sorry.

9 JUDGE RIVERA: So if your response is, well, when  
10 there's a speeding problem, the answer to that is the  
11 police have to stop them and give tickets, that hasn't  
12 worked, so is - - - is the City's position that regardless  
13 of whether or not the law enforcement protocols don't work,  
14 you can stand back and do nothing?

15 MS. GREENBERG: No, Your Honor, what we're saying  
16 is that speeding is complex. There are a range of  
17 approaches that you can take, and it can't be that there's  
18 a tort duty to completely prevent speeding on a public  
19 roadway.

20 JUDGE FAHEY: No, but let me give you an example.  
21 Of course, I - - - I recognize the nature of your argument,  
22 but - - - but you're asking us - - - we - - - we have two  
23 paths to go down here. We can go down the governmental  
24 path or the proprietary path. You're proposing that we go  
25 down the governmental path. Is that - - -

1 MS. GREENBERG: Co - - - correct.

2 JUDGE FAHEY: Is that - - - is that a fair - - -

3 MS. GREENBERG: Correct.

4 JUDGE FAHEY: - - - a fair reflection of it?

5 Okay.

6 MS. GREENBERG: And this court has recognized  
7 time and again that where - - - where you're dealing with  
8 an issue of policing on a - - - complex decisions about  
9 policing in a broader public area, the fact that a  
10 municipality could supplement those efforts with some  
11 property-based measure, does not make it proprietary. Is  
12 that - - -

13 JUDGE STEIN: Has this court ever analyzed road  
14 design or maintenance cases based on a governmental  
15 function?

16 MS. GREENBERG: Not - - - not in this way, but  
17 certainly that's the reason behind Bonner, Clinger, Weiner,  
18 Miller, World Trade Center. The same principal applies  
19 here.

20 I'd like, if I could, because I see I have very  
21 little time left, to turn briefly to proximate cause. Here  
22 it was undisputed that plaintiff's traffic calming theory  
23 was beyond the ken of an ordinary juror, right.  
24 Plaintiff's whole theory is that lay people don't  
25 understand about traffic calming, and that's why they're

1            requesting traffic calming, but you really need a traffic  
2            light.

3                            So at a minimum, plaintiff's expert needed to  
4            identify a particular measure that should have been  
5            implemented. To opine that its absence was a substantial  
6            factor in causing this particular accident and to explain  
7            why and the reasons that he didn't - - - there are reasons  
8            that their expert was unable to do that, having to do both  
9            with the challenges of policing this particular location  
10           and traffic calming this location, and of this particular  
11           driver.

12                           The expert also completely failed to opine that  
13            any traffic calming measure that could have been  
14            implemented would have had any effect on the driving of  
15            someone like Pascarella, right. Our expert said if  
16            somebody's irresponsible enough to go forty-eight to fifty-  
17            two in a thirty-mile-per-hour zone, traffic calming is not  
18            going to stop them.

19                           JUDGE ABDUS-SALAAM: Would - - - would that  
20            person - - - would that driver had been able to speed in a  
21            - - - on a roadway that included speed bumps? Isn't that  
22            the whole nature of speed bumps, that you have to slow  
23            down, otherwise you tear up your car, and possibly - - -

24                           MS. GREENBERG: It was - - -

25                           JUDGE ABDUS-SALAAM: - - - injure yourself?

1 MS. GREENBERG: It was undisputed that speed  
2 bumps would not be appropriate for this roadway. Here's  
3 the key thing. This roadway, Gerritsen Avenue, is the sole  
4 point of egress for that neighborhood, which makes it a  
5 very challenging place to calm, right. You can see in the  
6 evidence, it's a peninsula-shaped neighborhood. The water  
7 comes in in the middle.

8 So for the whole southern portion, you've got a  
9 neighborhood that's completely bounded by water, and has  
10 one road out, right. If a storm is coming and they need to  
11 evacuate, one road out. If there's a fire, fire trucks  
12 need to come, there's one road in. A bomb scare, a  
13 terrorist threat, one road for emergency vehicles. That's  
14 not a road where you want to put speed bumps, roundabouts,  
15 rumble strips - - -

16 JUDGE FAHEY: But what - - - what your argument  
17 is, is that there is - - - that your study would have shown  
18 - - - that - - - that if they - - - that if the study was -  
19 - - but that wasn't done, would have shown - - - if it had  
20 been done would have made no difference because there is no  
21 design difference that would make a difference.

22 MS. GREENBERG: No, what I'm saying is that  
23 plaintiff's causation theory was deficient at the most  
24 basic level, because he did not and could not identify a  
25 particular measure that would have been appropriate for

1 Gerritsen Avenue, and that would have had any effect on  
2 preventing this accident.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 Counsel?

5 MR. WALKER: Good afternoon, Your Honors. My  
6 name is Robert Walker. I represent the plaintiff-  
7 respondent. At counsel table with me is Michael Walker of  
8 the firm.

9 JUDGE FAHEY: Counsel, could you fin - - - could  
10 you address first what - - - what opposing counsel finished  
11 with, the proximate cause argument?

12 MR. WALKER: Yes, sir. Your Honor, the testimony  
13 was from the City's own expert, Mr. Summerfield, that the -  
14 - - it has been known for many decades that traffic calming  
15 is an effective means of reducing speeds, controlling  
16 speeds, indeed it redu - - - it's known to reduce the whole  
17 speed curve. The ITE manual, which is the Institute of  
18 Transportation Engineers, which they all - - - all the  
19 municipalities rely on - - - specifically contain - - -  
20 there was a mention of speed bumps. It's not just speed  
21 bumps. There were literally dozens and dozens of these  
22 traffic calming measures.

23 JUDGE PIGOTT: Was it that - - - isn't that her  
24 point? In - - - in other words, let's - - - let's assume  
25 instead of a road, we're talking about a saw. And somebody

1 gets hurt on a saw. And the plaintiff comes in and says,  
2 well, they could have taken the - - - the saw blade off,  
3 they could have put a guard on, they could have taken the  
4 plug out of the wall, they could have - - - that's not a  
5 case. You - - - you've got to show - - - I - - - I think  
6 her argument is that you have to show that this is what  
7 caused this accident.

8 And so if you'd put in - - - if - - - if your  
9 expert had said speed bumps would do it, they would counter  
10 by saying, speed bumps are only used in certain - - -  
11 certain situations, slowing - - - you know, for  
12 construction and things, so that doesn't - - - he wants to  
13 say divided highway. I would then think the City would  
14 want to say, well, you can't divide this highway, because  
15 of whatever.

16 So does it do it to simply say there are ways  
17 that you could have calmed the traffic here and here's a  
18 dozen of them, therefore we win?

19 MR. WALKER: Your Honor, to address Your Honor's  
20 question, there was also testimony from the plaintiff's  
21 expert, Mr. Hintersteiner, who a traffic engineer - - -

22 JUDGE PIGOTT: Well, that's what I meant. You -  
23 - - you were talking about the defense side, but I was  
24 thinking your prima facie case - - - he's the one that  
25 said, you know, divide the highway and do the - - - do the

1           rumble strips, do this, do that.

2                   MR. WALKER:   Right.

3                   JUDGE PIGOTT:   But he never said, I've looked at  
4           this and now I know what we ought to be doing here and  
5           maybe what we ought to be doing here is reducing the speed  
6           to ten miles an hour.  Then they'd come back and say that  
7           you can't do that.

8                   MR. WALKER:   He - - - he did express an opinion,  
9           however, Judge, specifically on proximate cause, that  
10          traffic calming measures are the appropriate response,  
11          could have been used, and had they been used - - -

12                  JUDGE PIGOTT:   Do you understand my question?  I  
13          mean, can you just say that?  Can you say - - - can - - -  
14          can - - - go back to my saw case.  Can you simply say,  
15          well, you know, they could have put guards on; they could  
16          have unplugged it; they could have done - - - that - - -  
17          that doesn't get you to a prima facie case; does it?  I  
18          mean, you have to prove that - - - that the injury, you  
19          know, the cause - - - and the cause was a proximate cause  
20          and in this - - - in this case, they could have prevented  
21          that by - - - and you're saying everything.

22                  MR. WALKER:   Not really, Judge.

23                  JUDGE PIGOTT:   That's too - - -

24                  MR. WALKER:   I'll concede the answer to your  
25          question as to the saw - - - your example, yes.

1 JUDGE PIGOTT: Get rid of the saw.

2 MR. WALKER: I think what's different about the  
3 case, the actual testimony, we had unrefuted testimony,  
4 actually agreeing testimony, by the experts on both, that  
5 traffic calming measures are effective in reducing speed.  
6 The case involved speed. There was no question about that.  
7 Exactly what I thought was interesting, the type of  
8 speeding that was involved here, is exactly why traffic  
9 calming works. The testimony from the gentleman, Mr.  
10 Pascarella, who was ultimately convicted, he admitted that  
11 he was speeding ultimately. But he sa - - - his actual  
12 trial testimony was I did not think I was going over  
13 thirty-five miles per hour.

14 JUDGE PIGOTT: Is this the same one that - - -  
15 was it - - - was it seventeen charges he had before that -  
16 - - that was never before the jury, and the fact that he  
17 had - - - he had been caught speeding on this road before,  
18 I mean, he - - - he's not - - - I didn't get the impression  
19 that he was some lamb, that said, oh, my God, I was - - -  
20 you know, I was - - - I was lured in to speeding here  
21 because my - - - my car is so nice.

22 MR. WALKER: Yeah, I'm - - - I'm not sure if it  
23 was seventeen or not.

24 JUDGE PIGOTT: How many?

25 MR. WALKER: There was a prior traffic conviction

1 for speeding on that road, that the judge let in.

2 JUDGE FAHEY: So were they - - - and I think it  
3 too far in to reset him, but were - - - were they charges  
4 that he had on that road?

5 MR. WALKER: As prior speed - - - no, not  
6 seventeen. There was one prior speeding charge on that  
7 road.

8 JUDGE FAHEY: And I assume that's the police who  
9 charged him there, right?

10 MR. WALKER: Yes, he got a ticket and it was a -  
11 - -

12 JUDGE PIGOTT: Seventeen - - - seventeen  
13 suspensions - - - license suspensions.

14 MR. WALKER: Yeah, I think there was only - - -

15 JUDGE PIGOTT: It could have been - - -

16 MR. WALKER: - - - one speeding ticket on this  
17 road, that - - -

18 JUDGE PIGOTT: That's right.

19 MR. WALKER: - - - because the judge - - - Judge  
20 Kramer let that into evidence because it might be relevant.

21 JUDGE ABDUS-SALAAM: Can we get back to the  
22 question that your adversary raised, though, counsel - - -

23 MR. WALKER: Yes, Your Honor.

24 JUDGE ABDUS-SALAAM: - - - about whether you have  
25 to show as part of your prima facie case that there's a

1 specific traffic calming measure that could have been taken  
2 here, so that the City would have an opportunity to rebut  
3 that.

4 MR. WALKER: I - - - Your Honor, I may - - - I  
5 think that the plaintiff's expert did address that. He  
6 said there were any number of things that can be done. Mr.  
7 Summerfield conceded on cross that, yes, there are many - -  
8 - any number of things that could be done, either  
9 individually and - - - and/or in combination to get the  
10 specific speed. There was testimony, as a matter of fact,  
11 that what they often do with these, they'll try out things  
12 to see how they work; if they need to be spaced differently  
13 or tried differently and go back and redo the plan.

14 The - - - the more basic issue, I guess, was the  
15 plan was never done, so it's kind of - - - but I - - - I  
16 don't think proximate cause from - - - if I understand the  
17 court's cases - - - you don't have to prove with a hundred  
18 percent certainty that the accident would have been - - -  
19 that this accident would not have happened. The standard  
20 is one of more probable or not and I - - - I think that  
21 certainly meets it.

22 I - - - I might point out, we had testimony from  
23 - - - there was a biomechanical expert, Mr. Fijaklowski,  
24 that the City called, and he conceded specifically, that  
25 had the speed been lower, this impact would never have

1 occur - - - occurred because the car would have stopped  
2 twenty-eight feet before the point of impact.

3 JUDGE PIGOTT: So - - - so one of the - - - one  
4 of the - - - the reasons for proximate cause is they had a  
5 thirty-mile-per-hour speed limit, and it should have been  
6 less.

7 MR. WALKER: It should have been less?

8 JUDGE PIGOTT: Yeah.

9 MR. WALKER: No.

10 JUDGE PIGOTT: Didn't you just say that if the  
11 speed had been lower, the impact would have been less, and  
12 he wouldn't have - - -

13 MR. WALKER: No, Your Honor, for instance, he  
14 specifically conceded that if the car had been traveling at  
15 - - - at thirty-five miles per hour, for instance, which  
16 would still be over the speed limit, but the impact would  
17 not have occurred.

18 JUDGE PIGOTT: Okay.

19 JUDGE RIVERA: So your point with that is that if  
20 they have used traffic calming protocols, not necessarily a  
21 sign that says this is the speed limit, not necessarily a  
22 traffic light, but some other - - - these other traffic  
23 calming protocols, that the speed would have been reduced.

24 MR. WALKER: Yes, Your Honor, exactly. What - -  
25 - what would - - - what happens - - - the - - - the

1 principal of that underlies traffic calming, and Mr.  
2 Summerfield is actually the one that gave this testimony.  
3 The - - - the images, if you picture a very narrow winding  
4 alley that's barely wider than your car, you can put a  
5 sixty-five-mile-per-hour speed limit there, nobody's going  
6 to do that, because of what's called friction. The dri - -  
7 - the driver's concerned about clearances and whatnot.

8 The alternative to that is you can have a six-  
9 lane straight highway, and put a thirty-mile-pre - - - per-  
10 hour speed limit, they know as traffic engineers that  
11 people aren't - - - most people aren't going to go thirty  
12 miles per hour. It's an inherent reaction of drivers - - -  
13 just as Mr. Scarella (sic) said that he wasn't looking at  
14 the speedometer; he thought he was going thirty-five.

15 JUDGE PIGOTT: But to follow up Judge Abdus-  
16 Salaam - - -

17 MR. WALKER: Yes, sir.

18 JUDGE PIGOTT: - - - was asking, I think, and I  
19 was too, Hin - - - Hintersteiner, your - - - your expert  
20 never said what they had to do was this.

21 MR. WALKER: In - - - in terms of picking a  
22 specific thing - - - a protocol of specific devices, yes,  
23 Your Honor.

24 JUDGE PIGOTT: Rumble strips - - -

25 MR. WALKER: I would agree with that.

1 JUDGE PIGOTT: You know, but - - -

2 MR. WALKER: Well, he - - -

3 JUDGE PIGOTT: But don't - - - I mean, how do - -  
4 - how do - - - okay.

5 MR. WALKER: Yeah, I mean, I would concede that  
6 he didn't say - - - give a specific plan - - - this is what  
7 I would use. What he did say there were a number of things  
8 that could be used.

9 JUDGE RIVERA: As from a tech - - - tech - - -  
10 technical standpoint, is it a - - - a discrete limited  
11 universe of calming - - - traffic calming protocols? Or is  
12 that up for grabs? I think that also is in part what the -  
13 - - these questions have been asking.

14 MR. WALKER: Yeah, Judge, there's a - - - the IT  
15 manual contains literally dozens of different types of  
16 devices that can be used individually or in combination.  
17 There's science to just making space - - -

18 JUDGE FAHEY: Yeah, I thought the more  
19 fundamental issue was whether or not a study was to be  
20 done. Wasn't that the so - - - isn't that the source of  
21 the duty that was violated?

22 MR. WALKER: Exactly, Judge. The - - -

23 JUDGE FAHEY: Right. And - - - and it's - - - I  
24 think both experts concede that a traffic calming study was  
25 not done here.

1 MR. WALKER: That's right.

2 JUDGE FAHEY: And - - - and the guy you were  
3 quoting before was a defense expert, Hin - - - Summerfield.

4 MR. WALKER: That's correct, Your Honor.

5 JUDGE FAHEY: Yeah, that's what I thought, okay.

6 JUDGE RIVERA: Oh, but the question then is, the  
7 - - - the proximate cause. I think that's correct, but the  
8 question is whether or not not having done the study and  
9 not taking these measures results in the accident, right?

10 MR. WALKER: Yeah, I - - -

11 JUDGE RIVERA: The proximate cause of the  
12 accident.

13 MR. WALKER: I - - - I understand, Judge. I - -  
14 - I think what Mr. Hintersteiner specifically did testify  
15 to and gave an opinion to that these measures were  
16 available, and could have been implemented in a way to  
17 avoid this accident. And failing to do that study, and  
18 implement some of these, was the proximate cause. Mr.  
19 Summerfield conceded, yes, these are known to be effective;  
20 this could have been done. Whether it was a rumble strip  
21 or not, or this, in con - - - is - - - I think is  
22 irrelevant.

23 JUDGE STEIN: So I thought your standard argument  
24 - - - you - - - you're - - - you're - - - first of all,  
25 you're not saying that the driver didn't have also some

1 liability here.

2 MR. WALKER: Of course not, Judge. We argue - -  
3 -

4 JUDGE STEIN: Because in - - - you're not saying  
5 the City was the sole proximate cause.

6 MR. WALKER: Absolutely.

7 JUDGE STEIN: What you're saying is, is that had  
8 any one or more of these identified measures, which your -  
9 - - your experts talked about, been implemented, and even  
10 slowed this car down, not even necessarily below the speed  
11 limit, that there was - - - that there was a chance this  
12 wouldn't have happened.

13 MR. WALKER: And that was Mr. Fijaklowski's  
14 point, that - - - you know, on cross he conceded, even at  
15 thirty-five miles per hour, five miles still over the  
16 posted speed limit, this impact never occurs. So, yes,  
17 that's exactly - - -

18 JUDGE RIVERA: So the protocols are - - - are - -  
19 - in the sense that they work, is that - - - there is no  
20 way that one could reach the speed that this car reached -  
21 - -

22 MR. WALKER: Exactly.

23 JUDGE RIVERA: - - - with some or any or a  
24 combination of these protocols. That's the point of the  
25 expert.

1 MR. WALKER: That was specific - - -

2 JUDGE RIVERA: He might still be speeding, but he  
3 couldn't have done this.

4 MR. WALKER: Well, in - - - exactly, Judge. Mr.  
5 Summerfield conceded that they are known traffic calming  
6 measures, are known to be effective.

7 JUDGE RIVERA: Can I ask is - - - is - - - why  
8 isn't it appropriate for them to rely on law enforcement if  
9 we're talking about bad behavior of members of the  
10 community or even someone just driving through who's not  
11 from that community?

12 MR. WALKER: I - - - I think, Your Honor,  
13 specifically to address that and Mr. Summel (sic) - - -  
14 Summerfield, the plaintiff's expert conceded this - - - one  
15 of the very indications in the ITE manual for traffic  
16 calming is if normal traffic enforcement police efforts are  
17 not affective. That's a completely separately warrant for  
18 starting a traffic - - -

19 JUDGE PIGOTT: There's a rumor, and I don't know  
20 if it's true or not, that there are people that drive on  
21 the New York State Thruway in excess of sixty-five miles an  
22 hour.

23 JUDGE FAHEY: I'm shocked by that.

24 JUDGE PIGOTT: I don't know if that's true, but  
25 if it is true, and they haven't done a study, and there's

1 an accident on the New York State Thruway, is the New York  
2 State Thruway Authority responsible for failure to test - -  
3 -

4 MR. WALKER: Absolutely not, Judge.

5 JUDGE PIGOTT: - - - the speeding - - -

6 MR. WALKER: Absolutely not. I - - - I think  
7 there - - - there's a big difference between the New York  
8 State Thruway and a local street - - - stretch of street  
9 where you have specific - - - I - - - I mean, there were a  
10 tremendous number of written complaints by virtually - - -

11 JUDGE PIGOTT: I'm suggesting that - - - I - - -  
12 as I say, I don't know, but I - - - you know, I drive the  
13 thruway, and - - - and a lot of people pass me, because I -  
14 - - I do sixty-four. And - - - I'm not under oath, but - -  
15 - but if we know that all this is happening, isn't - - -  
16 isn't the logical extension of that, then, that - - - that  
17 any accident that happens on a thruway where someone is  
18 speeding is re - - - is the responsibility - - - to some  
19 extent - - - of the New York State Thruway Authority for  
20 not doing calming studies.

21 MR. WALKER: I - - - I don't think there will be  
22 any such duty, Your Honor. The - - - if in your example,  
23 you're proposing an isolated, random act of speeding - - -

24 JUDGE PIGOTT: No, no - - -

25 MR. WALKER: - - - which happens - - -

1           JUDGE PIGOTT: I'm saying that everybody speeds.  
2           That's the problem. And - - - and - - - and there's  
3           accidents as a result and the damage is worse, because  
4           people are going faster. And they're on their phones and  
5           whatever, and unless and until the study - - - the New York  
6           State Thruway Authority does some - - - somebody - - - type  
7           of study, they are in every single las - - - lawsuit  
8           involving an accident on the thruway, are they not?

9           MR. WALKER: Your Honor, I - - - to address your  
10          question, I - - - I think if there were specific complaints  
11          that a particular section of the thruway, for whatever  
12          reason had a high - - - a high accident rate and a high  
13          speeding rate, I - - - and I think that would then trigger  
14          the duty to do a study and that's what we have here.

15          JUDGE PIGOTT: Well, if - - -

16          MR. WALKER: But I don't think just a general - -  
17          -

18          JUDGE PIGOTT: But the complaints are you need -  
19          - - you need more traffic lights. And the Thruway  
20          Authority says we don't use traffic lights. Your argument  
21          would be, well, the - - - they complained about traffic  
22          lights, but everybody knows that that's not going to work,  
23          so they should have done something else.

24          MR. WALKER: Yes, and - - - and for instance, I  
25          mean, I guess the analogy on a roadway like the thruway,

1           like a superhighway, would be if they had a turn in the  
2           road that an abnormal amount of cars were not negotiating,  
3           and going off, you know - - - that's partly the driver's  
4           fault, obviously, but at some point, it becomes, whoa,  
5           maybe we have to look at the design of the road. And  
6           that's what we have here, Judge, I think it was.

7                        CHIEF JUDGE DIFIORE: Thank you, Mr. Walker.

8                        MR. WALKER: Thank you very much, Your Honors.

9                        CHIEF JUDGE DIFIORE: You're welcome.

10                      Ms. Greenberg?

11                      MS. GREENBERG: Your Honors, if I could just  
12           speak to some of the questions about the expert testimony.  
13           The point about whether their expert said if you had done a  
14           combination of measures, he couldn't have sped, that's  
15           exactly what their expert did not say. He freely conceded  
16           and admitted that if you put in traffic calming measures,  
17           if someone chooses to speed, you're not going to stop them.  
18           And he never opined that any traffic calming measure would  
19           have prevented or had any effect on this accident.

20                      JUDGE RIVERA: But - - - but - - - but - - -

21                      MS. GREENBERG: The only thing he said - - -

22                      JUDGE RIVERA: So is it true that he also didn't  
23           opine that even if you couldn't stop the speeding, that is,  
24           you're - - - you're driving in excess of the speed limit,  
25           you could at least slow them down and that might have made

1 a difference?

2 MS. GREENBERG: He opines that traffic calming  
3 would have an effect on the average speed of reasonable  
4 drivers, right. So the parents driving their kids to  
5 school during the day on Gerritsen Avenue might have a  
6 modest five to fifteen percent reduction in speed. He  
7 never opines that any measure that would be appropriate for  
8 this area would in any way affect the top fifteen per cent  
9 - - - of percent of speeders. And this is a guy, bear in  
10 mind - - -

11 JUDGE RIVERA: But if the point of that is  
12 because the cars got to slow down to work its way through  
13 these traffic calming designs, why isn't it - - - of  
14 course, a fortiori that would be true if one is driving at  
15 seventy as opposed to forty.

16 MS. GREENBERG: Because again, any of the  
17 measures that we're talking about for this roadway would  
18 not physically force a driver to slow down. There are  
19 things that increase the workload - - -

20 JUDGE FAHEY: Well, you - - - you don't know  
21 that, because you didn't do any of the studies. Listen,  
22 everybody who worked for the City of New York said you  
23 didn't do the studies after all these complaints. Let me  
24 finish. I count at least four. Your own expert said that  
25 the studies that were done, were not traffic calming

1 studies.

2 MS. GREENBERG: That - - -

3 JUDGE FAHEY: Excuse me. Just let me finish, and  
4 I'll - - - you know. So to say that they have to say - - -  
5 first you got to do the study, and then out of the study we  
6 have to say what are the appropriate measures that should  
7 be done. But the question is, whether or not you had a  
8 duty to do the study and it seems almost uncontested, in  
9 terms of raw evidence that you - - - you didn't meet that  
10 duty.

11 MS. GREENBERG: To the contrary, Your Honors.

12 The studies that we did included speed studies that  
13 complied with engineering standards and that showed that  
14 speeding while present was normal. And that this was the  
15 incremental approach the City chose to take.

16 And here's our key point about immunity.  
17 Regardless of whether this court calls it discretionary  
18 function or qualified, if it's going to fulfill the  
19 purposes for which this court developed a doctrine, it has  
20 to give public employees the latitude and discretion to  
21 make a decision. Whether that's to conduct a study, not to  
22 conduct a study, to conduct one type of study and not to  
23 conduct another type of study, and just - - -

24 JUDGE FAHEY: But that's - - - that's not - - -  
25 that's not what happened here. You know, Patricia Matera,

1 the engineer at DOT, said you're not aware of any  
2 complaints or requests for a study at all. Melita James  
3 said there was no study to look at the complaints. So it -  
4 - - it wasn't like there was a - - - a choice made between  
5 to do the study or not do the study. There was no decision  
6 to do anything at all. Complaints were made and no  
7 response came forth.

8 MS. GREENBERG: To the contrary, Your Honor, the  
9 evidence showed that these complaints were routed to a  
10 particular unit in the first instance, because it was the  
11 one that was the most responsive to the range of  
12 complaints, including the issues about the school crossing,  
13 including the issues about pedestrians and bicyclist safely  
14 - - - safety - - - and could there really be any doubt,  
15 that if the opposite was true, right, that if we had done  
16 traffic calming, and we hadn't done a traffic light, that  
17 plaintiff would have said that this accident would have  
18 prevent - - - would have been prevented by a traffic light,  
19 because it would have given Anthony Turturro a - - -

20 JUDGE RIVERA: But you would have had a basis by  
21 which you would have said, this is why we chose one over  
22 the other, which is what, I think, Judge Fahey is trying to  
23 stress to you, you don't have in this record.

24 MS. GREENBERG: Our director of signals said that  
25 they chose to do this particular type of study, and then

1 they chose to deal with this as an enforcement measure,  
2 because they studied the speeding on that road over and  
3 over again, and the speeding law present was within normal  
4 range - - -

5 JUDGE RIVERA: But that's always had, right? I  
6 mean, you always have enforcement, even if it's not  
7 responding to anything. When you do what you've always  
8 done, that has not resolved the speeding issue.

9 MS. GREENBERG: But they did heightened  
10 enforcement - - -

11 JUDGE RIVERA: I mean, it is always true that  
12 you're doing enforcement. All types of - - - all types of  
13 vehicular law violations, right, you can deal with through  
14 enforcement. So your - - - your response to that, well, we  
15 decided we would just give them tickets and stop them, but  
16 that had not worked up to then.

17 JUDGE FAHEY: Yeah, it's kind of like your - - -

18 JUDGE RIVERA: And isn't that - - - is that what  
19 the point - - -

20 JUDGE FAHEY: - - - your traffic calming plan  
21 seems to be law enforcement, which is perfectly legitimate,  
22 I'm not saying that that's not legitimate. It's a proper  
23 response by the City. But the - - - under that theory  
24 then, there would never be - - - it's kind of like what  
25 Judge Pigott was talking about - - - there would never be a

1 - - - a question of highway safety or design. There would  
2 be - - - it's contrary to a lot of case law from this  
3 court.

4 MS. GREENBERG: To - - - to the contrary, just to  
5 be clear on the facts, right, the - - - the evidence was  
6 that the City has a policy that they study again in  
7 eighteen months, and that's what they did here. They did  
8 study it again. And because this is a case that's going to  
9 affect a lot of other cases, I might as well say, it's a  
10 matter of public record, the City is still studying whether  
11 to put traffic lights on Gerritsen Avenue. Did the most  
12 recent study this year for the first time it met the  
13 criteria, and the City intends to put a traffic light at  
14 Channel and Gerritsen, to address the problem of speeding  
15 along the entire length of the roadway.

16 So it's not that we're saying that we don't have  
17 a duty, but we're saying this duty is first and foremost a  
18 law enforcement function. To the extent that traffic  
19 calming is used as a supplement, you can't get away from  
20 the fact that that's mixed up with looking at the  
21 reasonableness of our enforcement, the effectiveness of our  
22 enforcement - - -

23 JUDGE ABDUS-SALAAM: But why can't we look at it  
24 the opposite way? Like, traffic calming is the main duty  
25 and enforcement is the supplemental - - -

1 MS. GREENBERG: But the trial evidence was just  
2 the opposite, even their expert conceded that - - - that  
3 stopping speeding in general, leaving aside the - - - the  
4 question of how you would stop this particular driver or  
5 the drag racing that the letters were talking about, but  
6 even regular speeding, it's first and foremost a police  
7 matter. Their expert agreed with that, and said you try  
8 policing first, and that's why throughout this trial,  
9 plaintiff, at every single critical point - - -

10 JUDGE RIVERA: But that was my point. Isn't that  
11 what you were doing to begin with? Not you - - - I could  
12 see if your argument is, we'd always of course do - - - we  
13 do enforcement throughout the City, we're doing enforcement  
14 on Gerritsen. We needed to consider whether or not a  
15 different type of enforcement was the better response, but  
16 did you do that?

17 MS. GREENBERG: But ag - - - so again to defend -  
18 - -

19 JUDGE RIVERA: But did you study that? Is there  
20 something in the record that shows that?

21 MS. GREENBERG: It - - - it - - - the record  
22 shows that we did do a second set of - - - set of studies,  
23 eighteen months later. Those included speed studies.  
24 Those included studies of various measures on this roadway.  
25 And there's no way - - - the basic point is this. There's

1 no way that the City could defend itself against that claim  
2 without putting on a defense that dealt with much broader  
3 questions about how we allocate police enforcement  
4 resources, about how we scaled up the effectiveness of our  
5 police enforcements and that's exactly the outcome that the  
6 public duty bar is designed to prevent, right.

7 In closing arguments, plaintiff's counsel said,  
8 the City refers things to law enforcement. They close the  
9 folder and they put it away, right. And there's no way for  
10 us to defend ourselves against that claim and avoid the  
11 type of liability that was imposed here, without putting  
12 our law enforcement efforts on trial, and explaining what  
13 heightened efforts we do, how we chose to allocate public  
14 safety resources across the competing needs around the  
15 City.

16 CHIEF JUDGE DIFIORE: Thank you, Ms. Greenberg.

17 MS. GREENBERG: Thank you, Your Honor.

18 MR. WALKER: Thank you, Your Honors.

19 CHIEF JUDGE DIFIORE: You're welcome.

20 (Court is adjourned)

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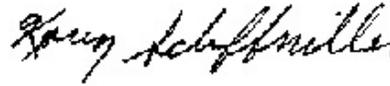
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Turturro v. City of New York, No. 196 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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