

Chavez v State of New York

2013 NY Slip Op 33961(U)

December 1, 2013

Court of Claims

Docket Number: 117613

Judge: Stephen J. Mignano

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STATE OF NEW YORK COURT OF CLAIMS

**JUAN CHAVEZ, as Administrator of the
Estate of BRYANT CHAVEZ,**

Claimant,

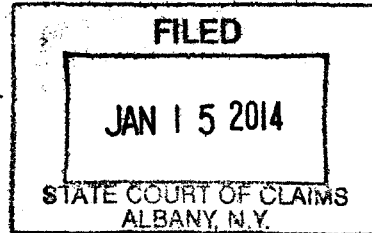
DECISION

-v-

THE STATE OF NEW YORK,

Claim No. 117613

Defendant.



**BEFORE: HON. STEPHEN J. MIGNANO
Judge of the Court of Claims**

**APPEARANCES: For Claimant:
BURKE, MIELE & GOLDEN, LLP
By Robert M. Miele, Esq.**

**For Defendant:
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
By J. Gardner Ryan, Assistant Attorney General**

Claimant seeks damages for personal injury and the alleged wrongful death of his decedent, Bryant Chavez, who died after a January 29, 2009 collision involving his 1999 Chevrolet van and a 2008 Motor Coach Industries bus. Claimant's decedent was driving eastbound on Route 17M in Blooming Grove, Orange County at noontime when he failed to negotiate a curve to the left on an icy roadway and lost control of his vehicle, which spun and ended up in the westbound lane where it was struck by the bus. The accident was allegedly the result of defendant's negligence in the maintenance of the highway.

Chavez's girlfriend, Amanda Perez, was driving her vehicle in front of Chavez's as they drove eastbound from Chester to Monroe just before noon. She testified that the roads were generally clear, there was no ice or snow and it was not snowing. The speed limit on Route 17M was 55 m.p.h., although Perez stated she was not driving that fast. As she approached what she described as a "shady area,"¹ going around a curve, her vehicle "fishtailed" on what she described as "black ice" but she did not lose control and continued to drive to Monroe. She saw a bus approaching westbound as she drove through the curve.

According to Perez, the ice did not cover the entire lane; her left side wheels were on pavement. She stated she did not see the ice as she drove through the curve, only after she returned to the scene when Chavez failed to arrive in Monroe.

State Police Investigator John VanDerMolen, Jr. received a call at 12:17 p.m. and proceeded to the accident scene. The ambulances had already left when he arrived, and he found a Coach USA bus in the westbound lane with front end damage and a 1999 Chevrolet van off of the shoulder, down a steep embankment. He also found one to two inches of ice extending about three feet from the shoulder into the eastbound lane. He stated that it appeared as if the van had run off the eastbound roadway off the shoulder, into the adjacent "snow bank" through which it proceeded 100 feet or so, came back onto the roadway and proceeded into the westbound lane where it was struck by the bus.

VanDerMolen referred to numerous photographs of the scene (Exhibit A), 28 of which were excerpted and received as Exhibit 58. He noted that the ice on the road and shoulder are

¹ Unless otherwise indicated, quotations are from the electronically recorded trial proceedings.

clearly shown on many of the photos. He did not take any measurements of the ice but estimated its thickness to vary between one to two inches.

According to VanDerMolen, the subject accident was the only accident that day on Route 17M, which he described as a "heavy traffic commuter road." He did not come to a conclusion as to what caused the Chavez vehicle to leave the roadway, although his opinion was that excessive speed did not appear to be a factor.

Terrance Mullen, a veteran State Police officer in charge of the collision reconstruction unit was also called to the scene. Mullen, who took most of the photographs, stated that the eastbound lane had "a sheet of ice from the shoulder running into the travel lane about three feet." Mullen supervised the investigation, which was primarily conducted by officer Victor Pirtle and which resulted in a four-page "Collision Reconstruction Findings Report" (Exhibit 14). Pirtle testified, and wrote, that Chavez's vehicle came into contact with the ice on the pavement, the vehicle failed to negotiate the curve and drove into the snow off the shoulder making a track in the snow 109.5 feet long, reentered the road, contacted ice, spun out of control and was facing west when it was struck by the bus. He testified that he could not say what caused the vehicle to initially leave the roadway and a number of items on his report, including "Conclusions/Findings" were left blank (Ex. 14, p 3).

Pirtle's report included a diagram of the accident scene, depicting the area of impact, the points where the vehicles came to rest, the ice on the roadway and the tire track through the snow (*id.*, p 4). Not depicted is the area where the van left the travel lane, a location that would seem to be off of the top of the area (to the west) shown on the diagram. Pirtle testified that "for some

reason he failed to negotiate the curve and left the roadway,” but he did not know how far to the west of the area shown on his diagram that was.

Pirtle testified that he had been working out of the Monroe barracks for ten years and that there had been accidents in that area in the past, although there was no proof produced at this trial with respect to any other accident at the subject location.

Pirtle stated that it seemed like the ice in the travel lane, which was not smooth but irregular, had resulted from snow melting across the lane and freezing. It was apparent to him that the condition had existed “for some time.” He did not feel that speed was a factor – there were no skid marks or anything indicating that the van was out of control prior to entering the snow – and could only conclude that the van came into the curve but failed to negotiate it. Although he did not know why, he observed that the road was very slippery and that may have been part of the reason decedent’s vehicle initially left the road.

Five Department of Transportation Employees testified at this trial. Jennifer Clark had been the resident engineer for Orange County for five years but she was transferred to Rockland County in October 2008. She identified the DOT’s 2008/2009 Snow and Ice Manual for western Orange County as something she participated in the development of, in accordance with the statewide snow and ice guidelines (Exhibit 3). The Orange County manual identified the various plowing and salting beats in the residence, including beat UMO-1, which includes Route 17M from Monroe to Chester (Ex. 1, p 18). This beat was 21 miles long, on the low end of the beat lengths in the residency.

The State guidelines state that after travel pavement and ramps are cleared, shoulders should be plowed and that “it is particularly important that snow be cleared beyond the shoulder

high point on banked curves in order to minimize possible re-freeze or snow melt on the pavement” (Ex. 3, p 15). The guidelines also state that “when possible, accumulated snow on the high side of banked curves should be removed to the shoulder break to minimize the risk of melt water freezing on the pavement” (*id.*, p 17).

Clark testified that the truck assigned to beat UMO-1 (truck no. 055105, or the “No. 8 truck”, Ex. 1, p 27) was different from the other trucks in that the salt dispenser was located on the driver’s side of the truck – “mid-ship” – rather than in the center rear of the truck . She stated that the truck – which has particular benefit in hilly areas because the salt provides traction to the truck’s rear wheels, being dispensed from the middle – is just as effective on flat terrain as rear-discharge trucks. She denied that the truck was possibly less effective in salting the high side of a curve on the right shoulder: “That truck just as any other truck would do what it was assigned to do.” She noted that the truck had a “blast button” to apply sporadic additional bursts of salt, and that it was up to the driver where and when to hit the button.

Randall Mulkins was a highway maintenance supervisor working out of the Middletown yard, the supervisor of the crew that operated out of the Monroe yard. He identified records of a telephone call from the Blooming Grove police to the DOT at 11:40 a.m. on January 28, 2009 advising that “E/B lane of 17M from Chester to Monroe sheet of ice” (Ex. 63, Ex. 9). Mulkins testified that he was probably just showing up for work when the call came in – during a weather event the crews worked 12-hour shifts, midnight to noon. The prior supervisor would have taken the call and Mulkins stated that he was sure he was told and he would have relayed the information to a driver, but he did not have specific recollection. He noted that the residency’s snow and ice sheets showed seven passes through 17M in the preceding 12-hour shift during

which 14 buckets of salt, at 2 to 2.5 tons per bucket – were used on the route. Sanding operations continued as well after the phone call.

Gordon Scott is a highway maintenance supervisor who works under Mulkins. He noted that the corner in question was a known cold spot, because it was in a shady area, and that his drivers were told to “hit it heavier” – to hit the blast button – when salting cold spots and also that they should check their cold spots frequently. Although the spreading pattern was different on truck 055105 than it was on the rear-spreaders, his impression was that “it should throw it all over to give traction to the rear wheels and cover the shoulder.”

Scott testified that he drove past the curve in question at about 6 a.m. on January 29 and saw ice on the road, similar to the photos in evidence (Ex. 59), “maybe a little worse.” He could not recall giving any particular special instruction to the drivers when he got to the yard, only his usual instruction to blast the cold spots where needed. He stated that there were other cold spots in the area – “plenty of them.” He noted, after looking at the drivers’ records for the day (Ex. 5, p 5) that the last round of salting was between 3 and 4:30 a.m. before he drove through at 6 a.m. and that there were two more runs that day before the subject accident at noon: 6:30 - 8 a.m. and 9 - 11:30 a.m.

Paul Miller, the supervisor of the crew that worked out of the Monroe yard, as well as the two drivers who worked beat UMO-1 in the two twelve-hour shifts immediately preceding the subject accident, were called by defendant. Miller, like all of the D.O.T. employees who testified, was aware that the corner in question was a cold spot that required extra attention, via the blast button. He also testified that the rate at which the trucks dispense salt is variable and can be set at 115 to 450 pounds per lane mile, at the driver’s discretion. On the truck with the

side dispenser – the truck at issue in this case – the belt that conveys the salt to the dispenser can be temporarily reversed by the driver to dump salt on the right side of the truck, so that “if a certain shoulder or area needs more attention on the opposite side, that belt can be reversed and salt can be dumped out.”² He stated that the No. 8 truck did just as good a job as the rear-dispensing trucks at clearing the roads.

Miller noted that the curve in question is banked and that snow melt will inevitably flow over the roadway and testified that the only thing to do is continue to apply salt.

From the residency’s snow and ice truck records (Ex. 5), he identified Anthony Rotundo as the driver for the shift from noon on January 28 to midnight, and Dave Cherry as the driver for the shift from midnight to noon on January 29, about the time of the subject accident. Rotundo’s record shows four round-trip passes through the beat (eight times past the subject corner), the last one ending at 10 p.m., using six buckets of salt total (*id.*, p 3), and Cherry’s record also shows four round-trips, between 1 a.m. on January 29 through 11:30 a.m., using 1 ½ buckets of salt total. Each run took between 1 ½ and two hours.

On cross-examination, Miller conceded that he preferred the trucks with rear-mounted spinners because it was easier to get the salt all the way to the right shoulder without having to use the blast button or reverse the conveyor belt and dump salt. Although he knew that the curve in question was a cold spot, he maintained that he never knew the area to be a problem and that he had never seen a condition like that shown in the state police photographs. He noted that the snow and ice reports reflect whether the driver spot salted on the route but not where on the

² TR 2, p 13 (two of the trial days were transcribed).

route. Specifically, Cherry's record for the shift ending at noon on January 29 shows that he used 35 tons of salt on the four round-trips and that he spot salted on all four runs. The first run he also spot plowed and applied salt at a rate of 225 lbs. per lane mile. The final three runs he did not plow at all and the salter was set at the lowest level, 115 lbs. per lane mile. Given the total salt usage and the lower end per mile rate, it is reasonable to infer a liberal use of "blast" salting.

Anthony Rotundo, who had the shift immediately preceding Cherry's, testified that the road did not look like it does in the state police photographs during his shift; indeed, that he had never seen the road in that condition. Looking at his snow and Ice Report (Ex. 5, p 3), Rotundo noted that he put an "N" in the "spot salt" column, which meant that he was not "spot salting" but salting the whole time, which is consistent with the six buckets of salt he used during the shift. He salted at a rate of 350 lbs. per lane mile on his first run, 275 on the second and 225 on the final two runs.

Rotundo stated that he generally addressed the curve in question by increasing the salt rate to 450 lbs. per lane mile. He also indicated that the truck salts both lanes of the highway on each pass, from fog line to fog line. Rotundo testified that he would apply salt to the eastbound shoulder when the truck was driving westbound; that if he turned up the spinner the salt would reach past the fog line and to the grass at the far side of the shoulder.

Rotundo completed his final run at 10:00 p.m. Although he testified generally as to activities between runs, including truck and personal maintenance, he did not have any specific recollection of what he did on the evening in question between 10 p.m. when he completed the run and the midnight shift change. The three-hour period between 10 p.m. and 1 a.m. the following morning, when Cherry set out to do the first run of this shift, was a major element in

claimant's position that defendant's maintenance of the road prior to the subject accident fell short of reasonable care.

On cross-examination, Rotundo advised that his route would take him past the curve in question towards the beginning of each run. He also noted that the winter in question was his first on that route and that he had worked seven prior shifts that winter prior to the storm in question.

David Cherry drove the midnight - noon shift immediately preceding the subject accident. He testified that the route he would take was from the Monroe yard first to Harriman, then to Chester and then back to Monroe. He stated that most of the cold spots on his route were between Monroe and Chester and that was why he did that portion of the route last. He testified that he always used the blast button when he salted the curve in question: "I go on the wrong side of the road and I hit . . . the blast button. . . when I use that truck I watch the spinner and I turn the spinner up, and it shoots all the way across the road" (TR 2, pp 201, 202). Cherry had no specific recollection of what he did that day, his testimony being limited to what he usually does and what is reflected in the records and photographs. Looking at the photographs depicting the ice on the road, Cherry testified that the ice on the road was the result of salt melting ice and the water running over the roadway and freezing: "it's called a bleeder." (*Id.*, p 216).

Timothy Leggett, an engineer with particular expertise in winter road maintenance and the effects of chemicals on ice, testified for the claimant. Looking at national weather service data, he testified that there was a snowstorm that began on January 28 at about 1 a.m., changed to freezing rain around noon and continued until about 6 pm when the temperature rose above freezing and the precipitation changed to rain before ending completely at about 8 p.m. He noted

that the temperature that day was unusual in that it did not reach the warm point of the day, 36 degrees, until about 10 p.m., after having risen above freezing at 6 p.m. The temperature stayed above freezing until 11 p.m., continued to drop until 7 in the morning, but at no time prior to the subject accident at noon on January 29 did the temperature rise above 32 degrees.

Looking at the state police photographs, Leggett testified that the ice shown on the roadway was not black ice but what he called white ice, quite a bit thicker than black ice. His opinion was that the ice shown on the travel lane was the result of snow melt bleeding onto the road as the result of the superelevation of the curve and freezing when the temperature dropped.

Looking at the state police photographs, Leggett's opinion was that the curve had not been salted in the twelve hours prior to when they were taken: "There is no evidence that there's any salt in the areas of the pavement that are dry . . . there's thick solid ice with no burn holes in it. So, there is no salt here in the last . . . twelve hours . . . Based on my review of the photographs, there has not been a recent salt application made at this particular section of the highway (TR2, pp 111, 113-114, 115).

Leggett testified that the critical speed on this curve – the maximum speed at which a driver could drive through the curve on an icy road without losing control – was 36 m.p.h. and that a vehicle traveling in excess of that speed was likely to lose control. He acknowledged that a vehicle proceeding at that rate into the curve, not accelerating or braking, would likely not lose control. Addressing the vehicle's speed after it traversed the 110 foot track through the snow and reentered the highway, Leggett observed that the short distance between the re-entry point and the point of impact with the bus indicates that it was not traveling at what he called a high speed – anywhere near the 55 m.p.h. that was posted for the highway generally.

Although Leggett agreed that the salt truck in question had the capacity to appropriately address the road, by reversing the conveyor belt and/or using the blast button, his analysis of the state police photographs led him to the conclusion that “there’s no way that was done . . . there’s no evidence that the ice was in anyway compromised” (TR2, p 131).

In addition to contending that the curve had not been salted – directly contradicting defendant’s contentions in that regard – Leggett questioned why the curve was not salted between 10 p.m. and 1 a.m. the evening before the accident, when temperatures were below freezing, a period that he described as a perfect opportunity to work on the curve and shoulder. He also questioned the response to the a.m. inspection by Gordon Scott, maintaining that it should have been salted enough so that the lane could have been plowed clear before the subject accident at noon and that the six-hour interval was more than enough time to do so.

William Fitzpatrick, a long-time traffic engineer with DOT and formerly the Regional Director of Traffic and Safety, testified as an expert witness for defendant. He described the highway in this area as a winding, undulating road with a 55 m.p.h. speed limit, and posted advisory speeds of 35 m.p.h. (eastbound) and 40 m.p.h. (westbound). Looking at the state police photographs, Fitzpatrick noted that although it was clear where the vehicle left the three-foot paved shoulder, there was no indication of where it crossed the fog line from the travel lane onto the shoulder. Indeed, he was critical of the state police investigation, asserting they did a “horrible job,” failed to address where the vehicle left the road, and marks he stated it must have left on the pavement, and he described the report as “incomplete,” observing that there are no conclusions and that the narrative just stops. He testified that “we don’t know what caused the vehicle to leave the road, it could have been the ice,” and contended that the tire marks generated

by the vehicle rotating 180 degrees on the pavement, which he asserted had to have been made, were not examined.

Fitzpatrick's opinion was that DOT forces plowed and salted Route 17M continuously for a two-day period and that they assiduously followed all applicable protocols. He advised that there is no "bare pavement policy" in New York, that the protocols recognize that there will sometimes be ice on the roads, ice that "hopefully will be visible," and he noted that the ice in this case, as shown on the photographs, was readily visible and was not black ice. He agreed that the ice covered a significant portion of the travel pavement and he agreed with all of the other witnesses that the ice was the result of melt coming from the high side of the banked curve, flowing onto the pavement and re-freezing. He testified that this condition is typical of banked curves and that there is no way to completely clear the shoulder and prevent melt from running onto the roadway, that the protocol is to keep dumping salt, which he asserted was done, based on both the truck records and the photographs.

Fitzpatrick came to the opposite conclusion than Leggett: he asserted that many of the photographs demonstrated clear evidence of recent salt application on the road and shoulder – telltale pockmarks in the ice, evidence of water running down the road, discoloration, rough surface, evidence of lifting of the ice by the brine formed by salt and snow melt (see Ex. A, photos 127, 138, 139, 142, 155, 161). He testified that the photographs are consistent with the testimony and that the truck records indicate that "a lot of salt" was dumped at the curve, including on the eastbound fog line and shoulder.

The three-hour "gap" between 10 p.m. and 1 a.m. was described by Fitzpatrick as "not unusual" given the things that happen during shift changes, although there was no proof at this

trial of what the reason was here. More important, he asserted that it was “pure speculation” to attribute any part of the road’s condition to what was or was not done during that three hours. He agreed that the curve in question was a cold spot and agreed that a banked curve needed to be salted at the high side of the curve, which the photographs establish was done.

There is no question that there was ice on eastbound Route 17M on the morning of January 29, 2009 and, while the record is insufficient to draw any conclusion as to why the Chavez van left the travel lane and entered and then crossed the shoulder into the piled snow, there seems little doubt that the ice that was present where the van re-entered the travel lane was a contributing factor in the van losing control and spinning into the oncoming lane.

Nevertheless, the duty imposed by law is not to keep the state’s roads free from ice and snow, but rather to use reasonable care to maintain them in a reasonably safe condition (*Lopes v Rostad*, 45 NY2d 617), and it is clear that the presence of ice on a highway does not necessarily indicate a breach of that duty (*Timcoe v State of New York*, 267 AD2d 375 [2d Dept 1999]; *Slaughter v State of New York*, 238 AD2d 770 [3d Dept 1997]; *Valentino v State of New York*, 62 AD2d 1086 [3d Dept 1978]). The pertinent inquiry is whether the ice was present as the result of the State’s lack of reasonable care and diligence in its snow and ice removal activities, or whether it was there in spite of such activities.

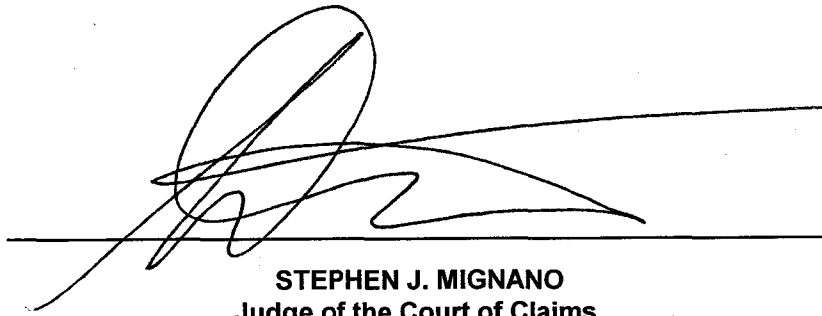
The record in this case did not support claimant’s contention that no attention was paid to the subject curve and the court finds that Fitzpatrick’s contention that the photographs were replete with evidence of salt application was accurate and Leggett’s contention to the contrary – and claimant’s concomitant suggestion that defendant’s witnesses were less than honest with respect to their salting activities in the 12 hours preceding the accident – could not be sustained.

The records show that salt was used, the drivers testified that they did what they always did and applied extra salt to the curve, and the photographs supported that testimony. While there is no question that their efforts were far from entirely successful as of noon on January 29, 2009, the contention that nothing was done is clearly unsupportable.

The contention that the truck that was used to treat the subject route, with the side dispenser, was inadequate to do the job was belied by the testimony that the truck had been the sole truck used on that route for some time coupled by the complete lack of any evidence of any prior issue on that curve, including the lack of any reports of any prior accidents in that location, a factor that strongly supports the position that the use of that truck on that route did not conflict with reasonable care. Similarly, the lack of any indication that any other driver had any problem on the curve on the morning of January 29, notwithstanding what Gordon Scott saw at 6 a.m. and what the photographs show six hours later, also strongly supports the contention that, despite the presence of ice on a significant portion of the eastbound lane, the road was safely passable by drivers who exercised ordinary care. As was noted at this trial, complete snow and ice removal from the roads is impossible given the weather conditions in this state. The policies and procedures that have been put into effect and refined over the years recognize that fact and also recognize that safe winter driving is dependent on driver cooperation as well. It is a basic principle of the law of this state that the state is not an insurer of the safety of those who travel its highways (*Friedman v State of New York*, 67 NY2d 271; *Tomassi v Town of Union*, 46 NY2d 91). In order for liability to be found, it must be shown that the state fell short of the duty of care.

The court is mindful of the tragic result of the circumstances that day and the devastating effect on the family of the decedent. However, the record at this trial cannot support a finding that defendant fell short of meeting its duty to make Route 17M reasonably safe for drivers who exercised reasonable care. Accordingly, the court finds that claimant failed to meet its burden of proof herein and the Clerk of the Court is directed to enter judgment dismissing the claim on the merits.

White Plains, New York
December 1, 2013



STEPHEN J. MIGNANO
Judge of the Court of Claims