Long v State of New York
2014 NY Slip Op 33608(U)
February 26, 2014
Court of Claims
Docket Number: 119503
Judge: Francis T. Collins
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK COURT OF CLAIMS

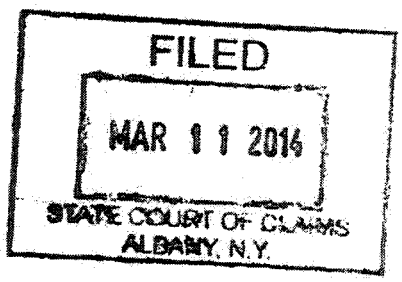
BECKY LONG,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, **Claim No. 119503**

Defendant.



BEFORE: **HON. FRANCIS T. COLLINS**
Judge of the Court of Claims

APPEARANCES: **For Claimant:**
LaFave, Wein & Frament, PLLC
By: Jason A. Frament, Esquire

For Defendant:
Honorable Eric T. Schneiderman, Attorney General
By: Glenn C. King, Esquire
Assistant Attorney General

Claimant, Becky Long, seeks damages for injuries allegedly sustained when she tripped and fell near a ticket booth at Belleayre Mountain on March 17, 2010. The trial of this claim was bifurcated and the issue of liability was tried on September 19, 2013. The trial testimony consisted of claimant's testimony and the testimony of her expert, Conrad Hoffman.

Claimant testified that she and her then-husband arrived at Belleayre Mountain at approximately 11:00 a.m. After parking the car, her husband took both pair of skis and "he just started vaulting", meaning he dashed, toward the ticket station (Tr. 13).[1] Claimant proceeded

[1] Numbers in parentheses preceded by "Tr." refer to the page numbers of the trial transcript.

toward the ticket booth behind her husband carrying two sets of ski poles and a shoulder bag. Claimant testified that as she approached the ticket booth, depicted in Exhibit 5, "[m]y right foot hit a crevice on the ground, and the asphalt gave out, and my body went forward and spun, and I ended up falling" (Tr. 20). She identified the specific crevice that her foot hit with a small circle drawn on the photograph received in evidence as Exhibit 3 (Tr. 21). According to the claimant, the larger circle on Exhibit 3 depicts the area "where my left leg ended up" (Tr. 28). As depicted in Exhibit 3, the crevice claimant's foot "hit" is located on the edge of pavement which is bounded by what appears to be a gravel and dirt surface. At the time of her fall, claimant testified that she was looking straight ahead at a yellow sign mounted on the ticket booth (*see* Exhibit 2). After the accident her husband went to get help and the ski patrol arrived about one-half hour later. According to the claimant, she reported to the ski patrol that her right foot hit the crevice, her body spun and she fell. Claimant testified that the palms of her hands and her knee were bleeding, and that she hit her head and was dizzy.

On cross-examination, claimant was unable to estimate how long it took her to get from the place where her car was parked to the location where she fell. She testified that she was walking approximately four feet behind her husband and repeatedly called out to him to slow down because she felt he was walking too fast:

> "Q. And he was walking faster than you, correct?
> A. That is correct, sir.
> Q. And you kept yelling to him, could you please slow down, correct?
> A. Yes.
> Q. Your husband did not slow down, though, did he?
> A. No, he did not" (Tr. 31-32).

While claimant agreed that the smaller of two circles on Exhibit 3 depicts the crevice her foot came in contact with, she did not agree that the crevice was "little" as she had described it at her examination before trial where she testified "I was walking. I was carrying the poles. My right foot or toe hit this little crevice" (Tr. 34). Claimant testified that after her foot hit the crevice, she continued moving forward, spun around 180 degrees, and contacted the ground, first with the palms of her hands and then her knee.

Conrad Hoffman, P.E. was claimant's next witness. Mr. Hoffman graduated from Rensselaer Polytechnic Institute with a Bachelor of Civil Engineering and attended graduate school at the University of Maryland and the University of Wisconsin at Madison. He is a licensed Professional Engineer and Land Surveyor. Mr. Hoffman testified that he acquired extensive experience in the design and maintenance of walkways during his tenure as an engineer for various municipalities as well as during the course of his work as a consulting engineer. Mr. Hoffman reviewed various documents and inspected the area of the accident on August 28, 2013. He testified that at the time of his inspection the property was in the same condition as is depicted in the photograph received in evidence as Exhibit 3.[2] According to Mr. Hoffman, the height of the drop-off edge of the pavement varied between less than one-half-inch to one inch. In the area where the claimant fell, the drop-off edge of the pavement was "between a half inch and three-quarters of an inch" (Tr. 45). Mr. Hoffman testified that according to the examination before trial transcripts he reviewed, the paved area where claimant fell is a walkway which leads from the parking lot to the ticket booth. Mr. Hoffman testified that § 302.3 of the Property Maintenance Code of 2007, which was in effect

---

[2] It is unknown when or by whom the photograph was taken.

at the time of claimant's accident in March 2010, required that "[a]ll sidewalks, walkways, stairs, driveways, parking spaces, and similar areas shall be kept in a proper state of repair and maintained free from hazardous conditions" (Tr. 49; *see also* Court's Exhibit 1). According to Mr. Hoffman, § 5.7.1 of ASTM standard F1637-10, entitled Standard Practice for Safe Walking Surfaces, defines walkways as "[w]alking surfaces constructed for pedestrian's usage, including parking lots and similar paved areas that may be reasonably foreseeable as pedestrian paths" (Tr. 52).[3] Mr. Hoffman testified that the area of the claimant's fall was a walkway as defined in the ASTM standard. As a result, Mr. Hoffman opined with a reasonable degree of engineering certainty that the condition of the walkway was in violation of the New York State Property Maintenance Code. In addition to a violation of the New York State Property Maintenance Code, Mr. Hoffman testified that in rendering his opinion he relied on ASTM § 5.2.4 which states: "Changes in levels greater than ½ in. (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances, or all of these (Court's Exhibit 2, § 5.2.4; *see also* Tr. at 53). Mr. Hoffman testified that "the exposed edge of the asphalt in a walking surface of one-half to three-quarters of an inch represents a hazardous tripping hazard" (Tr. 54).

On cross-examination Mr. Hoffman testified that in preparing his report he read the accident report prepared by Mr. Broder which states "walking and don't know what happened" (Tr. 56). He also acknowledged his awareness that Ms. Brittain had testified that the claimant "didn't complain about any particular thing, except that she fell" and that she and Mr. Broder inspected the area and "we couldn't see any reason why she would have fallen" (Tr. 57-58). Mr. Hoffman stated that he

---

[3] In fact, the ASTM standard F1637-10 which was marked as Court's Exhibit 2 provides in section 5.7.1 "Exterior walkways shall be maintained so as to provide safe walking conditions" (Court's Exhibit 2).

did not consider either Ms. Brittain's testimony or the entry contained in the accident report in forming his opinion regarding the manner in which the claimant was injured.

Mr. Hoffman's measurements of the drop-off edge of the pavement, which were taken with a ruler, were performed in August 2013, three and one-half years after the accident. He stated that the purpose of his site visit was to ascertain whether the area had changed since the date of a report prepared by Frank Cannata, P.E., dated February 12, 2012.[4] Mr. Cannata's report, however, was written two years after the date of claimant's accident. As a result, Mr. Hoffman conceded that he is unable to determine whether the area of the accident had changed in the two year period prior to Mr. Cannata's report (Tr. 67). Mr. Hoffman also acknowledged that the New York State Property Maintenance Code does not address height differentials in a walkway surface and includes no definition of a "walkway" (Tr. 59).

Mr. Hoffman testified that in rendering his opinion he did not consider the claimant's testimony that the ground crumbled beneath her. Moreover, Mr. Hoffman admitted that while it is important to gather all of the information available in order to formulate a valid opinion, he never spoke to the claimant's then-husband or the claimant herself before producing his report (Tr. 70). Nor was Mr. Hoffman aware of the traffic volume in the area of the accident, whether the ticket booth in the area is opened in the summer or whether there were any prior accidents or complaints regarding the pavement in the area before the date claimant's accident occurred.

This concluded the trial testimony.

---

[4] Mr. Cannata's report was not offered into evidence.

Received in evidence as claimant's Exhibits 6, 7 and 8 are the transcripts of the examination before trial testimony of Elizabeth Brittain, Ski Patrol Woman at Belleayre Mountain; Charles Thomas Tar, General Manager at Belleayre Mountain, and Robert Broder, Ski Patrolman at Belleayre Mountain. Ms. Brittain testified that lift tickets may be purchased at both the lower area of the mountain where the claimant's accident occurred as well as the upper area of the mountain (Exhibit 6 at 12, 15). She also testified that Exhibit B (trial Exhibit 3) fairly and accurately depicts the area of the accident as it existed in March 2010 although she was unable to state whether the area had been paved since then (Exhibit 6 at 13, 14). Ms. Brittain testified that Bob Broder was the first Ski Patrolman to respond to the claimant's accident and she responded to assist him (*id.* at 22). Upon her arrival, claimant was on the ground (*id.* at 23) in the area indicated by the circles drawn on Exhibit B (trial Exhibit 3) (*id.* at 24). She was in the "walkway area", which is to the right of the pavement (*id.* at 24). She asked claimant what happened and the claimant responded that she fell, without further explanation (*id.* at 27). According to Ms. Brittain "[t]here was no reason apparent why she fell . . . [W]e looked at it. There was nothing really there that should have caused her to fall" (*id.* at 27). Ms. Brittain and Mr. Broder transported the claimant to the first aid office where Mr. Broder completed an accident report (*id.* at 30, 31). Although the accident report indicates claimant fell on the pavement, according to Ms. Brittain she fell on the unpaved area adjacent to the pavement (*id.* at 35). With respect to how the accident occurred, claimant reported only that she fell while walking (*id.* at 44). Ms. Brittain testified that she was not aware of any prior accidents in the area (*id.* at 39).

Mr. Broder testified that the claimant was sitting on the ground when he arrived (Exhibit 8 at 19). She appeared angry at what she perceived to be his late arrival and was "hostile" toward her

companion (Exhibit 8 at 16). Claimant complained that she hurt her knee, a splint was applied and she was transported to the first aid office (*id.* at 22). Mr. Broder completed an accident report indicating, in part, "while walking she fell" (*id.* at 28-29). In the patroller comments section Mr. Broder indicated "[n]o hazards present" (*id.* at 26). The witness testified that claimant's companion stated he had not seen the accident (*id.* at 37). Mr. Broder had no personal knowledge of prior accidents or complaints at the location where claimant's accident occurred (*id.* at 33).

Charles Thomas Tar, General Manager at Belleayre Mountain, testified at an examination before trial (Exhibit 7) that he has been employed by the State of New York since 1978. Mr. Tar identified the area depicted in Exhibit 3 (marked as Exhibit B at the deposition) as the ticket booth for the Discovery Lodge (Exhibit 7 at 15), which is located on the lower part of the mountain. It is one of the public entrances to the mountain and is a walkway area used by pedestrians entering the facility (Exhibit 7 at 16). According to Mr. Tar, the condition of the ground depicted in Exhibit 3 existed "for some time" (*id.* at 17) and he was unaware whether the area had been re-paved since 1978 when he began working for the State (*id.*). He did say, however, that the only changes to the pavement between 2002 and March 2010 would probably have been from "rains, things like that" (*id.* at 18). Mr. Tar was unaware of policies and procedures regarding the maintenance of the particular area depicted in Exhibit 3 (*id.* at 19) and no records are kept regarding maintenance of the parking lot at that location (*id.* at 21). Mr. Tar was unable to state why the pavement shown in Exhibit 3 did not extend further to the right, stating only "[a]s far as I recall it always has been like that" (*id.* at 23). He stated further that he is not aware of any complaints about the area or accidents occurring in the area other than the claimant's (*id.* at 23).

The law is well-settled that having waived its sovereign immunity, the State, as a landowner, " 'owes the same duty of care as that of a private individual: the duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition' " (*Gonzalez v State of New York*, 60 AD3d 1193,1194 [3d Dept 2009], *lv denied* 13 NY3d 712 [2009], quoting *Mesick v State of New York*, 118 AD2d 214, 216-217 [3d Dept 1986], *lv denied* 68 NY2d 611 [1986]; *see also Preston v State of New York*, 59 NY2d 997 [1983]; *Smith v State of New York*, 260 AD2d 819 [3d Dept 1999]; *Matter of Boettcher v State of New York*, 256 AD2d 882 [3d Dept 1998]). Like any other landowner, therefore, the State is not an insurer of the safety of persons on its premises (*Killeen v State of New York*, 66 NY2d 850, 851 [1985]; *Preston v State of New York*, 59 NY2d at 999). Rather, its liability is gauged by reference to "all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Preston v State of New York*, 59 NY2d at 998, quoting *Basso v Miller*, 40 NY2d 233, 241 [1976]). Moreover, whether a dangerous or defective condition exists on the property of another so as to create liability "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the [factfinder]" (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). The mere existence of a dangerous condition, however, is insufficient to establish liability. To prove a prima facie case of negligence, the claimant is required to establish that the defendant was negligent in that it either created the condition or had actual or constructive notice of its existence (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]) and that this negligence was a proximate cause of claimant's injury (*Dapp v Larson*, 240 AD2d 918, 918 [3d Dept 1997]). Applying these principles to the case at bar, the Court finds that claimant failed to establish by a preponderance of

the credible evidence that the alleged defective condition of the pavement was a proximate cause of her injury.

Claimant testified she informed Belleayre employees who responded to her accident that she had fallen as a result of her foot coming in contact with a crevice. According to the claimant:

> "I told them that my right foot hit the crevice, and my body spun and I fell, and my palms were bleeding, which they could see, and so was my knee bleeding . . ." (Tr. 26)

Despite this testimony, Mr. Broder testified at his examination before trial, without objection, that the accident report states only that the claimant fell while walking and neither Ms. Brittain nor Mr. Broder recalled any such statement during the time they assisted the claimant.[5] The incident was otherwise unwitnessed.

Although claimant testified that her foot "hit" a crevice causing her to fall, she was at the time walking parallel, not perpendicular, to the raised edge of the asphalt and there is no defect obvious in the photo that would cause the sort of contact between her foot and the asphalt described by the claimant. Claimant further testified that her husband vaulted, dashed and/or rushed from their car to the ticket booth carrying the couples' skis. The claimant followed him carrying four ski poles in her right hand and a bag over her left shoulder. Claimant testified that her husband did not slow down despite her repeated requests and that she felt at the time he was walking "too fast", yet she was only four feet behind her husband at the time she fell. Under these circumstances, the Court finds it is more likely than not that claimant's accident was caused by her own conduct in rushing to keep pace with her then-husband rather than the negligence of the defendant in failing to properly maintain the pavement (Tr. 31-32; *see Boyce Motor Lines, Inc. v State of New York*, 280 AD 693,

---

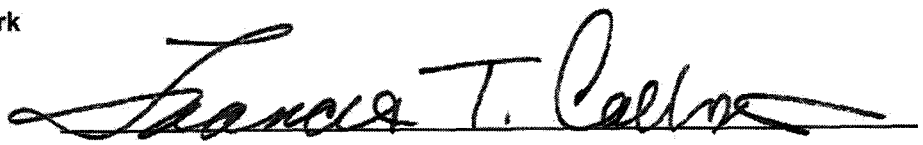
[5] The accident/incident report was not introduced in evidence at the trial.

696 [3d Dept 1952], *affd* 306 NY 801 [1954]). As a result, the Court concludes that claimant failed to establish that defendant's negligence was a proximate cause of her fall.

Accordingly, the claim is dismissed.

Let judgment be entered accordingly.

Saratoga Springs, New York
February 26, 2014



FRANCIS T. COLLINS
Judge of the Court of Claims