

Sterns v New York State Thruway Auth/

2015 NY Slip Op 31874(U)

March 2, 2015

Court of Claims

Docket Number: 119227

Judge: Renee Forgensi Minarik

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STATE OF NEW YORK COURT OF CLAIMS

**RICHARD STEARNS, Individually, and
as Administrator of the Estate of KEVIN
STEARNS and NATHANIEL STEARNS,**

Claimants,

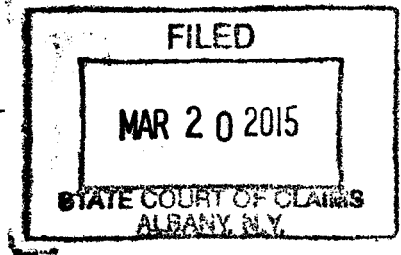
**AMENDED
DECISION**

-v-

**THE NEW YORK STATE THRUWAY
AUTHORITY,**

Claim No. 119227

Defendant.



BEFORE:

**HON. RENÉE FORGENSI MINARIK
Judge of the Court of Claims**

APPEARANCES:

**For Claimants:
HOGAN WILLIG
BY: JOHN B. LICATA, ESQ.**

**For Defendant:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
BY: THOMAS G. RAMSAY, ESQ.
Assistant Attorney General**

On September 26, 2009, at approximately 4:50 p.m., near New York State Thruway (Thruway) Exit 48A in the Town of Pembroke, New York, Kevin Stearns lost control of his motorcycle, crashed and died. He was 29 years old. His father, Richard Stearns, has sued the New York State Thruway Authority (Thruway Authority) both individually, and as Administrator of the Estate of Kevin Stearns, for the negligent and reckless care and maintenance of its roads. The unified trial of this matter was held August 19-22, 27, 2013 and September 9, 2013 in Rochester, New York. The Court accepted post trial memoranda.

Claimant called New York State Trooper Kenneth E. Howard, who investigated the accident. Trooper Howard testified that on September 26, 2009, he was assigned to the area of the Thruway between Batavia, New York and Clarence, New York (mile post markers 390 to 412). He responded to a call of an accident at eastbound mile marker 403. He noticed that the pavement was wet and it was raining sporadically. He stopped his patrol car just west of the scene for traffic control purposes, closing one lane of the highway. He observed many cars parked around the area, on the side of the road and in the median, as well as people standing around. He did not notice anything about the road itself that could have caused the accident.

Other troopers then arrived on the scene and took statements from witnesses, while Trooper Howard assessed the scene and acquired the information he needed for his report. This generally included the time of the accident, the people involved, insurance information, whether or not medical attention was needed, and the possible cause of the accident. At the time he wrote his report of this accident, Trooper Howard concluded that poor weather and road conditions, and lack of tire tread all contributed to Kevin Stearns losing control of his motorcycle. His report indicates that Mr. Stearns lost control while attempting to change lanes (Exhibit 2).

Trooper Howard has been a State Trooper for 26 years and has been trained in accident investigation and reconstruction. In all his time investigating accidents on the Thruway, he never considered that a wide strip of tar might cause a vehicle to skid. Several weeks after Kevin's accident, Trooper Howard testified that he received a telephone call from an attorney¹ who asked specifically about the tar at the location of the accident. Trooper Howard testified that, while he

¹ No attorney in the courtroom made this call.

had not given the tar much thought on the day of the accident, after this call, he went back to the site to observe how wide the tar strips at the accident location were. Despite going back to the scene and determining that the strip was wider than 3 inches, and indeed looked as depicted in Exhibit C, Trooper Howard did not amend his report to include the tar as a possible cause of the accident. However, he now looks for tar strips whenever he conducts an accident investigation. I also note that the Police Accident Report MV-104A Key (Key) does not list tar, or crack sealant, as one of the "apparent contributing factors." I note that it may fall under number 65 on the Key, "Pavement Defective."

Michael Scuteri is a retired Assistant Traffic Supervisor for Defendant, who formerly investigated fatal accidents on the Thruway. In 2009, he investigated Kevin's accident. At trial, he did not appear to recall much about his methodology or his findings. He did opine that it had been raining, but he did not see ponding, holes or large cracks or anything that would have indicated that a defect in the highway caused the motorcycle to crash. He was unable to reconstruct the path of Kevin's motorcycle before it contacted the guide rail. He determined that Kevin lost control of his motorcycle due to excessive speed for the weather conditions while changing lanes (Exhibit B). He never considered the crack sealant as a possible cause of the accident. As a witness, I found Mr. Scuteri most unhelpful and it was obvious to me that he did not want to be bothered to testify. His testimony carried no weight in my analysis of the issues in this matter.

Five witnesses gave supporting depositions to State Troopers on the date of the accident (Exhibit 2). Kenyata L. Mack-Hendricks was the back seat passenger in a car moving eastbound in the travel lane when she noticed a motorcycle on her left, in the passing lane, pass the car she

was riding in and “slide into guide rail.” Trudy Marie Ryan was also moving eastbound in the travel lane when she noticed a motorcycle in the passing lane “coming up behind me at a high rate of speed.” She stated that a green SUV was behind him in the passing lane and she observed the motorcycle operator take his left hand off the handlebars and turn to his left to look over his left shoulder while moving into the right hand lane. She saw the motorcycle under the guide rail “3 to 5 minutes later.” Ms. Mack-Hendricks and Ms. Ryan did not testify at trial. The remaining three witnesses did testify.

Toni Nicole Swatzell’s supporting deposition also placed Kevin Stearns in the passing lane. She, too, observed Kevin take his left hand off the handlebars and look behind him. At trial, Ms. Swatzell did not recall him removing his hands from the handlebars, but she did confirm he kept looking over his right shoulder. She was consistent in her recollection that a green SUV was following closely behind Kevin in the passing lane.

The remaining two eyewitnesses had a different perspective. Quinclen and Quinclon Davis are twin sisters who, on September 26, 2009, were eastbound on the Thruway when they witnessed the accident. Their testimony is significant to the outcome of this case because it puts another potential cause for the accident into play that no eyewitness mentioned in the written statements taken that evening at the scene. I note both sisters were genuinely upset about what they witnessed; they were the first to arrive on the scene and stayed with Kevin on the side of the road until the authorities arrived. Four years later, they are still emotional about what they witnessed.

Quinclen A. Davis was the front seat passenger in her sister’s car. In her supporting deposition, she states she observed the motorcycle pass their car on the left at a “high rate speed”

[sic] in the rain. After he passed the car, she observed him slide across the road to the right shoulder (Exhibit 2). At trial, Ms. Davis testified that the motorcycle did pass the car on the left, but she observed it pull into the travel lane, in front of the car she was riding. As they approached the Pembroke exit, it began to rain harder and the motorcycle continued to drive in front of the car when a tractor-trailer passed them on the left, spraying the car windshield with water. It was then she observed something flip in the air. Ms. Davis looked for the motorcycle and the driver. Her sister slowed down the car. When the witness observed Kevin laying on the right side of the road, her sister pulled the car over to the left and she exited, waited for a gap in traffic, and crossed the Thruway to reach him. Quinclen believed Kevin had already died, and a registered nurse who stopped shortly thereafter, but before the authorities arrived, confirmed that Kevin was dead. Ms. Davis stated she had not spoken with the State's Assistant Attorney General about her testimony at trial, nor had she reviewed her supporting deposition.

When confronted with the inconsistencies between the supporting deposition given the evening of the accident and her testimony at trial on cross-examination, Ms. Davis testified she did not recall the motorcycle sliding across the road to the right shoulder, but admitted that what she had told the Trooper in her supporting deposition was more likely the accurate account of what she observed.

Quinclon Davis had been driving the car on September 26, 2009. She stated in her supporting deposition that she observed the motorcycle pass her car at approximately 70-75 mph. Once past her, it began to rain harder and she saw the motorcycle hit the guide rail and objects flipping in the air. She pulled her car over. At trial, she testified to more details about what she observed.

Ms. Davis stated the motorcycle passed her car and pulled in front of her, about two car lengths ahead, in the travel lane. At that point, a tractor-trailer passed her car, then passed the motorcycle, and she noticed something flip in the air. She pulled over to her left and onto the left shoulder of the Thruway. Her sister left her car to run across the road and Quinlon proceeded to back her car into a position across from where Kevin lay.

On cross-examination, Quinlon identified her signature on Exhibit 32, a typewritten statement about her observations on September 26, 2009, that are consistent with the observations noted in her supporting deposition. She did not recall giving this statement to anyone but acknowledged that the signature was hers. Claimants' attorney was unable to shake her off her account of the tractor-trailer. She continued to state "I know that truck passed" and "once that truck passed, he went up in the air."

It is beyond quibble that the Davis twins were emotionally traumatized by what they witnessed on September 26, 2009. In fact, so traumatized that four years later, discussing the accident causes obvious emotional pain. In their earnestness to be truthful, they have created a conundrum for this Court. Every shred of evidence produced by eyewitnesses omits the mention of a tractor-trailer. Also problematic is the Davis twins' recollection that Kevin successfully changed lanes, riding a car length or two in front of the car they were driving in, before the accident, precluding the possibility that Kevin's motorcycle slid on the tar strip.

I find that the reasonable and probable account of what all five witnesses observed to be what they reported the day of the accident. A significant amount of time has elapsed since that day that could hinder a witness' recollection. Trooper Howard reported the accident occurred because of an unsafe lane change. Not one witness mentions a tractor-trailer or seeing Kevin

riding upright in the travel lane. The three witnesses who testified were three of the individuals who stopped to personally check on Kevin. They observed a horrific scene that obviously still resonates with them to this day. Each witness has their own version of the facts, as they observed them, but piecing together their written statements provides the most reasonable and probable account of what happened. In addition, as discussed later in this opinion, it seems that the laws of physics support this position as well.

Timothy Brudz is a Thruway Maintenance Specialist One in Buffalo, working for the Division Highway Engineer, assisting with budget preparation, and overseeing maintenance and research. He testified that he was familiar with the application of crack sealant and the Thruway Authority's Maintenance Directive on Highway Management Activities (Maintenance Directive, Exhibit 15) that discusses the application of crack sealant on the Thruway. He stated that the Thruway Authority has been using crack sealant since the 1960s, and the only thing that has changed over time is the type of equipment used to apply it.

Mr. Brudz explained how, in 2009, the Thruway Authority used a nine person crew to apply sealant. One person held the wand that deposited the sealant in the crack, followed by one or two individuals with "squeegees," who directed any material spilled on the roadway back into the crack(s), and another person would observe traffic. The remaining crew members would drive the trucks that directed the traffic to another lane and carried the tar kettle and other equipment (Exhibit 15, p. I-17). The objective is to fill the crack roughly level or slightly crowned, so that as it settles and cools, it is flush with the pavement. "Over filling or wide bands are not appropriate" (Exhibit 15, p. I-18). What constitutes over filling or wide bands, however, is left to interpretation.

Mr. Brudz was shown several photographs of Thruway sections that had sealant applied. Claimants' counsel asked him to opine what was "too wide" and would, therefore, violate the Maintenance Directive's Activity 1014. He testified that Exhibits 13R, 13S, and 13T were "on the wider side" and not appropriate over a long stretch of highway. He stated that the section depicted in Exhibit 13B was "on the wider side of normal for sure." The strip depicted in Exhibit 13A would be inappropriately wide if all that material was used to fill one crack, but it appeared to Mr. Brudz that two parallel cracks were filled so the width was appropriate.

As far as traction was concerned, Mr. Brudz opined that sealant "probably reduced skid resistance," but he also pointed out that any time road material is changed, for example by using sealant or adding striping, the skid resistance is altered.

Claimants' expert witness was John A. Serth Jr., P.E. Mr. Serth possesses both a Bachelors of Science and a Masters Degree in Civil Engineering. He studied pavement management as an undergraduate and concentrated in transportation engineering in graduate school. Also, while in graduate school, he worked as a research assistant in an asphalt laboratory, helping a professor research cold-mix pothole patching material. Mr. Serth has been doing accident reconstruction for approximately 20 years. I find Mr. Serth qualified to testify as an expert on traffic accident reconstruction.

Mr. Serth explained that the Thruway is constructed with a gravel sub-base, followed by rectangular slabs of concrete reinforced with steel. Some areas of the Thruway are composed solely of the concrete slabs with the gravel sub-base. These areas become polished over time by the constant flow of traffic and become quite smooth. Other areas, such as where the accident occurred, have an asphalt surface applied over the concrete. Asphalt is essentially a stone and tar

mixture. It is apparent from Mr. Serth's testimony that creating quality asphalt is a science. Stones must be rough and not easily polished to create the right friction to keep the stones adhering to the tar and each other and to not get pulled out by tires passing over them. These rough stones, when compacted together with the right amount of tar, also form little channels in the asphalt that allow water to pass through and run off the road surface. Too much tar in the mixture diminishes contact between the stone and tires and fills the channels, inhibiting water runoff. This, in turn, makes the road slippery. Or put in other terms, it creates a lower coefficient of friction than required for safe travel.

Mr. Serth stated that a co-efficient of friction of .8 allows for top performance on the roadway. I understood this to mean that vehicles traveling over pavement with a .8 friction coefficient can safely execute maneuvers. He also stated that when top performing pavement becomes wet, as in after a rain, the friction co-efficient drops to .6. That is why it takes longer to stop a vehicle on a wet road surface. The other principle of physics he testified to was that, as a vehicle increases its speed, it requires a higher co-efficient of friction to safely perform maneuvers. While a good portion of the Thruway may be top performing, there are circumstances that can have a negative impact on the friction co-efficient.

The Thruway is laid down one lane at a time. There are transverse joints between each concrete slab, and there is a longitudinal joint between each lane. The asphalt is laid down over the concrete by a machine that produces a maximum sheet of asphalt 13 feet in width. When the asphalt is laid down, another longitudinal joint exists, but is barely noticeable. Over time, when the concrete slabs beneath the asphalt expand in summer and shrink in winter, the asphalt cracks over all the joints. These are the cracks that are filled with warm tar, preferably when the

weather is colder and the cracks are at their widest. The idea is to fill them up to the surface. No value is added by using more tar than necessary and, in fact, too much tar creates a slippery condition.

Mr. Serth stated he equated the excess tar in a crack-filling operation to a condition known as "asphalt bleeding"; a situation where the tar in the asphalt mixture rises to the top of the stones, drastically diminishing the co-efficient of friction from the optimal .8, or a normal .6, to a .2. He testified that while asphalt bleeding has actually been tested, wide strips of excess tar from crack-filling operations have not. In his opinion, a surface covered in tar would be below even the .2, but for his testimony, he assigned it a co-efficient of friction of .2. He opined that no one has tested the friction co-efficient of crack sealant because it is not supposed to cover a road beyond the surface of the crack meant to be filled. Here, the tar applied to the longitudinal crack where Kevin lost his life was approximately 12 inches wide.

Mr. Serth testified that he inspected the scene in the Spring, several months after the accident, and ruled out the existence of wheel ruts - "[t]his was nice pavement out there." He recalled a slight curve to the left with a slight incline, with the north side of the road being slightly higher than the south side, so water would drain more quickly and make it easier for vehicles to handle the curve. He was aware that it was raining the evening of the accident, but because there were no wheel ruts, he concluded that there was no standing water on the pavement. The only problem he observed was a one foot wide tar patch between the two lanes. He also observed a painted center line, but discounted it as an issue because it was narrow and had glass beads imbedded in it for visibility and friction. He testified highway markings are

specifically designed to not cause problems for motorcycles. He also testified that he examined the motorcycle tires and ruled them out as a possible cause of the accident.

Mr. Serth explained that motorcycle tires and automobile tires do not behave the same way and the treads do not look similar. Motorcycle tires are rounded because, to execute a turn, the motorcycle must lean, therefore the sides of the tire come into direct contact with the road. Normal operation of an automobile requires that the flat part of the tire remain in contact with the pavement, so you would not require tread up the sides of an automobile tire. Both vehicles use the same tire pressure and they push down on the pavement at the same pounds per inch, or force. As long as a motorcycle does not have to traverse a deep puddle, the tires are safe in the rain and the motorcycle can maneuver.

Mr. Serth ruled out hydroplaning as the cause of the accident because of the way tires are engineered. While a car tire is about 8 inches wide, the treads are designed to push water away from where the tire contacts the road; the tire treads have to move water four inches in each direction out from under it, at four spots on the road (one for each tire). Thus, as an automobile traverses the one foot wide tar strip, in the rain, the strip does not present a slipping problem because it has four, eight-inch contact points. A motorcycle, on the other hand, has significantly less contact with the road, with two, one-half to one inch contact points. Also, on a motorcycle, the tread is flat on the bottom and as the tread moves up the rounded sides of the tire, it gets deeper in order to move the water out from under the narrow contact patch on the bottom of the tire. A motorcycle tire moves the water a shorter distance and in faster time than an automobile tire. This makes the motorcycle less susceptible to hydroplaning but more likely to lose control on a 12 inch tar strip because it has less tire contact with the pavement.

Mr. Serth also testified that the age of Kevin's tires was not an issue. He stated that the treads would have passed New York State Motor Vehicle Inspection, as they met the 2/32 of an inch tread requirement to be deemed road-worthy.

Mr. Serth believes Kevin attempted a maneuver he did not have enough friction to execute. Kevin would have needed a .6 co-efficient of friction to move his motorcycle from the passing lane to the travel lane. It is Mr. Serth's opinion that, when Kevin contacted the 12 inch tar strip, the co-efficient of friction fell to .2, causing the front tire to lean farther than it should have and the second tire to then slide out from under the rider. The lean was too steep for Kevin to correct. Mr. Serth noted there was no evidence that Kevin was driving aggressively or applying his brakes. In his opinion, Kevin would have been unable to observe the tar strip in the rain because the whole road would be darkly colored. Kevin was the victim of insufficient lateral traction. Mr. Serth stated, with a reasonable degree of engineering certainty, that the 12 inch tar strip between the two lanes of traffic caused Kevin to lose control of his motorcycle because he had insufficient friction to execute the maneuver of changing lanes. Even with the rain, without the tar strip, the wet pavement would have provided sufficient friction to safely change lanes.

Wade Bartlett testified as Defendant's expert witness. Mr. Bartlett is a mechanical engineer, certified to do traffic reconstruction, but while Mr. Serth is an expert in pavement, Mr. Bartlett is an expert on motorcycles. I found his testimony helpful in understanding how the laws of physics apply to the operation of a motorcycle.

Mr. Bartlett explained that the co-efficient of friction is the interplay between two surfaces, how one acts upon the other. Here, it is the motorcycle tires and the pavement. It is measured in "G-Force," the amount of acceleration as the speed changes, or how quickly the

vehicle slows down. He stated that the co-efficient of friction for dry pavement is .75, and wet pavement is .65. He hypothesized that the tar sealant would have a co-efficient of friction of .4, based not on a scientific study, but his own experience as a motorcycle driver and racer. He testified that .4 also applies to a packed snow surface.

Mr. Bartlett conducted a thorough investigation of the post-accident damage to the motorcycle (Exhibit F). Most of his testimony focused on its tires. In particular, he noted that the left side of the front tire was damaged with a slight twist in the front forks of the frame. It had two clear cuts in the side wall and a dent in the front wheel (Exhibit F 834). This was a Michelin brand soft/delicate race tire, possessing just over the State's minimum requirement for tread depth. It was six years old at the time of the accident, and the rubber on the right side appeared to be rough and worn, or "stippled." In addition, the tire appeared discolored or "blue," indicating it had been heated up. Mr. Bartlett testified that these conditions indicated the tires had been used on race tracks with hard cornering and braking (Exhibits F 795, F 796). The rear tire was a Dunlop racing tire, which exhibited some of the same wear and tear as the front tire. This tire was almost 11 years old. It also met the required tread depth. Both tires were "street legal." Further, even though they were not the manufacturer's recommended size and brand, that fact had little to no impact on Mr. Bartlett's opinion of causation. What did impress Mr. Bartlett was the age of the tires.

He described these tires as "take offs," meaning they were used on the race track where the hard banking of the course would beat up the walls of the tires but that the center contact pad (the bottom of the tire that contacts the road) would still be in good shape. However, because racing tires are designed to be soft and respond better to heat caused by the high friction on the

race track, they are unlikely to perform optimally on street pavement. Because street operation is less demanding than racing, the tires do not get heated up, or "sticky," which would increase their ability to hang on to the road. Mr. Bartlett opined that tires manufactured for street driving are more effective on asphalt. In addition, a street tire performs better in the rain because the tire tread is better designed to channel water away from the contact pad. Manufacturers usually recommend replacing tires that are five years old and older if they show wear.

Like Mr. Serth, Mr. Bartlett explained that motorcycle tires are rounded to make it easier for them to turn by leaning. Sufficient lateral traction is required to safely execute a lean. While a rider and motorcycle are driving straight, the rider's center of gravity is squarely over the motorcycle. When the motorcycle leans to execute a turn, the center of gravity moves to the side of the motorcycle toward which the rider and the motorcycle are leaning. If there were not sufficient lateral traction, gravity would pull the rider and the motorcycle to the ground. For example, if the rider and motorcycle lean at 3 degrees, a .6 co-efficient of friction is required. If they lean at 10 degrees, they would need a 1.7 co-efficient. Mr. Bartlett concluded that Kevin attempted a move that required more lateral traction than was available.

Mr. Bartlett identified a list of items that are prone to reduce traction. Among them are swerving, leaning, braking, accelerating, rain, tires and sealant. He considered all of these items and concluded that it was more likely than not that the tires were the culprit in this instance. He explained that rubber needs to be soft to grip the road. Rubber "smushes" itself into the bumps on the pavement and that is what creates traction. There are no bumps on steel bridge decks, so there is much less friction and nothing the rubber can grab. In other words, it is slippery. As tires age, the rubber hardens and the tires have less ability to "smush" onto the bumps in the

pavement, thus less traction. Also, the colder the pavement is, as when it rains, the harder the tire rubber is and, therefore, it does not stick well to the pavement. Further, Mr. Barlett found no evidence to suggest that braking or accelerating occurred, and there was no way he could tell if Kevin had used an excessive lean angle, was surprised or had hydroplaned.

On cross-examination, Mr. Bartlett admitted that the lowest amount of lateral traction was at the center point of the road where the crack sealant was located. All things being equal, Kevin was more likely to lose control on the crack sealant. The only safe way to cross the center line of the Thruway was to cruise, not lean, brake or accelerate. Mr. Bartlett held firm in his opinion, however, that sufficient competing factors existed, such as the bad tires, the rain and possible driver error, to keep him from drawing the conclusion that it was more likely than not that Kevin lost control at the center of the road. In fact, Mr. Bartlett could posit no more likely than not scenario.²

Scott F. LaPoint, M.D., Deputy Medical Examiner, examined Kevin Stearns on September 27, 2009, to determine his cause of death (Exhibit 1). I found him qualified to give his opinion on cause of death, as well as to provide information on how Kevin's injuries were sustained. Dr. LaPoint stated that he sustained multiple fractures of the pelvis as well as a 10 cm x 4 cm contusion on the left anterior hip. He opined that Kevin hit the guidepost with his left hip, which caused the bruise and shattered his pelvis. This caused internal bleeding because the fractures tore the soft tissue around the bone as well as the periosteum - the tissue that covers the bone. Blood from this injury, from the broken blood vessels, flowed into Kevin's abdomen,

² Mr. Bartlett testified that a driver could have seen the crack sealant and adjusted his riding accordingly. I decline to adopt that theory because, during a rain storm, the whole pavement looks dark and you cannot distinguish the sealant from the pavement (Exhibits A9, A10).

lowering his blood pressure. Prior to sustaining the injury to his pelvis, Kevin also sustained abrasions and contusions on his left arm, hand, wrist, knee, and ankle. On his right side, he had a "22 cc full thickness laceration," just down to the first layer of muscle along three quarters of his right thigh. In addition, his right foot was nearly amputated, the ankle being connected to the foot only by a few strips of skin and soft tissue. Blood tests showed only nicotine and caffeine were present in his blood stream.

Dr. LaPoint testified that, during the summer of 2013, he examined, on average, two motorcycle fatalities a week. His examination caused him to opine that Kevin fell on his left side, as the injuries to his left arm and leg showed that he tried to correct himself. Dr. LaPoint explained that Kevin's injuries to his right leg and ankle were typical for a rider who has been thrown from his motorcycle. He stated that body parts can get caught in something on the motorcycle and, unlike a motorcycle that skids on the side it falls on, a human body tumbles. Kevin injured his right side by tumbling off the motorcycle and over the pavement. Although the cut to his right leg and the near amputation of his right foot were severe, Dr. LaPoint explained that the brain slows blood flow to the body's extremities to protect the brain and the heart. Once Kevin's pelvis was shattered, his body's ability to limit the blood loss diminished because the damage was too close to the organs it was trying to protect, causing Kevin to bleed to death internally within two minutes. Given the injuries sustained, Dr. LaPoint opined that Kevin hit the guide rail at approximately 45 to 50 mph.

Richard Stearns testified he is the father of three young men. Kevin was his oldest child, born in April 1980. Richard Stearns has been married to his wife, Cecilia, since 1979. He has been riding motorcycles since his early teens, commencing with "off-road bikes" and then

graduating to road motorcycles at the age of 17. At the time of trial, Richard Stearns owned five motorcycles himself. He also possesses a mechanical engineering degree from the Rochester Institute of Technology, which he earned at age 39, and has worked with automotive equipment repair and service in some form or another since his early high school years. It was clear from Richard Stearns' testimony that he was an avid motorcycle enthusiast who shared his knowledge and love of the hobby with his sons.

All of Richard Stearns' sons began riding dirt bikes at the age of 12. He taught them how to maintain them and ride them safely, including lessons on less-traveled country roads to give them practice steering and braking. Kevin earned his motorcycle license at age 17, before he earned his automobile license. He started his first job at age 14 or 15, and worked until the day he died. Although Kevin took a few college courses, which he paid for himself, he never earned an advanced degree because, as his father stated, "school wasn't his thing."

Richard Stearns was familiar with Kevin's driving abilities, as he had ridden with Kevin at least once a month, except during the winter, since 2004. Kevin was a "risk taker" who enjoyed driving on back roads and taking corners, but only pushed himself on closed race tracks that were meant to test a driver's skills, not on regular roadways.

The motorcycle Kevin was riding on the day of the accident was originally owned by Richard Stearns, who had purchased it to use on race tracks where a driver could ride it hard, practice cornering and develop skills. Richard Stearns was aware the tires on the motorcycle at the time of the accident were not the manufacturer's specified tires, but were instead specifically selected for their performance on a race track. Kevin Stearns had ridden this motorcycle before on a race track. Richard Stearns' explanation of the process of steering a motorcycle matched the

expert explanations presented in this decision. He stated he taught Kevin how to safely steer, as well as the importance of being "smooth," that is, no hard braking or throttle use, and that rapid vehicle movement was dangerous. He considered his son a professional driver who appreciated the hazards of tailgating and unsafe driving. He knew Kevin always conducted a "pre-flight" check of any cycle he drove, which involved an inspection of the cycle's general condition, tire pressure, fuel level, headlights and condition of the chain.

At the time of the accident, Kevin was the father of two children. His son William was born February 12, 2008 to him and his then wife, Renee (Exhibits 31, 31A, 36). Kevin's daughter, Raylee, was born on May 22, 2009 to his partner at the time of his death, Tara (Exhibits 30, 30A, 36). When Kevin was not at work, he spent time playing with his children, changing diapers when necessary, and doing most of the cooking. Kevin, Renee and William lived in Richard Stearns' "in-law" apartment at his residence until they divorced in 2008. Kevin then resided with Raylee and her mother in an apartment in Buffalo, New York. Kevin supported Raylee and her mother and paid child support for William. It appears that William and Raylee spent a good deal of time with Richard Stearns and his wife.

At the time of the accident, Kevin Stearns did not own a motorcycle, but would borrow the one involved in the crash on Track Days, from the owner, his brother Nathaniel Stearns. Kevin spent most of his time driving trucks, but did own a car which he had loaned to his other brother, Jeremy. Jeremy and Nathaniel shared an apartment in Rochester, New York. Kevin took Nathaniel's motorcycle and left Jeremy his car on the day of the accident. Kevin was on his way to Rochester to return the motorcycle when the accident occurred. Richard Stearns was working ski patrol at Swain Resort when it happened. Kevin's ex-wife was at work at a hospital,

when she heard an emergency call about a fatality on the Thruway. Kevin's partner had not been able to contact Kevin. Richard Stearns stated no one seemed to be too worried, confident in Kevin's ability to handle a motorcycle. It was Trooper Howard who delivered the news to the family.

Richard Stearns, broken-hearted about the loss of his oldest son, was determined to figure out how Kevin, an experienced motorcycle rider, could have met such a tragedy. Richard inquired of Trooper Howard how the accident happened and understood it occurred while Kevin was changing lanes. The day after the accident, Richard inspected the scene, dry at the time, taking note of the center line of the road. Richard expected a "squiggly," narrow line of tar, commonly referred to as a "tar snake," not the wide band of tar he saw down the center line. He stated that, in his experience, tar snakes were slippery. Richard took pictures, trying to figure out what could have caused Kevin to lose control of his motorcycle. The photos in Exhibits 13R, 13S, 13T were taken within a month after the accident. They depict a wide band of black adjacent to the dotted white center line, visible from a motor vehicle's front window. The tar strip was approximately 14 inches in width (Exhibit 13U).

Nathaniel Stearns is the youngest Stearns brother, born in 1984. He recalls Kevin as the "baby sitter" for his brothers while his parents were working. Nathaniel corroborated his father's testimony regarding Kevin's riding ability, that Kevin was a skilled operator, having gained expertise on closed race tracks. Kevin had ridden Nathaniel's motorcycle on race tracks before (Exhibit 33). The tires on the motorcycle were originally purchased by Richard Stearns. Nathaniel confirmed that Kevin was riding his motorcycle, having loaned his car to their brother Jeremy. He also recalled Kevin spending time playing with William and reading him books,

even after the divorce. Like his father, he knew the narrow, curvy lines of tar on a road were “slick” and that a motorcycle driver needed to be “very careful.”

Renee Ackert, Kevin’s ex-wife, also testified about Kevin’s superior riding skills, referring to him as “hyper-vigilant” and stating that she always felt safe riding with him. She mentioned a two-week vacation in Switzerland that the whole family took, riding motorcycles, and that she had ridden as a passenger with Kevin the whole time.

Renee met Kevin in 1998 while they were both attending Genesee Community College. They began dating in 2000 and married in 2005. Renee earned a degree in Physical Therapy. Although Kevin did not earn a degree, he was employed almost the whole time, just taking short time periods off to move or do home remodeling. Kevin attended school for trucking in 2006. Once William was born, both parents changed jobs for more flexibility and money. Renee testified that Kevin was home Sunday through Wednesday and drove trucks Thursday through Saturday. After the divorce, which was amicable, they worked hard to make sure Kevin had as much time as possible with William. It appears that Richard Stearns played a significant role in William’s life then and continues to do so. Richard also offers the same stability for Raylee.

LIABILITY

The State owes the public a nondelegable duty to design, construct and maintain its roadways in a reasonably safe condition (*see Friedman v State of New York*, 67 NY2d 271, 283 [1986]). To prove liability on the part of the State, Claimants must establish: 1) the existence of a dangerous condition; 2) that the State either created or had actual or constructive notice of the condition; 3) that it failed to remedy or warn of the condition and 4) that such failure was the proximate cause of Claimants’ injuries (*see Cappolla v City of New York*, 302 AD2d 547, 548

[2d Dept 2003], *lv denied* 100 NY2d 511 [2003]; *Brooks v New York State Thruway Auth.*, 73 AD2d 767 [3d Dept 1979]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Where the State provided and placed paint on a roadway on which a motorcycle driver and his passenger skidded, slipped, and fell while executing a right hand-turn, the Hon. Philip J. Patti found that the State had created the dangerous condition and, therefore, had actual notice of its existence. Also, Judge Patti found that the State had failed to remedy or warn of the danger it created with the paint (*Dispenza v State of New York*, UID No. 2010-013-503 [Ct Cl, May 13, 2010]). Here, it is undisputed that the Thruway Authority applied the tar strip down the center of the highway. The tar strip was at least 12 inches wide, in violation of the Thruway Authority's Maintenance Directive. It is also undisputed that the Thruway Authority failed to remedy or warn motorcycle drivers of the danger. I find that Claimants established that a one foot tar strip constituted a dangerous condition; that the Thruway Authority created that condition; and that the Thruway Authority failed to remedy or warn of that condition. The issue left to consider is whether or not the tar strip was the proximate cause of Kevin Stearns' death. I find that it was.

Both experts agree that the location on the section of the Thruway where the accident occurred had a 12 inch tar strip down the center line, with a low enough co-efficient of friction to make it slippery. They also agree that there was no evidence of aggressive driving on Kevin's part. The fact that witnesses placed Kevin in the passing lane attempting to move to the travel lane when he lost traction and slid into the guide rail did not constitute aggressive driving. Additional support came from the rebuttal testimony of Mr. Serth, who demonstrated how the laws of physics tended to negate the possibility that Kevin had successfully moved to the travel

lane, as Quinclon Davis had testified. In fact, Mr. Serth opined that, given the facts, it was a physical impossibility for the accident to have accrued that way. He testified that, because the part of the Thruway where the accident occurred possesses a slight, but long curve, if Kevin were in the center of the lane as Quinclon had testified, he would have had to skid approximately 500 feet to reach the guide rail. Mr. Serth demonstrated that it would be impossible for a rider to hit the guide rail at the 45-50 mph as testified to by Dr. LaPoint, after skidding such a long distance. Further, the trail of debris from the crash, as well as the position of the motorcycle partly underneath the guide rail, support Claimants' contention that Kevin encountered the guide rail after a relatively short, sharply angled skid, as opposed to a long, slightly angled skid. Based upon a totality of the evidence before me, I find that the tar stip was the proximate cause of Kevin Stearns' fatal injuries.

Defendant has raised an affirmative defense under CPLR Article 14-A, Effect of Contributory Negligence and Assumption of Risk. At trial, Defendant claimed Kevin's own culpable conduct was, if not solely the proximate cause of his death, a contributing factor for which a portion of the liability should be attributed and the amount of damages reduced proportionately. I find that the evidence does not support a finding of sole proximate cause (*cf. Marrow v State of New York*, 105 AD3d 1371 [4th Dept 2013]).

The defense expert testified credibly regarding the appropriateness of the motorcycle tires, specifically, that their age and prior race track use had an impact on the ability of the tires to hold the road under the conditions present on the day of the accident. While I acknowledge that the tire tread depth met New York State inspection requirements, Kevin was a sophisticated motorcycle driver, knowledgeable about motorcycle operation, who should have known that

these tires were not high-functioning regular road tires. I attribute 30% of the liability to Kevin and 70% to the Thruway Authority for creating the tar strip.

DAMAGES

The damages awarded in a wrongful death action are those deemed “fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought” (EPTL 5 - 4.3 [a]). “Pecuniary injuries” are injuries measurable in purely economic terms and do not include “loss of society, affection, conjugal fellowship and consortium (*Liff v Schildkrout*, 49 NY2d, at 633-634)” (*Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]). Nor may they include consideration of “sympathy, passion, prejudice or corruption” (*Juiditta v Bethel Steel Corp.*, 75 AD2d 126, 138 [4th Dept 1980]).

Pecuniary injuries are calculated upon the following factors: present and future earnings; the age, character and condition of the decedent; increased expenditures needed to continue the services decedent provided; circumstances of the distributees (*Gonzalez*, 77 NY2d 663); and the “premature loss of the educational training, instruction and guidance [that the children] would have received from the now-deceased parent” (*Mono v Peter Pan Bus Lines, Inc.*, 13 F Supp 2d 471, 477 [SDNY 1998], citing *Gonzalez v New York City Hous. Auth.*, 161 AD2d 358 [1st Dept 1990]).

The parties offered testimony of economists with Ph.D.s, both of whom are teaching professors who offer their services in valuing losses of past and future wages. The approach to valuation used by both experts, and indeed, I find them both qualified to testify as such, was to

determine the annualized earnings, apply a percentage for wage growth, and reduce that amount by the percentage of personal consumption.

Kevin Stearns' early work life, from 2000 to 2006, involved retail sales positions with low remuneration (Exhibit 38). It was not until he began driving commercial trucks that his income escalated rapidly (Exhibit 18). In the nine months prior to his death, he earned \$62,519.00. Claimants' expert, Richard A. Shick, Ph.D., annualized that figure for an amount of \$83,358.00. Defendant's expert, Michael J. Wolkoff, Ph.D., also annualized those earnings, but reduced that amount by averaging his earnings from 2007, 2008 and 2009, noting that the figure was still higher than the median earnings for commercial truck drivers in Western New York. He determined \$61,600.00 per year was appropriate, given that the median income of a commercial truck driver is \$42,270.00. While I understand Defendant's expert's reasoning, I find that a base salary of \$83,358.00, the actual annualized earnings, is reasonable, given Kevin Stearns' employment record of significantly improving his earnings each year. That salary would grow by 2% each year, as agreed to by both experts.

Another point of disagreement is the expected retirement age. While both experts originally agreed that age 62 was appropriate, Claimants' expert's amended report indicated age 67, because that was when Kevin Stearns would have been eligible for full Social Security benefits. I agree with Claimants that the pre-1984 data previously relied upon to determine retirement age is no longer applicable, given the economy and current culture that males with less than a college education are more likely to stay in the workforce until eligible for full benefits. Thus, at age 67, Kevin Stearns' total income would be \$4,766,084.00.

The next step entails analyzing what percentage of that total projected income would have been consumed by Claimant, had he survived. Claimants' expert reduced the total projected income by the personal expenses, approximately 27% to 30%, for clothing, food and hobbies for Kevin and his partner. He made no deduction for any family consumption, such as housing, but the amount of personal consumption did increase as the children aged, just not to the extent advocated by Defendant's expert. Defendant's expert included jointly consumed items and increased Kevin's and his partner's percentage of personal consumption when the children reached the age of 21, as well as accounting for taxes paid and retirement savings. He testified that this was the logical way to more accurately capture what a family of four's typical picture of income and expenses would be like over time. He reduced the income by 35%, then by 80% after the children left. He admits that his method relied on information from an older study and that Claimants' expert's source for personal consumption is good. Defendant's expert's position is logical, but there is not enough evidence in the record for me to determine when the youngest child would leave the residence. Children are considered adults at age 18, but in New York State, parents are responsible for their support until age 21. Considering the state of our economy and the difficulty young adults face finding jobs, adult children may be living at home until 23 or 24 years of age. Given the unknowns, I will rely upon Claimants' expert's analysis for personal consumption.

Both experts also agree that total projected earnings should also be reduced by Kevin's Social Security contributions and I adopt the figures as presented in Claimants' expert's report. I also accept the figure posited by Claimants' expert for lost household services and find it reasonable, based on the testimony provided by Kevin's father and William's mother regarding

the services provided by Kevin to his children and his partner. Therefore, past economic loss is \$232,322.00 and future economic loss is \$2,814,518.00.

Claimants posit that the decision I wrote in 2004, *LaMendola, et ano. v New York State Thruway Auth.* (UID No. 2004-031-510 [Ct Cl, June 23, 2004]), should apply to the case at bar. *LaMendola* involved a tragic loss of four of six family members in an automobile accident, leaving the surviving two youngest children parentless; one of whom was a special needs child. The proof offered in *LaMendola* was specific to that case regarding a large award for loss of parental guidance and advocacy and is not applicable here.

In *LaMendola*, I determined that the older surviving child receive \$450,000.00 for loss of past and future nurture and guidance and the younger, a child possessing special needs, receive \$1,500,000.00. These awards were based on the evidence presented at trial, specifically, health and school records and the testimony of multiple expert witnesses, care providers, family and friends. These particular awards compensated both children for the loss of both parents.

Here, as noted above, Kevin Stearns was the father of two children. His son, William, was approximately 19 months old at the time of Kevin's death and his daughter, Raylee, was approximately 4 months old. I heard testimony from Kevin's father, brother, and William's mother regarding Kevin's role as a parent. Although Kevin and William's mother, Renee, divorced shortly after their son was born, Renee testified that the divorce was amicable and that she encouraged Kevin's desire to see his son as often as possible. Raylee's mother, Tara, and Kevin were living together in May of 2009, when Raylee was born. Nothing in the testimony given at trial led me to believe that there were any problems between the two families and it

seemed that all parties concerned made an effort to have Kevin's children know each other as brother and sister.

This unrefuted testimony depicted Kevin as a hardworking and loving father who, when he was not on the road for work, spent time with both of his children, reading stories, playing with them outdoors, cooking and changing diapers. Kevin also encouraged the involvement of his extended family in William's and Raylee's upbringing, and the children spent considerable time with their grandparents, nurturing that bond. I award damages for each child in the amount of \$250,000.00, as fair and just compensation for the loss of their father's parental guidance.

As to Claimants' claim for conscious pain and suffering, Dr. LaPoint testified that Kevin's body continued to function, in a limited fashion, for approximately two minutes following impact with the guide rail, as evidenced by the bruising he observed on the pelvic area. It is undisputed that the three eyewitnesses at the scene saw no signs of life. Kevin, however, was conscious when he drove the motorcycle from the passing lane towards the travel lane, lost traction over the tar strip and went down, sustaining injuries to the left side of his body and eventually sustaining the serious injuries to his right leg and ankle. I find he was conscious of these injuries and based on the testimony of Dr. LaPoint regarding the reaction of Kevin's pain receptors upon injury, hereby award \$500,000.00 for conscious pain and suffering between the time his motorcycle slid out from under him until he sustained the injuries to his right leg and ankle. I found no proof in the record that Kevin was conscious when he came into contact with the guide rail.

I award Claimant, Richard Stearns, as Administrator of the Estate of Kevin Stearns:

1. \$162,625.40, which is 70% of the total past economic loss; and
2. \$1,970,162.60, which is 70% of the total future economic loss; and
3. Loss of Parental Guidance (70% of each total figure):
 - a. \$175,000.00 for William Stearns;
 - b. \$175,000.00 for Raylee Stearns; and
4. \$350,000.00, which is 70% of the amount awarded for conscious pain and suffering;
5. I make no award for funeral expenses or the individual claims of Richard Stearns and Nathaniel Stearns, as no evidence concerning these matters was presented at trial.

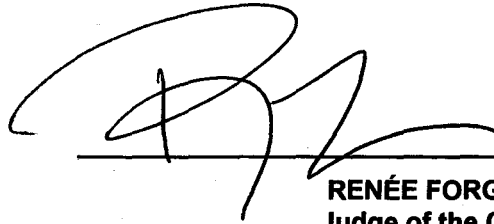
The total award to Claimants is \$2,832,788.00.

Since the amount of future damages exceeds \$250,000.00, a structured judgment is required, pursuant to CPLR 5041 (e). The Chief Clerk is directed to stay entry of judgment in accordance with this Amended Decision until a hearing is held, pursuant to CPLR Article 50-B, which will be scheduled as soon as practicable. I encourage the parties to agree upon the discount rate to be applied and to formulate a structured settlement of their own (CPLR 5041[f]). In the event that the parties fail to reach agreement, each party shall submit a proposed order directing judgment in writing, conforming to the requirements of CPLR Article 50-B, within 90 days of service of this Amended Decision upon them by the Clerk of the Court.

Any filing fee paid by Claimants shall be recovered, pursuant to section 11-a (2) of the Court of Claims Act.

All trial motions not heretofore decided are now deemed denied.

Rochester, New York
March 2, 2015

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of loops and a long horizontal stroke extending to the right.

RENÉE FORGENSI MINARIK
Judge of the Court of Claims