

<b>Pouria v State of New York</b>
2017 NY Slip Op 32901(U)
June 15, 2017
Court of Claims
Docket Number: 120298
Judge: Gina M. Lopez-Summa
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**STATE OF NEW YORK COURT OF CLAIMS**

**DONNA POURIA, as Executor of the  
Estate of ROBERT E. POURIA and  
DONNA POURIA, Individually,**

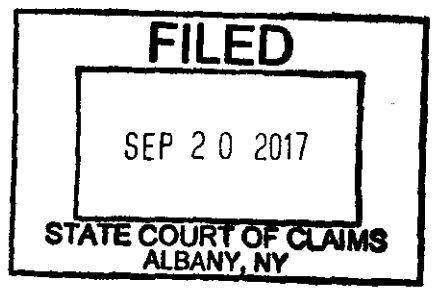
**Claimants, DECISION**

**-v-**

**THE STATE OF NEW YORK,**

**Claim No. 120298**

**Defendant.**



**BEFORE: HON. GINA M. LOPEZ-SUMMA  
Judge of the Court of Claims**

**APPEARANCES:**

**For Claimants:  
Gruenberg, Kelly, Della  
By: Frank Braunstein, Esq.**

**For Defendant:  
Hon. Eric T. Schneiderman, Attorney General  
By: Daniel S. Hallak, Assistant Attorney General**

A bifurcated trial concerning the issue of liability only was held in this matter. The subject claim arose on September 25, 2010 at approximately 12:00 p.m. when decedent, Robert Pouria, while ambulating with the use of a battery powered motorized scooter, fell off his scooter at the corner of North 10<sup>th</sup> Street and Jericho Turnpike due to a pothole in the street at that location.

Decedent's wife, Donna Pouria, described the day of her husband's accident as dry and beautiful. She testified that on that date she and her husband attended the New Hyde Park Street Fair, which was located on Jericho Turnpike. The Street Fair ran from New Hyde Park Road to

Covert Avenue. At that location Jericho Turnpike extends east and west with two lanes of travel in each direction. The eastbound and westbound lanes are separated by a double yellow line. She explained that the Street Fair had booths which were set up in the middle of Jericho Turnpike where the double yellow lines were located. She further stated that the booths were lined up back to back and faced out to the sidewalks. There were no cars parked in the parking lanes during the Fair and the entire street was being used for pedestrian traffic. The New Hyde Park Street Fair was an annual event showcasing local vendors, music, food and businesses.

Mrs. Pouria stated that she and her husband arrived at the street fair at approximately 10:30 a.m. and entered the fair at the corner of South 12<sup>th</sup> Street and Jericho Turnpike. She explained that her husband was using a motorized scooter to ambulate because he was a bilateral amputee. She testified that he had owned the motorized scooter for a few years. The scooter had three wheels, one in the front and two in the back and had a top speed of approximately five miles per hour.

Mrs. Pouria testified that prior to the accident she and her husband traveled back and forth on Jericho Turnpike in both the westbound and eastbound lanes. They were at the street fair for approximately an hour and a half before the accident occurred. During that time, they traveled eastbound on Jericho Turnpike all the way to its intersection with New Hyde Park Road, the end of the fair. They stopped at various vendors and purchased a t-shirt and some spices.

Mrs. Pouria testified that the fair was very crowded prior to the accident. She stated that they were traveling westbound on Jericho Turnpike at the time of the accident. She was to her husband's left side at a booth about 10 feet away at the time of her husband's fall. She explained that she did not witness his fall but heard a commotion, turned around and saw her husband on

the ground on his right side. She testified that he was lying in the right lane of Jericho Turnpike at the intersection of North 10<sup>th</sup> Street. The New Hyde Park Fire Department assisted in returning her husband and his scooter to an upright position after his fall. When she walked over to him she saw a pothole in the street. She testified that her husband then told her that the front wheel of his scooter came into contact with the pothole. She described the pothole as having a diameter of approximately 6 inches and a depth of 2 inches. There was a crack that ran the width of two lanes that bisected the pothole. She explained that she noticed no freshly broken pieces of asphalt and she described the edges of the pothole as worn. She returned to the area and took photographs of the pothole and the surrounding area a week later.

Mr. Pouria was asked at his 50-h hearing how the accident occurred. He testified that:

“After we made the U-turn on Jericho, heading west from New Hyde Park Road, we were weaving in and out of the crowd. It was very crowded. All I saw was the backs of a lot of people. Just before the corner, I didn’t see a pothole that was on the ground. As soon as I hit it, with my first wheel, which was a single wheel, it flipped me over on to the right side. I put my arm down and the chair came on top of me” (Def Exh A, p. 19).

Mr. Pouria stated that the pothole that caused his accident was in the westbound portion of Jericho Turnpike at the intersection of North 10<sup>th</sup> Street. He explained that there were two lanes for moving traffic on the westbound side of Jericho Turnpike. He stated that the pothole which caused his fall was located in the lane closer to the yellow divider line, however in the errata sheet he corrected himself and stated that it was in between the two westbound lanes. Mr. Pouria described the pothole as a big circle with cracks and an indentation in the roadway.

Brian Fitzgerald, a Highway Maintenance Supervisor at the New York State Department of Transportation at the time of the accident, testified in this matter. Mr. Fitzgerald explained

that his duties included taking out his crew of workers and conducting any assigned work given to him on a particular day. Mr. Fitzgerald was considered the foreman of his work crew. The roadways he was responsible for maintaining included Jericho Turnpike, Hillside Avenue and a small portion of Union Boulevard. Mr. Fitzgerald testified that pothole repair work was performed on Jericho Turnpike on August 18, 2010 and September 14, 2010. Mr. Fitzgerald explained that he would drive slowly at approximately 20 mph along Jericho Turnpike with his crew and survey the road in order to determine if there were any potholes which needed repairs. He testified that his crew filled potholes which he determined were necessary to be filled. The largest pothole they repaired was approximately 3 feet by 8 inches and the smallest was 6 inches by 2 inches. Mr. Fitzgerald explained that if there was a pothole in a crosswalk or in an area dangerous to pedestrians those potholes would be repaired as well. He was not aware that there was going to be a street fair on September 25, 2010. When shown a photograph of the pothole and the area around it, he testified that he did not recall seeing any of those defects on August 18 or September 14, 2010. He did not recall making a determination with regard to the pothole involved in the subject accident.

Mr. Fitzgerald testified that he and his crew would repair potholes and cracks since they get larger with time and create additional problems. He described the pothole at issue in this case as a depression and a small crack which did not need immediate repair because of its small size. Mr. Fitzgerald testified that he did not know when the pothole was formed and he did not know how long it existed. He again set forth that if a pothole exists and it poses a danger to motorists or pedestrians it is taken care of immediately.

Mr. Fitzgerald testified that he never received notification from anyone at the Department of Transportation to repair this pothole. He also denied having any knowledge of prior complaints or accidents concerning the subject pothole. He clarified that complaints of potholes would not go to him personally. He initially stated that he and his crew would go out 3 to 4 times a month to conduct pothole repairs on all the roads he was responsible for. Mr. Fitzgerald confirmed that discovery responses from the State indicated that he had been to that stretch of Jericho Turnpike in August and September of 2010.

Peter Heuschneider, a New York State Department of Transportation Civil Engineer 1 testified on behalf of defendant that this roadway is in his jurisdiction. He testified that although he never reviewed any notes, documents or other records, he recalled almost 7 years later that there were no complaints about this pothole nor were there any accidents involving this pothole.

The State of New York has a duty to maintain its roadways in a reasonably safe condition and the breach of that duty can result in liability to the defendant if the ascribed negligence in maintaining the road is a proximate cause of the accident (*Wittorf v City of New York*, 23 NY3d 473 [2014]). In addition, the State has a nondelegable duty to properly design, construct and maintain its roadways in a condition which is reasonably safe for those who use them (*Friedman v State of New York*, 67 NY2d 271 [1986]). However, the State is not an insurer of the safety of its roadways, and the mere fact that an accident resulting in injury occurred does not render the State liable (*Tomassi v Town of Union*, 46 NY2d 91 [1978]; *Brooks v New York State Thruway Auth.*, 73 AD2d 767 [3d Dept 1979], *affd* 51 NY2d 892 [1980]). In order to recover damages for a breach of this duty, a claimant must establish that defendant created or had actual or constructive notice of the dangerous condition and that it failed to take reasonable measures to

correct the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). When an alleged dangerous condition is at issue, a claimant must show that the State had actual or constructive notice of the condition and failed to act reasonably to remedy the dangerous condition (*Timcoe v State of New York*, 267 AD2d 375 [2d Dept 1999]).

“To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it” (*Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798 [2d Dept 2003]). A property owner may not be held liable in damages for trivial defects that do not constitute a trap or nuisance over which a pedestrian might merely stumble, stub their toes or trip (*Zalkin v City of New York*, 36 AD3d 801 [2d Dept 2007]). Whether or not a dangerous defective condition exists on the property of another so as to create liability depends upon the facts and circumstances of each case (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). The width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury are all factors to be taken into consideration when analyzing whether the defect was a dangerous condition so as to create liability (*id.*).

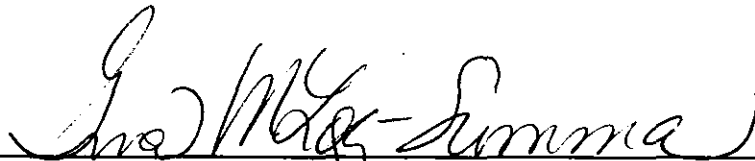
Claimants have failed to establish notice of a defective condition to defendant in this matter. Defendant repaired many potholes along Jericho Turnpike on August 18, 2010 and on September 14, 2010. However, there was no evidence presented to suggest that defendant knew of a specific pothole along Jericho Turnpike at the intersection of North 10<sup>th</sup> Street. The evidence established that Brian Fitzgerald, a Highway Maintenance Supervisor, would drive along the roadway in issue to make a visual inspection for potholes and other defects. Mr. Fitzgerald did not observe the pothole in question prior to the subject accident. This type of routine inspection

also does not constitute the kind of specific inspection, focused upon the area in question, required to justify the finding of constructive notice (*Brzytwa-Wojdat v Town of Rockland, Sullivan County*, 256 AD2d 873, 874 [3d Dept 1998]). Although the area is a highly trafficked area which would increase the likelihood of potholes, a “general awareness” that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). Additionally, the Court notes that there were no previous complaints regarding a defective condition and no record of prior accidents in the area in question.

Therefore, based upon the foregoing, the Court finds that claimants have failed to prove, by a preponderance of the credible evidence, their claims against defendant in this action. Accordingly the claim is hereby dismissed in its entirety. Any motions upon which the Court had previously reserved or which remain undecided are hereby denied.

The Chief Clerk of the Court is hereby directed to enter said Judgment accordingly.

Hauppauge, New York  
June 15, 2017



**GINA M. LOPEZ-SUMMA**  
Judge of the Court of Claims