

Mansour-Mohamed v State of New York

2017 NY Slip Op 32903(U)

September 11, 2017

Court of Claims

Docket Number: 126382

Judge: Stephen J. Mignano

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STATE OF NEW YORK COURT OF CLAIMS

MAGDA MANSOUR-MOHAMED,

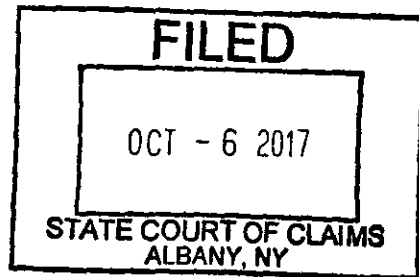
Claimant, DECISION

-v-

THE STATE OF NEW YORK,¹

Claim No. 126382

Defendant.



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

**APPEARANCES: For Claimant:
SCHWARTZAPFEL LAWYERS P.C.
By: Christopher F. Holbrook, Esq. and
Michael R. Reiner, Esq.**

**For Defendant:
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
By: Dian Kerr McCullough, Assistant Attorney General**

The claim for negligence arose on January 18, 2015, when claimant was seriously injured in a single-car accident on the Taconic State Parkway ("Taconic") near the Bear Mountain Parkway extension exit. Claimant was a passenger in the front seat of a car driven by her husband, who lost control after skidding on ice. The car left the road, rolled over and came to rest on its roof in a ditch. Claimant is now a quadriplegic, paralyzed from the neck down. She asserts that the State was negligent in putting up "mountable curbing" during reconstruction of the

¹ The caption has been amended to reflect the only proper defendant.

Taconic, which caused the car to “vault” into the air.² The court held a trial on liability only on April 25, 26 and 27, 2017.

Michael Schaefer testified that he has worked as an engineer in the design group at New York State Department of Transportation (“NYSDOT”) since 1990. They rely on the American Association of State Highway and Transportation Officials (“AASHTO”) Manual and the New York State Highway Design Manual (“NYS Highway Manual”) in their design standards. The manuals contain rules that govern highway design in New York. He agreed with the following statements from the AASHTO Manual, which the NYSDOT Manual has adopted:

“In general, neither barrier nor mountable curbs are desirable for use on high speed roadways. If a vehicle is spinning or slipping sideways upon impact, either type of curb could cause it to trip and overturn. Under other impact conditions, a vehicle may become airborne, which may result in loss of control by the motorist.”

(T: 51-53; Exh. 38, p. 25). He also agreed that the Taconic is a high-speed roadway (T: 55).

Schaefer explained that “vaulting” occurs when a vehicle becomes airborne on impact with an object, and vaulting can cause rollovers (T: 55-56). He agreed with the following statements in the NYSDOT Manual:

“Curbing has been shown to be a major contributor to vaulting and destabilization problems [. . .] When the tires of an errant vehicle strike a curb, the impact tends to bounce the vehicle upwards which can contribute to vaulting [. . .] Mountable curbing of any height is not to be installed on new or reconstruction projects, except that when curbing is necessary for drainage control on high speed roads, mountable curbs with a maximum height of 100 mm may be used at the outside edge of shoulder [. . .]”

² At the start of trial, claimant’s attorney stated on the record that claimant was basing her claim of negligence solely on the theory that the State’s inclusion of curbing in the design used for reconstruction of the Taconic was negligent, and not on the State’s maintenance of the highway (Trial Transcript [“T”]: 43-44, 159) (“T: #” refers to relevant pages of the trial transcript).

(T: 56-57; Exh. 39, pp. 237-238). Schaefer identified three types of curbing - mountable, non-mountable, and traversable. He explained that a "traversable curb in itself is mountable, but it's not a mountable curb" (T: 57). The NYSDOT Manual did not mention "traversable" curbing, only "mountable" (T: 58). They considered safety and historical elements in designing the reconstruction project. They replaced the existing curbing with traversable curbing, to assist with drainage. There were also other methods of drainage (T: 62-67).

On cross-examination, Schaefer testified that he has been the Regional Design Engineer for NYSDOT's Hudson Valley region for three years, and has worked with NYSDOT as an engineer in the highway design group for 27 years. He is responsible for oversight of the capital program delivery of all the design projects for highway and bridge design in the Hudson Valley region (T: 68-69). The Taconic, at the Bear Mountain extension exit, was reconstructed in 2000, along with the entire corridor, to bring it up to current standards and to make it three lanes because of increased traffic in Westchester County. The existing "fluted" curbing was replaced with "traversable" curbing three inches in height with a one foot width. Schaefer explained that the curbing at the site functions "as a support for the pavement section" to prevent deterioration of the pavement edge, and "accommodate[s] drainage along the parkway" (T: 69-71, 79). The drainage system is an "open channel flow along the face of the curb [. . .] then the water flows downhill until it reaches a series of catch basin inlets." NYSDOT used the AASHTO Manual and the NYS Highway Manual of guidelines (T: 71-75).

Schaefer referred generally to studies done prior to construction of the Taconic. He recognized Exhibit F as recommendations of the Parkway Standard Task Force dated January 1989, and amended October 25, 1990. He described the task force as including "individuals from

different agencies, and as well as from the Federal Highway Administration, different traffic and safety divisions, structures divisions, tech services, a landscape architecture bureau, design, as well as environment, and New York State DEC and FHWA representatives" (T: 72-73).

The task force recommended retaining or reestablishing curbing "as a means of preserving the parkway's character consistent with the following guidance," regarding "use," "location," "types," and more (Exh. F, § 3.02). The task force specified that where a parkway has an existing curb,

"Mountable-type concrete curbing should be used [. . .] To further minimize any effect on an errant vehicle, the standard curb height should be limited to 4" [. . .] The effect on an errant vehicle can be eased further by widening the curb to 12", resulting in a 1 on 3 slope at its face. This would produce a section similar to the Vee Ditch in the "Preferred Ditch Section" of the AASHTO Guide [. . .]"

(Exh. F, § 3.02, T: 74). The task force developed a curb that "matches a standard roadside slope treatment, which is a one-on-four slope, which is traversable by a vehicle" (T: 74). The curb eventually used for the Taconic reconstruction is three inches in height, one inch shorter than the maximum height of four inches provided by a NYSDOT approved standard sheet (T: 76-78, 83-85, Exh. 40 [standard sheet # 5], Exh. E). The curb served the same function as the prior one and met acceptable standards. In Schaefer's opinion, lowering the height made the curbing more traversable (T: 78-79, Exh. 40).

On redirect-examination, Schaefer read a passage from the task force recommendations (Exh. F), stating that "neither barrier nor mountable curbs shall be used on freeways or other high-speed arterials, but if provided in special cases, the curbs should not be closer than the outside edge of the shoulder, and a sloped end treatment must be provided" (T: 81). He explained

that "special cases is the consideration of the entire project, which entails the historic character of the Taconic" (T: 81). With every project, they use the AASHTO and NYS Highway Manuals as guidelines, as well as engineering judgment, and other manuals and recommendations (T: 84). Schaefer explained that the studies that were done "had vehicles impacting curbing at multiple angles" (T: 86). He agreed that striking a curb at an angle, or on the side, could cause it to go up (T: 87).

On recross-examination, Schaefer referred to the task force recommendation that curbs be widened to 12 inches (Exh. F), which results in a flatter curb with a one-on-three slope, to prevent vehicles going over it from becoming unstable. The curb they used (Exh. 40 [reconstruction of the Taconic contract]), was even flatter than recommended (T: 88-89).

New York State Trooper Sergeant Imani Kirkland testified that he responded to the scene of the accident on January 18, 2015. He observed ice and snow on the road near the Bear Mountain extension exit, calling for the use of caution while driving (T: 95-96, 103, 106). At the scene, he observed a car off the shoulder, down an embankment and upside down in a ravine. It was damaged on all sides, indicating that the car had rolled over multiple times. It appeared that the car had left the roadway, hit a sign, traveled some distance, then rolled down the embankment. He observed a debris field (T: 105-110, 115).

Sgt. Kirkland is not an accident reconstructionist. He drew a diagram (T: 113). He did not take photographs or take steps to preserve evidence, and he did not call his superior to get the collision reconstruction unit ("CRU") to the scene (T: 118-119).

On cross-examination, Sgt. Kirkland testified that the diagram he drew was not to scale, but rather a summary of what he observed that he attached to his accident report (T: 120-121,

Exh. A). The diagram shows the car rolling over further down the embankment where the elevation changes. In his 11 years as a trooper he went past the area hundreds of times (T: 121-122). When he drove up to the scene, there was snow and freezing rain. He saw the exit sign was down. The debris area was down by the car, and contained items you would take to college. He did not see debris in the grassy area on the way down to the pit (T: 125-127).

As for the cause of accident, he wrote on his report that, Vehicle 1 was traveling too fast for icy road conditions, lost control and struck the sign at the ramp to Bear Mountain Parkway extension exit. V1 then rolled down an embankment several times before coming to rest on its roof (T: 127, Exh. A). He concluded that the car had been going too fast for the conditions based on the distance it traveled after hitting the sign. Until this accident, Sgt. Kirkland had not responded, and was not aware of another trooper responding, to an accident involving the curbing at that location (T: 129-130). It was not his responsibility to take photographs at the scene (T: 132).

Jorge Argote testified³ that he is a resident NYSDOT engineer in Southern Westchester and in January 2015, he was a resident engineer in Northern Westchester. He is responsible for roadway maintenance. He is familiar with NYSDOT's Highway Design guidelines, but he has never designed a roadway, drainage system or curbing. When shown a photograph of the scene of the accident, Argote testified that the curbing shown is mountable and could serve a drainage purpose (T: 166-182).

³ Argote testified as a mutual witness.

Mirna Ismail, claimant's daughter, testified that on the day of the accident, her father, a limousine driver, was driving all five members of the family in his Lincoln Town Car upstate to drop off her brother at college. He seemed to be driving at a normal speed. She was sitting in the back looking at her phone. There was freezing rain. The car skidded on a patch of ice and he lost control. It hit the curb, vaulted, destabilized, hit the exit sign, and then flipped over a couple of times before coming to rest upside down in a ditch just beyond a rock pile (T: 185-200).

On cross-examination, Ms. Ismail testified that there had been freezing rain on the entire trip, and she did not realize her father was driving too fast (T: 202-204).

Claimant testified that her husband was undistracted, not on medication and driving at a "regular" speed before the accident.⁴ She described the car sliding into the curb then becoming airborne (T: 238-253). During cross-examination, she acknowledged her deposition testimony that there had not been many cars on the Taconic on the day of the accident, and they were going slow because it was icy (T: 255-256).

James Shultz, P.E. was accepted by the court as an expert in civil engineering and highway design. He was not proffered and was not accepted as an accident reconstructionist (T: 268).⁵ Shultz testified that in his opinion, to a reasonable degree of engineering certainty, there was no reasonable basis to put in the curbing, and the aesthetics should not be placed over safety. He concluded that the curb was not necessary for drainage, and he posited an alternative method that would be more effective and cost less (T: 314-315). He put forward the following grounds

⁴ Claimant explained that her husband left her after the accident and returned to Egypt (T: 239).

⁵ Shultz testified to being licensed as a civil engineer in Pennsylvania, and that the Court of Claims has previously accepted him as an expert in civil engineering (T: 262-266).

for his opinion: when the Taconic was reconstructed, it became a high-speed roadway; drainage could be accomplished more cheaply and without curbing by allowing water to flow into the grassy area, descend to a lower point, then be flushed away with piping (T: 304-305); the use of curbing in the Taconic reconstruction was unnecessary and was contrary to applicable standards in the 1984 AASHTO Manual and the NYS Highway Manual (T: 304-305, 311-315); if the design had complied with the applicable standards, the "crash would not have occurred in the manner that it did" (T: 334-335); the car rolled over because it vaulted after hitting the curb; any destabilization of the car was due to the curb (T: 334); the aesthetic aspect of the curbing was moot once the Taconic became a high-speed roadway (T: 306); the height of the curbing used was four inches (T: 306-307); traversable and mountable curbing are the same (T: 292-293); the NYS Highway Manual does not reference "traversable" curbs (T: 343); and bouncing or vaulting increased "in terms of a rollover event" if the car struck the curb at an angle (T: 311).

Shultz testified that he did not consider the speed of claimant's car or the Crash Data Retrieval information in formulating his opinion (T: 371-374, 384-387). He did not use a level to measure the curb (T: 339). He calculated the height of the curb by measuring the length along the slope, and the angle of the slope (T: 339). Shultz acknowledged that: the NYS Highway Manual, page 208, refers to four different types of curbs – non-mountable, two different kinds of mountable, and traversable (T: 344-352, Exh. 39); and the traversable curb is shown on the New York State Standard Sheet, T-100 series (T: 352, Exh. E). On redirect examination, Shultz testified that if the car's speed had exceeded 60 m.p.h., that information would not have changed his report or his opinions (T: 388).

Richard Hermance was accepted by the court as an expert in accident reconstruction (T: 447). Prior to formulating his opinions, Hermance visited and examined the area where the accident occurred, and he reviewed photographs of the accident site and the car, deposition transcripts, police reports and the Crash Data Retrieval document (Exh. C). He did not examine the car itself. He concluded that the car was traveling as fast as 65 to 66 m.p.h. right before it left the road, which was too fast for the icy conditions (T: 447-452, 457, 462). Information from the Crash Data Retrieval printout showed that: the speed of the car was in the range of 55 or 60 m.p.h. from about 20 seconds to about 10 seconds before the accident; at about 10 seconds the car accelerated to the range of about 60 to 66 m.p.h., the brakes came on, and it began to decelerate then left the road (T: 451); the stability control was not activated (T: 451); and the traction control came on .6 seconds before the accident (T: 456).

In his opinion, the three inch traversable curb did not cause the accident, and did not cause the car to roll over or to destabilize (T: 457). The fact there was so little debris left behind at the scene indicated that the car could not have rolled over before reaching the stone lined area of the extension exit. If the car had started rolling over right after hitting the curb, there would have been "debris all over the place," which neither the trooper responding to the accident nor the NYSDOT employee observed (T: 458-459).

Using Exhibit CCC (aerial map of the site), Hermance testified and showed the court how, in his opinion, the accident took place, which was "pretty consistent with what the Police Report shows" (T: 460). The court summarized his testimony as follows:

"What the witness has testified on Defense Exhibit triple C, Charlie, is his opinion that this vehicle left the highway somewhere close to the top of the triangle, which we've been referring to as the

bullnose [. . .] it traversed the grassy area until it hit the high level or high degree drop in elevation, and at the stone wall, which is shown to the left side of [Defendant's] triple C in the upper corner of the triangle, and that that stone wall is what caused the vehicular rollover."

(T: 463). Hermance referred to the rollover as a "driver's side leading edge roll," which he described as when the car goes over on the driver's side. When that happens, the driver's roof "goes underneath and doesn't sustain the main impact. The main impact comes over the passenger's side [where] [. . .] it hits on the passenger's side roof sill, which the pictures clearly show" (T: 461). He concluded the car rolled about 1½ times and there was no evidence that the car rolled over early, which was consistent with the police diagram (T: 461, 464). He agreed that his conclusion was consistent with Sgt. Kirkland's testimony, although in his opinion the car "tripped" where the rocks started and not just because of the elevation change, as the Sergeant concluded (T: 465). He estimated that the car went about 380 feet after it left the road, and if it had been rolling the whole way, it would have rolled six times (T: 467). In his opinion, to a reasonable degree of scientific certainty, based on his experience as an accident reconstructionist, the proximate cause of the accident was "driving too fast for conditions" (T: 470).

On cross-examination, Hermance testified that before becoming an accident reconstructionist, he worked as a police officer for ten years. He agreed it is important to preserve evidence (T: 475). He agreed that here, the State Police did not preserve evidence, take photographs of the scene, memorialize how it looked, or do a "Total Station." He also agreed that the CRU did not go to the scene. He did not know that the State had inspected the car or that it had been preserved until nearly before trial (T: 476-481).

He did not measure the curb. "Mr. Pucino" told him the curb was three inches high. Pucino's report said the curb was four inches, but the week before trial he said he measured it and it was three inches (T: 482-483). Hermance testified that the additional inch would not make a difference to his analysis.

On redirect examination, Hermance reviewed photographs of the scene taken by the Fire Department (Exhs. 3-6). He observed that the main structural damage to the car was on the roof at one contact point, and there was no "real crush deformation," which is consistent with his opinion (T: 511-513). Assuming that the car left the roadway at an angle, and that the trooper did not see debris in the grassy area when he drove by the accident scene, Hermance's opinion would remain the same (T: 515-516).

Nicholas Pucino was accepted as an expert in civil engineering, highway design and highway safety (T: 521-522). He testified that he began working for NYSDOT in 1958, and was eventually promoted to senior engineer. He went to work for the East Hudson Parkway Authority in 1968, and was appointed chief engineer in 1971. He had the overall responsibility for safety and operations on the parkway system that includes the Taconic. He worked with the Authority for 20 years (T: 519-521). He has been accepted as an expert in engineering by the Court of Claims 50-60 times (T: 518-519).

Pucino served as Chairman of the Parkway Standards Task Force that issued recommendations for parkway standards dated January 1989, and amended October 25, 1990 (Exh. F, T: 527). "[T]o address some of the safety concerns involving curbs generally by AASHTO and even the Highway Design Manual," the Task Force developed a "special curb," which later became known as the "traversable curb" (T: 527). They based their design on

"careful studies [. . .] of research tests and research reports on the performance of various types of guide rail, including mountable [. . .] type of curbs, [. . .] which demonstrate that even steeper curbs would not cause operational problems or vaulting" (T: 529).

The Task Force design widened the normally used curb design from 9 to 12 inches to create a "flatter slope." They also eliminated the "lip," which had been recognized as potentially causing a problem on a vehicle's sideways movement (T: 528). The newly developed curb was equivalent to a "V ditch section," which is consistent with the ditch section recommended in the NYS Highway Manual and the AASHTO Manual. Pucino explained that the design is described in these manuals as a "traversable curb," and the design's four inch height limit was adopted in chapter 10.⁶ The Task Force design is also included in a NYSDOT standard sheet as a Type T100 or PT100 traversable curb (T: 528-530, Exhs. E and G). The "high-speed traversable ditch section" described in the NYS Highway Manual is "the most forgiving type of ditch section that you can build" (T: 539). Going over it you will feel a bump, "but it should not throw the vehicle out of control." It does not sacrifice safety (T: 539). The AASHTO Manual does not address the New York State traversable curb because that guide is a national policy. You need a curb on the parkway because it is an important identifying characteristic, and it is very effective in controlling drainage. Without a curb, runoff would erode and cause salt damage to the shoulder, and create edge drops. You could put in a ditch, but that could result in a rollover and a curb is just as good as to safety (T: 542-543).

⁶ Pucino stated in his report that the curb here was four inches in height. He testified that originally he had relied on the standard sheet for his description of curb height and lane widths and shoulders. When he saw that the height of the curb noted on the plans was three inches, he went a week before trial and measured the curb as being three inches in height (T: 523-524).

Pucino concluded, to a reasonable degree of engineering certainty, that the State adequately conducted studies of curbing along the Taconic, and that the traversable curb complied with the AASHTO recommended practice; complied with the New York State Highway Design Manual; and was not the proximate cause of the accident (T: 543-545). Claimant's husband was driving 66 m.p.h. in a 55 m.p.h. zone, which was excessive for the roadway conditions (T: 546).

On cross-examination, Pucino testified that traversable curbs are mountable, but they are not "mountable curbs," which are different. He agreed that curbing should not be put on high-speed roadways unless it is necessary for drainage, and testified that the curbing here was necessary for drainage (T: 570-572).

Claimant is seeking damages for her injuries based on the State's decision to include traversable curbing as an element of its design for the reconstruction of the Taconic by the Bear Mountain extension exit. Defendant has asserted as an affirmative defense its immunity from liability for damages caused by discretionary decisions made by its agents or employees (Answer, ¶ 9 [4th Aff. Def.]).

The State of New York has an absolute, nondelegable duty to those using its roadways to design, construct, and maintain them in a reasonably safe condition, taking into account such factors as existing traffic conditions, terrain and fiscal practicality (*see Friedman v State of New York*, 67 NY2d 271 [1986]; *see also Gutelle v City of New York*, 55 NY2d 794 [1981]; *Weiss v Fote*, 7 NY2d 579 [1960]). The State, however, is not an insurer of the safety of its roadways and the mere occurrence of an accident does not create liability (*see Tomassi v Town of Union*, 46 NY2d 91[1978]).

“[T]he Court of Appeals has bestowed broad immunity to defendant in the area of highway design” (*Lake v State of New York*, 56 Misc 3d 1203[A] [Ct Cl, 2015], *affd* 151 AD3d 1425 [3d Dept 2017], citing *Weiss* at 579). Highway design and planning is a critical function of the State entitled to deference by the court (*see Weiss* at 579). The State is entitled to a qualified immunity from liability for design decisions made by highway planners unless the proof establishes that the design decision evolved without adequate study, was plainly inadequate or there was no reasonable basis for the plan (*see Gagliardi v State of New York*, 148 AD3d 868 [2d Dept 2017] [claim dismissed properly where trial evidence showed that the design and placement of a guardrail were the result of a deliberate decision-making process after an adequate study and had a reasonable basis]; citing *Affleck v Buckley*, 96 NY2d 553 [2001]; *see Friedman* at 284)). Claimant has the burden of establishing that the State did not adequately analyze the condition or there was no reasonable basis for its plan (*see Evans v State of New York*, 130 AD3d 1352, 1355 [3d Dept 2015], *lv denied* 26 NY3d 910 [2015]).

The evidence presented at trial does not show *prima facie* that the design and placement of the traversable curbing did not result from a deliberate decision-making process after an adequate study, or that the design and placement of the curbing did not have a reasonable basis (*see Gagliardi* at 869; *see also Ramirez v State of New York*, 143 AD3d 880, 882 [2d Dept 2016] [guardrail designed per NYSDOT design standards through deliberative decision-making process]; *Fan Guan v State of New York*, 55 AD3d 782, 784 [2d Dept 2008] [policy of maintaining 20 foot clear zone]; *Galvin v State of New York*, 245 AD2d 418, 419 [2d Dept 1997] [decision not to place guardrail]). The gravamen of claimant’s case is a difference of opinion among experts, which the Court of Appeals has rejected as a basis for liability against the State

based on discretionary planning and design decisions of State engineers (*see Weiss* at 588-589).

“[S]omething more than a mere choice between conflicting opinions of experts is required before the State . . . may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public” (*id.*).

Claimant makes several arguments, some conflicting. She proposes that NYSDOT’s decision to replace the curbing was negligent because the “traversable” curbing was actually “mountable” curbing; the national and state roadway design guidelines, and the recommendations of the Parkway Standards Task Force, do not permit replacement with mountable curbing on high-speed roadways with few exceptions that do not apply; and the “traversable” curbing used by NYSDOT was not supported by adequate studies and it did not have a reasonable basis. The evidence does not support her arguments.

Mutual witness Michael Schaefer, an engineer with NYSDOT’s design unit, testified that the State redesigned the Taconic with the primary purpose of ensuring its safety for use as a high-speed roadway while allowing for preservation of the parkway’s original character (T: 62-63). To accomplish this, the State formed the parkway task force, which benefitted from a broad swath of expertise in parkway design and safety. It was comprised of representatives from several State agencies, such as the DEC and the FHWA, as well as the Federal Highway Administration (T: 72-73, Exh. F). In the seminal case of *Weiss v Fote*, the Court of Appeals deferred to the discretionary decisions of an authorized public planning body (7 NY2d 579 [1960]). More recently, the Second Department affirmed a trial decision by the Court of Claims (Ruderman, J.) finding no liability based on qualified immunity where a guardrail was designed “pursuant to the

design standards set forth by the New York State Department of Transportation, which were the result of a deliberate decision-making process" (*Ramirez* at 881).

Nicholas Pucino, defendant's expert on highway design and safety, served as the Chairman of the task force, so his testimony as to the bases for their recommendations and their deliberative process was compelling. Pucino testified that the task force made its recommendations after "an extensive amount of study" (T: 545). Specifically, they reviewed testing done by the Transportation Highway Research Bureau, testing by NYSDOT's research bureau of different types of rails and curbing, as well as the AASHTO Manual and NYS Highway Manual (T: 530-541).

Schaefer explained that the studies that were done "had vehicles impacting curbing at multiple angles" (T: 86). The task force recommended retaining or reestablishing curbing "as a means of preserving the parkway's character consistent with the following guidance,"

"Mountable-type concrete curbing should be used [. . .] To further minimize any effect on an errant vehicle, the standard curb height should be limited to 4" [. . .] The effect on an errant vehicle can be eased further by widening the curb to 12", resulting in a 1 on 3 slope at its face."

(Exh. F, § 3.02). This is what NYSDOT did. Its engineers used "traversable" curbing that met these requirements, and it is a *mountable-type* of curbing, which is undisputed. NYSDOT deviated from the task force design for the purpose of making the curbing safer, by lowering the height by an inch, in order to make the curbing more traversable (T: 78-79, Exh. 40).

Claimant asserts that it was unreasonable for NYSDOT to consider aesthetics, and that the task force requirements are qualified by its own limitation that the specified curbing should

only be used "in special cases" (Exh. F). Schaefer explained that "special cases is the consideration of the entire project, which entails the historic character of the Taconic" (T: 81).

Claimant's expert, James Shultz, disagreed that this was a "special case," testifying that the aesthetic aspect of the curbing was moot once the Taconic became a high-speed roadway (T: 306). Mr. Shultz, although he is not licensed as an engineer in New York, is licensed in Pennsylvania, and his testimony showed him to be reasonably knowledgeable and experienced. However, his testimony is refuted by the task force recommendation that curbing on the parkway be retained or reestablished "as a means of preserving the parkway's character" (Exh. F). The court also credits the testimony of Mr. Schaefer since he was a fact witness who was intimately familiar with NYSDOT's interpretation of the task force recommendations.

Claimant's additional assertion, that the curbing NYSDOT used was unjustified because "traversable" curbing is not included in the NYS Highway Manual, is erroneous. The Manual mentions three types of curbing "generally found on freeways," and "traversable" is one of the three (Exh. 39, § 7.2.11.3). The curbing used by NYSDOT here is consistent in its parameters with the description of "traversable" curbing contained in the NYS Highway Manual (1:3 sloped face). In fact, the benefits described in the State Manual corroborate Mr. Schaefer's testimony that NYSDOT replaced the curbing in order to preserve the "unique" character of the parkway, prevent erosion, and to facilitate drainage, and they considered safety and historical elements in designing the reconstruction project (T: 62-79):

"Traversable curb is 305 mm wide with a 1:3 sloped face and no vertical reveal, which helps prevent vehicles in a lateral skid from tripping on the curb reveal (i.e., destabilizing or rolling after impact with the face of curb). Traversable curb is designed to permit delineation and drainage control while minimizing the

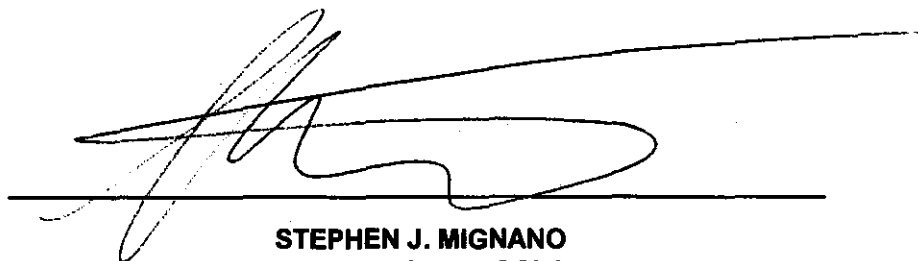
potential destabilizing effect to errant vehicles [. . .] Traversable curb shall be used instead of mountable curb where long sections [. . .] of curb will be removed and replaced as part of a historic parkway or where it must be used for drainage or erosion control.”

(Exh. 39, § 7.2.11.3). Mr. Pucino testified that the traversable curbing NYSDOT used was necessary for drainage, and safer than other types. Mr. Shultz disagreed, but a dispute among experts is insufficient to establish liability.

The car accident that took place on January 18, 2015, was, quite understandably, traumatic to claimant, who endured horrific injuries. The court is mindful of the severity and permanence of claimant’s injuries, and the extreme difficulty of her situation. Even so, upon consideration of all the evidence, the court has determined that defendant is entitled to qualified immunity. As a result, it is not necessary for the court to reach the issue of proximate causation.

The court finds defendant not liable and dismisses Claim No. 126382. Let judgment be entered accordingly.

White Plains, New York
September 11, 2017



A handwritten signature in black ink, appearing to read 'S. Mignano', is written over a horizontal line. The signature is fluid and cursive.

STEPHEN J. MIGNANO
Judge of the Court of Claims