O'Connor v State of New York
2017 NY Slip Op 32905(U)
October 11, 2017
Court of Claims
Docket Number: 122694
Judge: Thomas H. Scuccimarra
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STATE OF NEW YORK COURT OF CLAIMS

GERARD O'CONNOR,

Claimant,

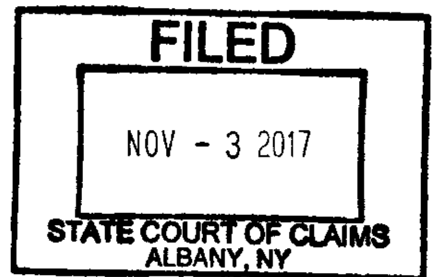
DECISION

-v-

THE STATE OF NEW YORK,

Claim No. 122694

Defendant.



BEFORE: HON. THOMAS H. SCUCCIMARRA
Judge of the Court of Claims

APPEARANCES: For Claimant:
KANTROWITZ, GOLDHAMER & GRAIFMAN, P.C.
BY: LOUIS GERBER, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: JOHN M. HEALEY
ASSISTANT ATTORNEY GENERAL

Gerard O'Connor alleges that as a result of defendant's failure to properly maintain State Route 304 between Cavalry Drive and Squadron Boulevard in the Town of Clarkstown, he sustained serious personal injuries on January 16, 2013 at approximately 4:00 a.m. More specifically, he asserts that the State knew or should have known and properly repaired a defective and hazardous pothole condition in the northbound travel lane of the roadway, concealed by a layer of snow when claimant stepped into the hole, lost his footing, and was injured. This decision relates only to liability, after a bifurcated trial of the matter and submission of memoranda of law.

In addition to his own testimony in support of his claim, claimant offered the expert testimony of Andrew Yarmus, P.E., the deposition testimony of Michael Mariotti, a civil engineer for the New York State Department of Transportation [NYSDOT] and George Clarke, a highway supervisor, as well as photographic and documentary exhibits. [Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 18, 19, 20, 21, 22, 23, 24, 25, 26]. Defendant cross-examined the witnesses, presented the testimony of Jennifer Pollard, retired Resident Engineer for the Rockland County region, its expert Nicholas Pucino, P.E., and photographic and documentary exhibits. [Exhibits A, B, C, D, E, F, G, H, K].

Gerard O'Connor is a sergeant with the Town of Clarkstown Police Department. He had started his law enforcement career with New York City in 1987, and moved to the Clarkstown Police Department in 1998. As a patrol sergeant with the Town of Clarkstown Police Department, he supervises a squad of 18 to 20 police officers and does patrol work himself as well.

In the early morning hours of January 16, 2013, he was on patrol in a marked police car for the latter part of the midnight shift, which had begun on January 15, 2013 at 10:30 p.m. The shift was due to end on January 16, 2013 at 6:30 a.m. He had gone out on patrol at approximately 12:45 a.m. It was snowing throughout his patrol, and the roads were covered by "about an inch of snow." [T1-32].[1]

At approximately 3:50 a.m. Mr. O'Connor was traveling southbound on Route 304 when he observed a stopped vehicle facing northbound on Route 304, "taking pictures of a bank across

[1] Quotations are to pages of the two volume trial transcript unless otherwise indicated.

the street on the corner of Route 304 and Germonds Road." [T1-34]. The stopped car looked like an unmarked police vehicle because of the make and model ("Ford Crown Victoria, which is pretty common for unmarked police vehicles" [T1-35]). The car moved on. Claimant ran the plate through his dispatcher and learned that it was not registered to a law enforcement agency. He continued to follow the car, advised the dispatcher that he would be pulling the suspicious car over, and asked for back up.

Mr. O'Connor pulled the car over on northbound Route 304, "just north of Cavalry Drive" near a blue, Adopt-A-Highway sign. [T1-37]; [Exhibit 5]. There were "three inches or so [of snow]" on the side of the road, less in the center. [T1-38]. When he stopped the suspicious car, he stopped his own car to the left of it, one or two car lengths behind in the travel lane portion of northbound Route 304. He claimed that as part of the safety training for stopping vehicles, the officer generally pulls his own vehicle "two or three feet" to the left of the stopped vehicle - "closer to the center of the road" - so that when he emerges from the vehicle he is protected from other cars in the road. [T1-39-40]. The suspect vehicle was stopped partially in the shoulder, partially in the right hand travel portion of the northbound lane.

After he stepped out of his car "and started to approach the suspect vehicle", he stepped into a pothole, "all the way from the heel to the toe" and the entire width of his shoe as well. [T1-40-41]. He estimated that his shoe "went in" "probably about five inches or so" "from about the bottom of the sole up to about the ankle area." [T1-41-42]; [Exhibit 21]. He testified that his boot was 11 ½ inches in length and 4 ½ inches in width, and that the pothole completely enveloped his boot when he stepped in it. From heel to ankle, he stated his boot went into a depth of 5 inches. [Exhibits 18-21].

[* 4]

Since the road was covered in snow, he was unable to see the pothole. After he stepped in the pothole with his right foot, and experienced his right knee "buckl[ing] inwards" painfully [T1-40], he "steadied" himself at the stopped vehicle, "trying not to let the passengers know that [he] was injured and . . . had a brief conversation with them." [T1-44]. He did not fall.

Back-up arrived "within a few minutes." [T1-44]. He told the responding officers the reason for the stop and that he had hurt his knee and needed to go get it taken care of. He turned the investigation of the matter over to the responding officers, and sat in his car for approximately five minutes while they did so.

Claimant returned to the police station to obtain the paperwork he needed to complete prior to going to the hospital. He went to Nyack Hospital, and brought the employee injury report with him. [Exhibit 22]. He estimated that he was at the hospital from approximately 4:30 a.m. until he was driven back to the police station by another officer to change out of his uniform, arriving there between 6:30 and 7:00 a.m.

When he left the police station, he returned to the location of his fall, and took photographs of the pothole from the inside of his car at approximately 8:00 a.m. The road was cleared by the time he returned to the scene and took photographs. [Exhibits 8, 9]. He knew that this pothole was the one at issue, "[b]ecause this [was] the area where [he] stopped the car and this is the area that [he] was walking and there are no other potholes there." [T1-56]. He returned to the scene again on February 4, 2013, and took "an overhead picture of the pothole." [T1-57] [*See* Exhibit 11].

On cross-examination, Mr. O'Connor confirmed that Route 304 is a roadway that runs in a north/south direction, and that the pothole he stepped in - although "it runs in both directions" -

[* 5]

is longer in an east/west direction (perpendicular to the lane of travel). [T1-90]; [*See* Exhibit 8]. The speed limit is generally 55 miles per hour, although it varies along the route. From the photographs of the scene, the area where Mr. O'Connor stated he stopped the car had one lane of travel in each direction, with a full size shoulder bordered by a solid, white line. Route 304 was a road Mr. O'Connor patrolled regularly, yet he could not say what the speed limit was in the area where he stopped the vehicle.

During cross-examination, claimant was also directed to various contemporaneous accounts he gave of the incident. In an employee injury report claimant himself completed, he wrote in the "description of incident" section that what he was "doing when injured" was "exiting patrol vehicle to check a suspicious occupied vehicle stepped onto an uneven portion of roadway which was not visible due to snow covered condition . . ." [Exhibit 22]. There is no specific mention of a pothole.

In the incident report completed by another officer based upon information provided by claimant, claimant apparently stated that "while exiting patrol vehicle he slipped on snowy roadway causing his right knee to buckle, injuring same." [Exhibit 23]. There is no specific mention of a pothole.

Finally, Mr. O'Connor did not "recall the exact conversation" he had with the treating doctor at the hospital, but recalled that he told personnel his knee was injured, and it was injured when he "twisted it on the roadway on Route 304." [T1-109]. According to the "history of present illness" section of the hospital records, Mr. O'Connor reported "injuring right knee when

he twisted his ankle and then knee while stepping out of his car onto an icy surface." [Exhibit K].[2] There is, again, no specific mention of a pothole.

All three statements indicate that claimant was stepping out of his vehicle, as opposed to walking some short distance.

Mr. O'Connor agreed that it would be his duty as a patrolling officer to report some potholes that were dangerous were he to see them, "right away" if a pothole was

> "in an area where the public walks, if it's in a portion of the roadway where it's causing damage to passing vehicles. If it's in the center of the road where nobody walks, generally, and the cars just pass right over, that's not one that I . . . personally, feel needs to be reported right away." [T1-151-152].

He had never seen or reported this pothole prior to January 16, 2013.

Andrew Yarmus, claimant's expert engineer, opined that the pothole present on January 16, 2013 was a dangerous condition. He stated that photographs taken by the NYSDOT on July 16, 2012 show the same pothole [*see* Exhibits 4-7, 25], and opined that if not repaired this pothole - allegedly visible in July 2012 - would increase in size and expand. All the elements the pothole would be exposed to - freezing temperatures, vehicular traffic and the like - would only serve to worsen the condition.

Based upon Mr. Yarmus' review of the daily work records, although multiple days of work crews conducting repairs in the subject area are recorded between July 16, 2012 and the date of the incident, there was no indication that this particular pothole was actually repaired. [Exhibits 1, F, G].

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[2] Claimant's objection to the admission of this certified hospital record, upon which decision was reserved at the time of trial, is hereby overruled. *See* Civil Practice Law and Rules §4518.

Work crews utilizing what is known colloquially as the pothole killer ("spray patching system" [T1-231]) made repairs within the highway markers of the subject pothole on at least seven occasions, namely August 15, 2012, September 21, 2012, November 29, 2012, November 30, 2012, December 3, 2012, December 4, 2012 and December 5, 2012. [Exhibit 1].

Basing his assessment of the size of the pothole on January 16, 2013, on crediting claimant's description of the incident, and the July 16, 2012 photograph [Exhibit 4], Mr. Yarmus said "it was large enough to have accepted the sergeant's foot, which was approximately eleven plus inches long, about four inches wide and at least five and a half inches deep." [T1-194-195]. He opined that it presented a hazard to people or vehicles that might be in the area, and should have been properly repaired. A proper repair of the pothole, would involve a cut to "square" it out, removal of loose material, and a hot mix patch. [T1-196, 200]. He testified that this would be in accordance with the Highway Maintenance Guidelines [Exhibit 2], setting forth the methodology for making such repairs. He opined that the State failed to properly repair the pothole, because it had not been squared, nor had loose materials been removed and then replaced with proper materials.

Looking at the photograph Mr. O'Connor took of the pothole on January 16, 2013 [Exhibit 9], Mr. Yarmus said that "[t]here appears to be loose material. It has not been squared off and there is no [replacement] material." [T1-202]. He observed that "[t]here appears to be some loose asphalt. There appears to be water and some slush, some snow, as well as an expansion joint filler." [T1-203].

It was his understanding that Route 304 had been constructed with a concrete base with an asphalt overlay. [*See* Exhibit A]. He thought that when the pothole was repaired, the

expansion joint material - that he said seems to be protruding in the January 16, 2013 photograph [Exhibit 9] - should have been removed. Such removal would not structurally impact the roadway, because "it's already pulled out of the expansion joint." [T-207]. He said that the removal was necessary for a proper repair "so that you don't have any flexible or loose material inside of the pothole patch" that "could pull through" or "allow movement within the patch." [T-210].

Finally, Mr. Yarmus said that between July 16, 2012 and January 16, 2013 there was ample opportunity for the State to make a permanent repair in conformance with the guidelines, as opposed to a temporary repair also provided for in the guidelines when weather conditions, or lack of equipment or materials, prevents such permanent repair. There was no evidence, upon his review, that the State lacked equipment or materials. He also opined that having made a repair, it is "good practice to reinspect the patch to make sure that it held and that it is holding properly." [T-213].

On cross-examination, Mr. Yarmus conceded that he could not tell from the July 16, 2012 photographs what the depth of the pothole was, nor could he tell if fresh asphalt was in the hole [*see* Exhibits 4, 25], and agreed that during winter months no permanent repairs are made. Although he was aware of the use of the pothole killer to make repairs along Route 304 on those documented occasions, he did not have any experience using the machine, nor could he describe what it looked like, or how it was used. He was unaware as to when the guidelines [Exhibit 2] - which do not mention the pothole killer as an equipment item - had last been updated. He thought that the State should keep a record of every pothole that is repaired (rather than the present documentation of repairs between highway marker number areas).

In terms of what should be accomplished by a temporary repair according to the guidelines, Mr. Yarmus said the goal was "[t]o restore it to a travelable condition to make it safe." [T-254]. He acknowledged that the squaring procedure was a guideline for a permanent patch.

With regard to the joint filler present in the February 2013 photograph [Exhibit 11], he conceded that he did not know if the filler had popped up on January 16, 2013, nor did he have any way of gauging when it did pop up, or whether the condition shown in February 2013 was present on January 16, 2013. He did not know whether joint filler was present when pothole repairs were made in December 2012. Mr. Yarmus also stepped away slightly from his direct testimony implying the presence of joint filler in the photograph taken on January 16, 2013 [*see* Exhibit 9], saying that he saw water and slush and some loose material there, and then also spoke of joint filler (and identified it) in the February 2013 photograph [*see* Exhibit 11].

Finally, Mr. Yarmus acknowledged that a snowplow can damage the surface of a roadway, including removal of asphalt out of a hole. He essentially conceded that he did not know for how long the hole seen in the center of the travel lane in the January 16, 2013 photograph had been present.

In deposition testimony by Michael Mariotti, a civil engineer for the NYSDOT, and section head for the pavement data services section, Mr. Mariotti indicated that his group was "responsible for obtaining pavement data condition" in part "for our own highway program assistance." [T2-6]. Photographs are "taken at every 1/200th of a mile, [or] 26.5 feet" from a camera mounted on a car. [T2-9]. This information is maintained "in perpetuity." [T2-10].

Portions of the deposition testimony of George Clarke, a highway supervisor during the period from July 2012 through January 2013 responsible for directing crews in Region 8, inclusive of the subject area on Route 304, was also read on claimant's direct case. Mr. Clarke indicated that there was no written schedule of pothole repairs, nor were there any guidelines for inspection of pothole repairs already made. He said that pothole repairs were a priority for highway maintenance, and agreed that he had received a copy of the Highway Maintenance Guidelines as a new employee on September 30, 1999. He did not recall that any changes to these guidelines had been made since.

With regard to the condition shown in the July 2012 photographs [Exhibits 4, 5], Mr. Clarke had been asked what directions he would give to his crew to repair the condition, and he responded that he would say "just fill the potholes." [T2-22]. No further detail as to how to accomplish that task would be given but to "give them a road from point A to point B, fill all the potholes." [T2-22].

No other witnesses and no other evidence was presented on claimant's direct case.

Jennifer Pollard, now retired, was a Resident Engineer for Rockland County at the time of this incident, and testified concerning the maintenance practices of the NYSDOT. She confirmed the regular use of the spray patching system as a leased tool for repairing potholes, which, while not listed as a tool in the highway maintenance guidelines is "a current state of the art piece of equipment" used during both her earlier tenure as resident engineer for Orange County West, and during her residency in Rockland County which commenced in October 2008. [T2-40-41]. The highway maintenance guidelines, in her experience, are just that: guidelines not mandates. Personnel make decisions in the field and adjust as needed, using the pothole killer.

In her experience the pothole killer "fills the hole neatly and . . . seem[s] to hold up well." [T2-42]. The equipment first blows out water and loose material with the nozzle portion, and then fills the hole. In her view, if any material was not blown out, "then it's not loose enough to be removed." [T2-77].

Shown the photographs from July 2012 depicting the area [Exhibits 4, 25], she thought it was very hard to conclude that there was any pothole, that if the "dark spot" that "appears very rectangular to start with . . . [and] small" was a pothole she would expect her maintenance crew to patch it, not cut out a square as set forth in the guidelines. [T2-43]. Based upon her comparison to the pavement markings, she estimated that the defective area in the middle of the travel lane delineated by the dark spot in the July 2012 photographs was approximately 12 inches in an east/west direction (across the travel lane, which travels north/south), of an entirely uncertain but seemingly very shallow depth, and of an uncertain width (north/south).

Ms. Pollard confirmed that no records are kept to indicate that a particular pothole was filled, rather the work reports document the area over which maintenance crews were working by highway marker, and the kind of activity they were performing.

Finally, Ms. Pollard testified that over a one to three year period preceding this incident, there had been no complaints to the residency about potholes at this location. She also said that even a properly performed repair made in July could fail the following January, depending on weather conditions, and traffic volume.

Nicholas Pucino, defendant's engineering expert with extensive work experience in pavement management and maintenance on New York State roadways, opined that the alleged defect shown in the July 2012 [Exhibit 4] photograph is at "a transverse joint in the concrete, and

on the outer edge of the joint" "a little less than [one] hundred feet north of the intersection [between Route 304 and Cavalry Drive]." [T2-96-97]. He thought that no exposed joint sealer is seen in July 2012. [Exhibit 4]. From his visit to the site and review of the photographs, he said that the subject area of Route 304 does not have any crosswalks, or sidewalks or any other identified route for pedestrian travel.

Joint sealer, Mr. Pucino said, was installed in the original concrete pursuant to a 1963 contract, which was then covered over with an asphalt overlay, whose thickness could vary between 1 ¼ inches and 2 ½ inches. [Exhibits C, D]. The joint sealer in the concrete is there to avoid having materials getting into the concrete joint when there are temperature drops, causing the concrete to shrink.

When asphalt is being resurfaced above the concrete, it is not normal practice to remove joint sealer material. Unless joint sealer has popped out - which his review of the evidence showed had not occurred prior to the claimant's accident in January 2013 [Exhibit 9], indeed it was only more apparent in February 2013 [Exhibit 11] - there is no reason to remove it or cut it to make a repair.

Shown the photograph of the area from July 2012, Mr. Pucino said all that is shown is a small depression along the joint, which is approximately 10 inches in an east/west direction, and "at most" 3 inches in a north/south direction. [T2-102]. He thought that it was "pretty shallow, just like it's been pushed down . . . At the edges, it looks like it's almost at grade and that we're matching the surface, but it could be dished down a little bit." [T2-109]. He did not think that the condition shown required that a section be cut out and squared off in order to make a repair. He did not think it was a pothole, but rather a "minor depression in what looks like a plant mix or

could be [cold] patch asphalt that was filled inside the joint, so it's just a joint. You've got joints all over the place." [T2-110]. A car driving over it would not "even notice going over it." [T2-110]. He opined that the condition shown in the July 2012 photograph was not one that was likely to become a serious condition, saying "it's not deep enough and it's not long enough to have any significant effect on traffic, other than a typical joint opening up." [T2-115].

On cross-examination, Mr. Pucino confirmed that the photograph from July 2012 shows that an asphalt repair had been performed at some point, but he could not say exactly when. He thought it had to have been fairly recently since the asphalt was "fairly black yet." [T2-128].

Upon review of all the evidence, including listening to the witnesses testify and observing their demeanor as they did so, the Court finds that claimant has failed to establish any basis for holding the State of New York liable for his slip and loss of balance and any associated injuries, primarily because he failed to establish that he was owed a duty of care in negligence as a matter of law.

Generally, the State has a non-delegable duty to maintain its roads and highways in a reasonably safe condition to prevent foreseeable injury, but it is not an insurer of the safety of its roads. *See* Friedman v State of New York, 67 NY2d 271 (1986). To hold a defendant liable in negligence, a claimant must show (1) a duty owed by the defendant to the claimant, (2) a breach of that duty, and (3) that the breach constituted a proximate cause of the injury. Without a duty, there is no negligence. *See generally*, Palsgraf v Long Is. R.R. Co., 248 NY 339 (1928).

As described in a claim that the Court finds very similar to the claim filed here:

> "the State's 'duty to provide pedestrians with a reasonably safe place to travel' does not extend to protecting Claimant against the injury he sustained while walking on this cloverleaf ramp. The duty of a landowner 'is not limitless' (*Di*

> *Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). It depends upon the extant circumstances and the State is 'under no obligation to provide for everything that may happen upon its highways' (*Lyons v State of New York*, 192 Misc 983, 988 [Ct Cl 1948], *affd* 274 App Div 1086 [4th Dept 1949]; *see Ring v City of Cohoes*, 77 NY 83, 86 [1879]). Rather, its duty 'extends only to foreseeable uses of the highways by vehicular traffic and pedestrians alike,' but 'not every use of a highway by a pedestrian comes within the scope of the State's duty' (*Kelley v State of New York*, Ct Cl, Claim No.101747, July 10, 2002, Lebous, J., [UID No. 2002-019-015]; *see Hamilton v State of New York*, 277 AD2d 982, 984 [4th Dept 2000], *lv denied* 96 NY2d 704 [2001])." Perez v State of New York, UID No. 2009-040-081 (Ct Cl, McCarthy, J., Oct. 28, 2009).

Whether a duty exists and its scope is a legal question to be determined by the Court as a preliminary matter. *See e.g.*, Lynfatt v Escobar, 71 AD3d 743 (2d Dept 2010) *lv denied* 15 NY3d 709 (2010); Sanchez v State of New York, 99 NY2d 247, 252 (2002)[3]; Di Ponzio v Riordan, 89 NY 2d 578, 583 (1997).

Thus in Perez v State of New York, the Court concluded that the State did not owe a duty to a police officer manning a safety checkpoint who walked on an exit ramp of the State highway and stepped in a hole, as the ramp was "reasonably safe for vehicular traffic" - the " 'primary use' of this ramp" - where the condition was " 'not such a deep hole'," and cars had driven over the condition without difficulty.

As the Perez court wrote:

> "Given the configuration of this ramp and its location, the Court determines that the ramp was suitable and safe for its intended purpose of conveying vehicles from Sunrise Highway to Brentwood Road. The Court further concludes that the

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[3] "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts (*see Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). Regardless of the status of the plaintiff, the scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). In words familiar to every first-year law student, '[t]he risk reasonably to be perceived defines the duty to be obeyed' (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928]). Although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent (*see Di Ponzio*, 89 NY2d at 584)."

> possibility was sufficiently remote that a pedestrian or bicyclist might elect to go onto the ramp that Defendant did not have a duty to maintain the ramp surface 'in such a state of repair and unmarred smoothness' that pedestrians and bicyclists could travel on it with 'assured safety' (*Cotter v State of New York*, Ct Cl, Claim No. 99844, April 12, 2001, Read, J. [UID No. 2001-001-511], Slip Op at 4 [bicyclist injured when front wheel was caught in a drainage grate on roadway]; *see also Yocum v State of New York*, Ct Cl, Claim No. 110797, filed February 11, 2009, Hudson, J. [State not required to keep park roadway in reasonably safe condition for in-line skaters]; *Schroeder v State of New York*, Ct Cl, Claim No. 108278, February 20, 2007, Schweitzer, J., [UID No. 2007-036-101] [movement of drain grate sufficient to 'cause a serious cycling mishap' not deemed dangerous condition on 'road designed primarily for automobiles to drive at a speed of 55 miles per hour']; *Grover v State of New York*, Ct Cl, Claim No. 97757, December 19, 2000, Midey, J., [UID No. 2000-009-014], *affd* 294 AD2d 690 [3d Dept 2002] [two- inch 'hump' in street pavement did not affect vehicular traffic and 'not in portion of the roadway designated as or intended for a pedestrian crossing'])."

In this case, if claimant's testimony as to the circumstances of how he came to suffer injury is credited, namely, that he lost his balance and slipped while stepping into a pothole some five to ten feet away from his vehicle (versus slipping on ice/snow as he stepped out of his vehicle, or other contemporaneous versions of the event not involving a pothole at all), he was walking in the vehicular travel portion of a 50 to 55 mile per hour roadway, where pedestrian travel was a mere remote possibility, and the roadway itself was reasonably safe for vehicular use.

Nothing in this record suggests that the State should have reasonably anticipated that a pedestrian would be walking in the middle of the northbound lane of a 55 mile per hour highway. There are no sidewalks on either side of the roadway suggesting that pedestrians would foreseeably be in the area. There was no nearby pedestrian crossing or intersection: the nearest intersection was almost 100 feet away. *See e.g.*, Rivera v State of New York, UID No. 2013-045-502 (Ct Cl, Lopez-Summa, J., April 2, 2013).

All witnesses, including claimant himself and his expert, agreed that the defect was not one that would cause harm to vehicular traffic. In short, the harm allegedly suffered here is not "within the class of reasonably foreseeable hazards that the [alleged] duty exists to prevent (*see Di Ponzio*, 89 NY2d at 584)." Sanchez v State of New York, 99 NY2d at 252.

Even assuming that this claimant as a pedestrian and foreseeable user of the center part of a 50 to 55 mile per hour highway was owed a duty of care, such duty has not been breached nor has claimant established notice and an opportunity to correct a defective condition on this record.

Certainly, on the day of claimant's accident a pothole was present in the area where he stopped a suspicious vehicle. If claimant's testimony is credited, that it was this hole that caused his loss of balance - rather than icy or snowy surfaces and uneven pavement generally - that he went back to find after the road had been cleared, that his foot went in as deeply as he testified (puzzlingly, in a defect that he would have to walk sideways to step into), then it was indeed a dangerous condition on January 16, 2013 for pedestrian, but not vehicular, traffic. *See e.g.* Stevens v State of New York, 47 AD3d 624 (2d Dept 2008).

No witness, however, could say how long such defect had been present, in order to establish that the State had appropriate notice and an opportunity to correct the condition. No prior complaints about this defect were made to the NYSDOT before the date of the accident. The only notice of a possible defect is from the July 2012 photograph, showing only a slight depression in a repaired area near a transverse joint in the asphalt surface. If indeed this possible defect - which the Court finds to be the slight depression testified to by Mr. Pucino - warranted repair, the Court agrees that there is no requirement that it be cut out and squared, and credits Mr.

Pucino's opinion as to how proper repairs are made based upon his extensive experience in highway maintenance on New York State highways.

Mr. Pucino's testimony, generally, was based upon years of practical experience and a more comprehensive examination of the evidence than Mr. Yarmus. Mr. Yarmus relied too extensively on a rigid application of the Highway Maintenance Guidelines, which the Court agrees are not mandates but suggestions for practice.

There is no evidence of any popped up joint filler prior to, at the earliest, January 16, 2013.

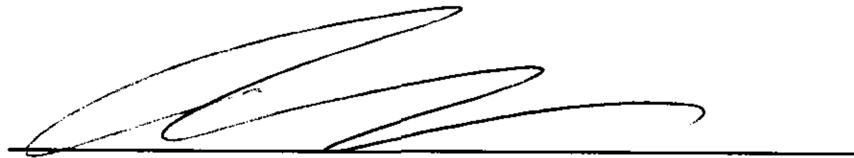
NYSDOT had performed pothole repairs in the same area. Had the condition observed in July 2012 become a defect, such would have been repaired within the time period that such repairs are generally made. *See e.g.*, Highway Law §58. There is simply no evidence that it was not repaired and, within the limits of the standard record keeping of the NYSDOT, there is evidence that it was. Even claimant's expert stated that a snowplow could have created the condition claimant alleges he stepped into on January 16, 2013.

Finally, the Court does not find that the claimant's assessment of what caused him to slip may be credited. When the incident occurred the road was covered with snow, and he immediately gave several contemporaneous accounts of what happened, none of which included stepping into a pothole, a rather specific experience. His return to the scene where the underlying roadway was revealed, and investigation, appears to be guesswork as to what may have caused him to slip, when the likeliest explanation is that he stepped out of his vehicle and slipped on an icy or snowy surface while a snow event was in progress.

Based on the foregoing, Claim No. 122694 is in all respects dismissed.

Let Judgment be entered accordingly.

White Plains, New York
October 11, 2017



THOMAS H. SCUCCIMARRA
Judge of the Court of Claims