Seabrook v State of New York
2016 NY Slip Op 32919(U)
November 23, 2016
Court of Claims
Docket Number: 120766
Judge: Thomas H. Scuccimarra

STATE OF NEW YORK COURT OF CLAIMS

JOSEPH L. SEABROOK,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 120766

Defendant.

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

APPEARANCES: For Claimant:
NOVO LAW FIRM, P.C.
BY: CRAIG PHEMISTER, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: KEVIN P. AHRENHOLZ
ASSISTANT ATTORNEY GENERAL

Joseph L. Seabrook alleges that the State of New York is responsible for injuries he suffered in an automobile accident occurring at approximately 6:30 a.m. on October 31, 2011 on southbound State Route 9W in the Village of Piermont, County of Rockland, State of New York. Among other things, he asserts that the State negligently failed to timely remove a fallen tree blocking the southbound lane of travel, and negligently placed a traffic barrier to block the fallen tree hazard too close to the fallen tree, without any lighting, creating an additional hazard because such placement did not provide adequate warning to the traveling public of the hazard

ahead, or provide opportunity to avoid same. This decision relates only to the issue of liability, after a two-day bifurcated trial and submission of post trial memoranda.

In addition to his own testimony in support of his claim, Mr. Seabrook offered the testimony of Police Officers Patrick Gaynor and Bernard Brown, of the Piermont Police Department, Tracy Becker, who resides along Route 9W near the scene of the accident, and Jeffrey Strike, a highway maintenance supervisor for the New York State Department of Transportation [NYSDOT] as well as documentary and photographic exhibits. [Exhibits 1, 3 - 7]. Defendant cross-examined the witnesses, offered the testimony of Joseph Vitulli, a more junior highway maintenance supervisor for the NYSDOT, and presented documentary exhibits. [Exhibits A, B, E, F].

Mr. Seabrook testified that on Monday, October 31, 2011 he was driving to work in his 1996 Honda Accord on a route he had been using for three years. He said he usually left his home in the Bronx at "around five" because he liked to get to work early, and was required to arrive "before seven."[1] The posted speed limit in the area was 40 miles per hour. As he drove along southbound 9W immediately before the incident, the ambient light was "something in between" "light out" or "dark out." [T-54]. The weather conditions were dry, he was traveling 30 miles per hour, and he had his headlights on.

When claimant was near Piermont, he observed "a barricade, a tree limb" "in the road" on "the south side of 9W." [T-55]. He said he was "around two feet" from the barricade when he first saw it. [T-55]. He did not observe any lights on the barricade. He said when he saw the

---

[1] Quotations are to pages of the trial transcript, unless the context suggests otherwise, here [T-54].

barricade, he "hit the barricade instantly, and instantly, it hit the tree and threw me into the northbound lane." [T-56]. He was unable to do anything with his vehicle prior to striking the barricade. He estimated that the distance between the barricade and the fallen tree was "about two feet." [T-57].

Once he was in the northbound lane, he said, "[he] tried to stop [his car]." [T-56]. On both sides of the roadway there was little to no shoulder area, and the abutting terrain on the southbound side is a hill, giving the drivers on both the northbound and southbound sides of 9W "no room to maneuver." [T-57]. When Mr. Seabrook's car entered the northbound lane there was an impact with another vehicle traveling northbound.

On cross-examination, Mr. Seabrook acknowledged that he was aware that there had been a "freak [snow] storm" [T-59] on Saturday, October 29, 2011, but had not been out of his home in the Bronx to observe any significant damage there. He said he was unaware that a state of emergency had been declared, or that the local utility company described the storm as one of the top ten worst storms in New York State history. When he was traveling along his commuter route on the Sprain Brook Parkway, over the Tappan Zee Bridge and then on to southbound Route 9W, he did not see any damage along the Sprain, nor did he see any trees, or leaves or branches down on 9W south before he got to the scene of the accident. He also acknowledged that he did not drive any more cautiously than usual, saying that he generally drove between 30 and 35 miles per hour.

Although at trial he initially could not recall how far he could see along the road with the illumination of his headlights, his recollection was refreshed by deposition testimony wherein he indicated that his headlights allowed for " 'maybe an eighth of a mile' " [660 feet] of visibility.

[T-64-65]. He could not explain why he could not see the tree until he was two feet away from it, when his headlights allowed for viewing 660 feet of roadway. He said, "I was driving cautious and I was . . . concentrating on going to work, and when I did see the barrier it was at the last second, and I didn't see the barrier before." [T-65]. He said he was not distracted by something in the car, and "the only thing [he had] on is the news." [T-65]. Claimant said he had been driving along southbound Route 9W for approximately ten minutes that morning, and had not observed any other trees in the roadway.

Police Officer Patrick Gaynor, a ten year employee of the Piermont Police Department, testified that on Saturday, October 29, 2011 he came upon a tree blocking both the northbound and southbound lanes of State Route 9W, and reported the incident at 5:30 p.m. that day. [Exhibit 4]. He wrote that the "DOT and 301 advised" and that there was "no ETA on DOT response. Thruway Authority advised they will block off Exit 10 to 9W SB and post 9W closed on Thruway sign." [Exhibit 4]. He noted the closest address for the fallen tree as "660 Route 9W." [Exhibit 4].

Earlier on the same day - 2:20 p.m. - Detective Brian Holihan had closed Route 9W "at the TZ School due to the roadway being impassable at numerous points along route 9W. Patrol had PDPW [Piermont Department of Public Works] place barricades at the TZ school and Broadway, OPD [Orangetown Police Department] advised NYSDOT." [Exhibit 3]. When Officer Gaynor made his 5:30 p.m. report the NYSDOT had not arrived.

Officer Gaynor said that in a further incident report he wrote on Sunday, October 30, 2011 he reported that the NYSDOT had cleared the road and it was reopened, but also indicated that there was a "tree partially blocking southbound lane in front of 701 Route 9W. Tree is on

power line and does not appear to be a hazard at this time. O and R [Orange and Rockland Utilities] advised and barricade placed. RO resumed patrol." [Exhibit 4]. Officer Gaynor said that he "did not" place the barricade. [T-22]. He said that either the "Department of Transportation or Orangetown Highway" would have placed the barricade. [T-22]. He "believe[d]" that at that point, the NYSDOT had partially cleared the tree out of the way, but had no direct knowledge.

On cross-examination, Officer Gaynor confirmed that there were multiple trees down along 9W and that there "could have been" more than ten trees fallen down. [T-23]. He remembered that the snowstorm over the weekend was particularly severe, with heavy snow bringing down multiple trees in part because the leaves were still on the trees, making them more vulnerable to falling down than in a typical snowstorm.

He said that he did not know if the reports he gave on October 29 and October 30 referred to the same tree, and acknowledged that the location noted for the fallen tree in each report was different. On October 29 he referred to "660 Route 9W" as the location, and on October 30 he referred to "701 Route 9W" as the location for the fallen tree.

Officer Gaynor also confirmed that he did not see that NYSDOT cleared the road, rather the Orangetown Police Department dispatch said that NYSDOT cleared the road. Additionally, he confirmed that it would be the local police department that would decide when the road should be reopened, namely Officer Gaynor "and whoever else was on that traffic post, if there was one." [T-27].

With regard to the report by the other officer from earlier on October 29, 2011, Officer Gaynor confirmed that it was the Orangetown Police Department who advised the NYSDOT that

the road was closed as of the time of that report (2:20 p.m. on October 29, 2011). Officer Gaynor, in response to the question if he knew whether the NYSDOT was advised that the road was reopened said "I believe they were the ones that said it could be reopened after they were done doing their work." [T-27]. He did not recall however, seeing any maintenance vehicles on the road on October 30. He did not recall whether he saw trees down on the other roads under his jurisdiction.

In addition to writing in the incident report that the tree he observed on October 30 was "on power line" [Exhibit 4], he recalled that the power lines were entangled in the tree, and that the reason why it was only partially cleared would be because of the power line entanglement. He confirmed that when power lines are entangled in a tree, the utility company, Orange and Rockland Utilities, is responsible for clearing the tree. While he did not notify the utility directly, it was his understanding that the Orangetown Police Department - who he would call - would notify the utility, and did so.

In terms of the barricade that was placed, Officer Gaynor said "it was a sawhorse, a white and orange placard, a reflective placard." [T-31]. He did not recall if road cones were also set out, but did not believe that there were any lights on the barricade. The tree blocked a part of the southbound lane, but he could not recall how far into the lane it intruded. At that location, the roadway is straight in both directions. He said the barricade and tree were visible from approximately 200 yards away during daylight hours.

Asked whether it were possible that the Piermont Department of Public Works had cleared the road, Officer Gaynor said "I don't believe so" because "anything that usually has to do with 9W, they don't handle." [T-33]. Likewise, when asked whether it was possible that the

Town of Orangetown had cleared the road, Officer Gaynor said he did not recall (but mentioned that it is the Town of Orangetown Highway Department that plows 9W). He did not remember if this area had power on October 31, 2011.

On redirect, Officer Gaynor confirmed that he did not know who placed the barricade around the tree, and that the reference in Detective Holihan's report to the Piermont Department of Public Works placing a barricade at the TZ school was not the same barricade as the one around the fallen tree that he noted.

Officer Bernard Brown, came upon the scene of claimant's accident on October 31, 2011. Prior to arriving at the scene, Officer Brown had seen the fallen, barricaded tree, and had not himself reported the fallen tree to the Piermont Police Department, the NYSDOT, or anyone else. He could not remember when he had first seen the barricaded tree, but thought that "the 31st might have been the first tour for [him]." [T-38]. He testified that he had patrolled 9W earlier on his shift, and had seen the barricades in place. He estimated that the barricade had been placed "at least ten feet" from the tree. [T-41].

He later corrected his testimony when read the testimony he had given at his deposition, to say that he had observed the barricade one or two days before, and that it was " 'a few feet - - a couple of feet from the actual obstruction, and the cones were several feet in front of that'." [T-42].

Officer Brown prepared the New York State Police Accident Report concerning claimant's accident, noting the time of the occurrence as 6:30 a.m. [Exhibit 1]. He recalls being directed to the scene by a radio call, and traveling from the south to the north (in the northbound lane of 9W).

When he first arrived, he "saw the area where the tree was down, blocking the southbound lane, [and] saw the traffic cones and barricades were struck and two vehicles in a head-on collision with one party in each vehicle." [T-40]. He did not see any indication as to who had placed the barricades, nor did he ever come to learn who had placed the cones and barricades.

In terms of what investigation he made, he spoke with both drivers, to check for injuries and to ascertain what happened. Officer Brown recorded that the northbound vehicle was traveling in her lane when claimant's vehicle came into the northbound lane of traffic and struck her head-on. Claimant reported to Officer Brown that he was traveling southbound on 9W, "when he struck traffic barrier and traffic cones blocking fallen tree hazard in the southbound lane, and went into the northbound lane of traffic lane causing collision." [T-43, Exhibit 1].

There were numerous trees down on 9W and, although other than the subject tree they were not blocking the roadway, there was still "debris all over the roadway." [T-45].

Officer Brown agreed with Officer Gaynor's assessment that the barricaded tree could be seen from 200 yards away in daylight, and would be visible as far as headlights would allow in the dark. It was his understanding that when the barricade was placed and the tree was left the wires in which it was entangled were dead, but he did not know who conveyed that information, other than to speculate that it was "probably the prior shift." [T-47]. He also confirmed that when a tree is in the electrical wires, it is Orange and Rockland Utilities that is responsible for clearing the tree.

With regard to the barricade itself, it was Officer Brown's recollection that it was reflective, and that it had flashing amber lights.

On October 31, 2011, he did not recall seeing any NYSDOT trucks on 9W.

Tracy Becker, who at the time of trial had resided at 709 Route 9W for nine years, testified that after the October 29, 2011 storm "there were a lot of trees that had fallen in the area close to [her] home" and the road had been closed "a little bit at some point." [T-81]. She said that she made two telephone calls prior to the accident to the Piermont Police concerning the fallen tree that remained partially in the roadway on Monday, October 31, 2011. She called to report that there were branches in the road, and that "[e]ven after the barricade was put up, it was clear there was going to be an accident." [T-82].

Ms. Becker said that the barricade was "an A-frame barricade" with "some kind of neon paint . . . [that was] reflective," painted across the long portion across the top. [T-82]. It appeared to be a "standard" width, but she was not sure if it was "maybe five feet, six feet" and thought it was the height of a table. [T-82-83]. The "bunch of branches and maybe a part of the tree" was "partially in the road," but did not block the whole lane. [T-83]. The barricade was in front of it. She thought the barricade was "right up against [the tree] . . . a foot maybe at the most." [T-84]. There were no lights on the barricade.

At approximately 5:30 a.m. on October 31, 2011 Ms. Becker heard a crash from her bedroom window - which is at the same level as the road - and "knew exactly what happened." [T-84]. She went out to see if she could help. It was "pitch black" out. [T-92].

Shown two photographs, Ms. Becker identified them as fairly and accurately depicting the general layout of Route 9W facing southbound [Exhibit 5], and facing northbound [Exhibit 6]. The driveway to her home is shown on the lower left-hand side of the southbound facing photograph. [Exhibit 5]. There is only a small shoulder area on the southbound side, which then

rises into a hill. [Exhibit 5]. On the northbound side, there is what appears to be a scenic viewing area, followed by Ms. Becker's driveway. [Exhibit 6].

When Ms. Becker got to the "top of 9W' she saw the two cars. [T-92]. She "saw a man in the car, who was in bad shape, and . . . started to talk to him, and there was a girl who was in the other car . . . down a little further south, and she was fine, she didn't want to get out of her car," so Ms. Becker stayed with Mr. Seabrook until the ambulance came. [T-92].

Although she did not see power lines entwined in the tree, Ms. Becker agreed that it was possible that the tree was on the power lines as noted in Officer Gaynor's report. [Exhibit 4]. She did not recall seeing any traffic cones in front of the A-frame barricade prior to the accident, but agreed that they could have been placed after she first observed the barricade, as her trips outside her house had been limited, nor could she recall them with specificity.

Jeffrey Strike, a highway maintenance supervisor 2 for the New York State Department of Transportation, and a 23 year employee of the agency, testified that the NYSDOT is responsible for the maintenance of that part of 9W where the accident occurred, and that he and his crew operated out of the "Townline yard" "off of Townline Road" as part of a sub-residency from the main residency located at New City, New York. [T-112-113]. He confirmed that the NYSDOT is responsible for clearing fallen trees there, with the exception of trees that are on power lines. Mr. Strike also confirmed that he did not have any personal involvement with the tree involved in claimant's accident, and had not been at the scene.

Shown the report by Officer Gaynor of the Piermont Police Department indicating that "DOT cleared road and road opened" [Exhibit 4], Mr. Strike agreed that it appeared that NYSDOT cleared the road based on that report, but said he did not recall specifically who would

have cleared it, and ultimately explained that he did not know whether the NYSDOT was there to clear the roadway or the tree, if they were there. The facility he was working in lost power at the time - including power to the computers - thus reports that would normally have been generated were not recorded.

With regard to trees that are entangled in power lines, Mr. Strike said that the NYSDOT did "absolutely nothing" with regard to such trees generally. [T-117]. He said that the local police would notify the utility, and that it was the utility's responsibility to clear the tree.

In terms of the tree at claimant's accident location, Mr. Strike said he did not believe that the DOT was "there at all to place barricades." [T-118]. He confirmed that the local police are the entity responsible for closing and opening roadways.

On cross-examination, Mr. Strike said that his independent recollection of the storm that weekend was that "it was pretty much just crazy." [T-120]. On Sunday, October 30, 2011 all of his staff from Townline Road were addressing issues on the main corridor within their jurisdiction, namely, the Palisades Parkway. The NYSDOT employees under his supervision - who did not typically work on weekends - had been called in shortly after noon on Saturday, October 29, 2011 trying to get the Palisades Parkway open. Mr. Strike and many of his crew worked through from Saturday, October 29, 2011 until nightfall on Sunday, October 30, 2011 trying to clear the Palisades.

Work for extended hours for all the crew continued for five days from Saturday, October 29, 2011, focused on the main corridor of the Palisades Parkway. Mr. Strike's daily log shows that crews continued to work overtime through November 4, 2011. [Exhibit B]. Until Monday morning, the NYSDOT had been alone in clearing the Palisades Parkway. On Monday, October

31, 2011 the New York State Thruway Authority came to help: an unprecedented element of assistance that had never been used on the Palisades Parkway prior to this storm of October 29, 2011. He was not aware as to whether the Thruway Authority assisted in cleaning up secondary roads as well.

Joseph Vitulli, a highway maintenance supervisor 1 and 20 year employee of the NYSDOT at the time of trial, testified that his area of responsibility was four roads, including Route 9W. He reports to Jeffrey Strike. He recalled being called in to work on Saturday, October 29, 2011 at "roughly one o'clock in the afternoon." [T-138]. Like Mr. Strike, he worked straight through until Sunday evening on the priority main corridor, the Palisades Parkway, when he "ran" "out of hours," as employees are only allowed to drive "16 hours a day during a storm." [T-138-139].

On Sunday, October 30, 2011, while working in his bucket loader after dark, the truck was "hit by a tree going up the Palisades Parkway. The tree came down in the dark and took out [his] windshield," putting the truck out of commission. [T-140]. When Mr. Vitulli left work Sunday night the Palisades Parkway was still not clear, and employees were expected to pick up the work again on the morning of Monday, October 31, 2011.

Mr. Vitulli said that throughout this storm weekend, no one under his authority was sent to 701 Route 9W to check out the subject tree. He said: "We were on the Palisades Parkway. We were in snow and ice operations, plowing" [T-141] and were still "clearing shoulders" on Sunday, October 30, 2011. Mr. Vitulli also confirmed that the power company is responsible for moving trees that are entangled in power lines, and that local police are responsible for closing

roads. On Sunday, October 30, 2011 it was his understanding that Route 9W was closed, and he never learned on Sunday or Monday that the road was reopened.

Shown the same report by Officer Gaynor shown to Mr. Strike wherein Officer Gaynor wrote that the "DOT cleared road" [Exhibit 4], Mr. Vitulli said that to his knowledge the NYSDOT had not cleared the road (given that all personnel from the Townline yard were at the Palisades Parkway) and further confirmed that even if the NYSDOT had sufficient manpower they would not have removed the tree because it was entangled in power lines and thus were not allowed to remove such trees.

On cross-examination, Mr. Vitulli acknowledged that he could not say for certain that a NYSDOT worker from the other yard at New City did not attend to clearing the road, in part because of the power failure that shut down the computers and communications that weekend.

On redirect, Mr. Vitulli confirmed that the New City yard had a completely different area of responsibility from the Townline yard, with no overlapping roads. He said "they have a cut off at Route 59. They're north of route 59; we're south of Route 59." [T-146]. He stated that the New City yard had, however, on occasion "sporadically" cleared a road that was within the Towline yard responsibility. [T-147]. They would, however, have let him know that they had done so. He was never told that 9W had been cleared. To his knowledge, no one from NYSDOT had placed any barricades around the tree at 701 Route 9W.

On re-cross-examination, Mr. Vitulli said this might have been a situation where the New City yard would have stepped in, however they would have told his boss, Jeff Strike, who would have told Mr. Vitulli.

Weather records confirm that a storm began on Saturday, October 29, 2011, yielding continued precipitation through Sunday, October 30, 2011 at 2:00 a.m. [Exhibit A]. While claimant's accident occurred at approximately 6:30 a.m. on Monday, October 31, 2011, and precipitation had seemingly ceased for approximately 30.5 hours at that point, weather records and testimony show that there continued to be wind, and gusts of wind throughout the weekend, causing further unpredictable damage.

Discussion and Conclusion

While the State of New York has a nondelegable duty to maintain its highways in reasonably safe condition for the use of the traveling public, it is not an insurer. Friedman v State of New York, 67 NY2d 271, 283 (1986); Vega v State of New York, 37 AD3d 825 (2d Dept 2007) *lv denied* 9 NY3d 812 (2007). What is required are reasonable precautions, which safeguards would arguably adjust as known conditions warrant such adjustment. Freund v State of New York, 137 AD2d 908, 909 (3d Dept 1988)[2] *lv denied* 72 NY2d 802 (1988). With dangerous conditions, the State must be shown to have had notice of same, and to have failed to take reasonable measures to remedy such condition within a reasonable period of time. *See* Harjes v State of New York, 71 AD3d 1278 (3d Dept 2010).

The storm-in-progress doctrine provides that "[a] property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." Solazzo v New York City Tr. Auth., 6 NY3d 734, 735 (2005). "The reasonableness of the time within which a municipality must respond to

---

[2] "The pertinent inquiry is whether the State exercised reasonable diligence in maintaining Route 17 under the prevailing circumstances . . . (*citations omitted*)"

its duty to clear the sidewalks [or attend to dangerous conditions] is measured from the time that the storm comes to an end since . . . 'responsibility for [dangerous] conditions arises, at the most, only after the lapse of a reasonable time for taking protective measures and never while a storm is still in progress.' " Valentine v City of New York, 86 AD2d 381, 384 (1st Dept 1982), *affd* 57 NY2d 932 (1982), *quoting* Valentine v State of New York, 197 Misc 972, 975 (Ct Cl 1950), *affd* 277 App Div 1069 (3d Dept 1950); *see also* Sherman v New York State Thruway Auth., 27 NY3d 1019, 1022 (2016). The significant inquiry here is whether the State of New York attended to those conditions created by the storm for which it was responsible within a reasonable period of time.

Claimant's theory of liability rests on whether the State of New York should be held liable for an alleged negligent failure to adequately maintain State Route 9W for the safety of the traveling public by keeping the area free of storm debris which it knew or should have known was present, and failing to adequately warn of a dangerous condition, with such failures constituting a proximate cause of claimant's accident and injury. Defendant argues that claimant failed to establish by a preponderance of the credible evidence that the State of New York owed a duty to this claimant, breached any duty owed to claimant, or that any action on the State's part was a substantial factor in causing the accident alleged herein.

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 accident and any associated injuries by a preponderance of the credible evidence.

The credible facts show that the storm commencing on Saturday, October 29, 2011 was severe, extraordinary, unseasonal, and unprecedented, causing trees and electrical wires to come down and causing power failures throughout the area and along the Northeast corridor. Indeed, as late as the night before claimant's early morning accident, wind caused a tree to fall on Mr. Vitulli's truck as he worked.

That the subject tree was intertwined with power lines is also credibly established, as is the fact that reflective barricades or a barricade was placed in front of the tree, that traffic cones preceded the barricade, and that no entity admits to having placed such barricade or barricades.[3]

Thus it is far from clear that claimant has established as an initial matter that the State of New York owed a duty to the traveling public and this claimant to clear the subject tree from the roadway, because if the tree was entangled in wires, it was the duty of the utility to clear it, not the State of New York. Likewise, it was the duty of the local police to determine whether this secondary road was safe to travel. Without a duty, there is no negligence. *See generally*, Palsgraf v Long Is. R.R. Co., 248 NY 339 (1928). On this basis alone the claim is subject to dismissal.

Assuming, nonetheless, that the State's duty is derived from its general proprietary duty to maintain State roadways in a reasonably safe condition for the traveling public, on this record the State may not be found liable because of the storm-in-progress doctrine, and the attendant reasonable period of time after cessation of the storm for clean-up activity and, alternatively, the State did not breach its duty of reasonable care under the circumstances.

---

[3] An affidavit by a clerk from the Village of Piermont is given no probative weight here, as claimant did not subpoena the witness to testify and make herself subject to cross-examination. [*See* Exhibit 7].

Because of the unprecedented and unpredictable nature of this storm, and the legitimate priorities expressed by the State to first clear the main corridors of travel within the region, before attending to local roads, and the presence of power lines in the subject tree, if the State was the entity that placed the barrier and cones in front of the fallen tree - which did not block the entire southbound lane of travel according to witnesses in any event - such measures were reasonable under the circumstances. The Court finds that placing cones and a reflective barricade in front of the tree entwined in power lines was sufficient warning of the partial obstacle in the road, given the existing priorities and conditions.

While it is difficult to credit testimony indicating that such barriers were only within one foot or two feet of the obstacle - indeed, such a placement belies common sense, and is difficult to ascribe to an experienced agency such as the NYSDOT - even if such placement is correct, and was performed by the State, such warning was nonetheless sufficient to the careful driver.[4] In any case, a driver fully aware of the freak storm and its effects, and paying close attention to the area ahead could not have failed to see the obstacle on this record. The only credible reason that the claimant did not see the cones and the barricade and the tree with the use of headlights on a straight portion of the road is that he was distracted or for some reason not traveling at the deliberate speed he testified to. His credibility is further in question because of his indication that he saw no storm debris on the roads he had traveled from the Bronx to the scene of the accident.

---

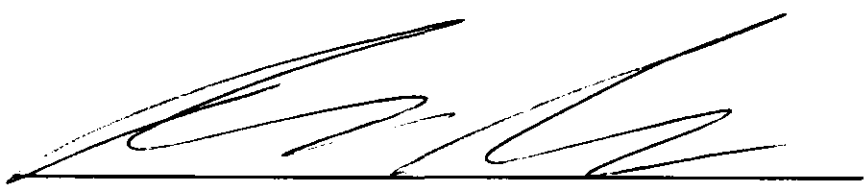
[4] Indeed, if it was not a sufficient warning it is the local municipality which failed to assess the danger in tandem with its responsibility to close local roads.

While it is distressing that Mr. Seabrook was harmed, the State is nonetheless not liable for this unfortunate accident. On this record, claimant has failed to establish that the defendant was negligent, and that any harm suffered by claimant was proximately caused by defendant's breach of a duty of care.

All trial motions not otherwise disposed of are hereby denied and Claim Number 120766 is hereby dismissed.

Let Judgment be entered accordingly.

White Plains, New York
November 23, 2016



THOMAS H. SCUCCIMARRA
Judge of the Court of Claims