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Trials & TRIBULATIONS

Court of Appeals upholds decision denying NYC qualified immunity

On Dec. 22, the Court of Appeals upheld the trial court and Second Department, Appellate Division's decisions, finding New York City liable in negligence for failing to adequately study and correct a documented speeding problem on a city street, which led to a car accident seriously injuring a 12-year-old boy. *Turturro v. City of New York*, __ NE3d __, 2016 WL 7389237 (Dec. 22, 2016).

On Dec. 5, 2004, plaintiff Anthony Turturro was hit by a car while attempting to cross Gerritsen Avenue in Brooklyn on his bicycle. A police investigation determined that the driver was going approximately 54 miles per hour in a 30 mile per hour zone. Anthony was seriously injured and his mother commenced a lawsuit against the driver of the vehicle, the owner of the vehicle and the City of New York (the "City"). The driver of the vehicle, who was admittedly speeding, pleaded guilty to assault in the second degree for recklessly causing serious physical injury to Anthony.

During the civil trial, evidence was presented that the City had received several complaints regarding speeding on Gerritsen Avenue between 2002 and 2004, and individuals had requested the installation of traffic signals to curb the speeding. Those complaints were routed to the Intersection Control Unit (ICU) of the Department of Transportation (DOT), and a total of four studies were conducted at three intersections on Gerritsen Avenue between 2002 and 2004.

The ICU concluded that many of the vehicles were speeding at the intersections studied, and after each study it notified the local police that speeding was a problem for



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enforcement purposes. The testimony established that there was never a study conducted on Gerritsen Avenue as a whole, and the studies conducted never specifically addressed "traffic calming" measures such as speed bumps, rumble strips, roundabouts or raised crosswalks, as opposed to adding a traffic signal.

At trial, the plaintiff's expert argued that because the ICU studies conducted at various intersections did not address speeding along Gerritsen Avenue as a whole, they were inadequate. The expert opined that once the studies established there was a speeding problem on Gerritsen Avenue and referred that issue to the police for traffic enforcement, the City should have followed up to determine if those enforcement efforts had resolved the problem. Further, if enforcement efforts alone were not adequate, the City should have then conducted a traffic calming study for the entire length of Gerritsen Avenue.

The City's expert argued that the four studies conducted and the referral of the studies' results to the police for enforcement purposes was an adequate response to the speeding complaints. He further testified that neither the average speed nor the accident rate for Gerritsen Avenue were abnormally high, and that the ICU generally does not follow up to determine whether police speed limit enforcement is successful.

At the conclusion of the trial, the jury

awarded the plaintiff \$36 million in damages, and apportioned liability 10% to plaintiff, 50% to the driver, and 40% to the City. The City moved to set aside the verdict based upon NY CPLR 4404(a), arguing that the City was entitled to qualified immunity because the studies performed were adequate to address the speeding problem on Gerritsen Avenue. The Supreme Court denied the City's motion, and the City and other defendants appealed the Court's decision. Ultimately, the Second Department confirmed, but reduced damages to \$20 million. The Second Department found that the City's duty to keep the roads and highways in a safe condition was proprietary, rather than governmental in nature. Therefore, plaintiff was not required to prove the existence of a "special duty" to the plaintiff. The Court further found that the City was not entitled to immunity, because it had failed to conduct "an adequate study to determine what reasonable measures may be necessary to alleviate the condition." *Turturro v. City of New York*, 127 AD3d 732, 736 (2d Dep't 2015).

The Court of Appeals granted the City leave to appeal, and in a six to one decision, affirmed the Second Department's decision. The Court of Appeals agreed with the Second Department in its finding that the City's "acts or omissions" in failing to conduct an adequate traffic study and to ultimately solve the speeding problem on Gerritsen Avenue were proprietary, rather than governmental in nature. The Court noted that while "police and fire protection are examples of

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long-recognized, quintessential governmental functions,” highway planning, design and maintenance, are proprietary functions arising from the municipality’s duty to keep its roads in a reasonably safe condition. *Turturro v. City of New York*, ___ NE3d ___, 2016 WL 7389237 (2016), at *8-9. Because the City was acting in a proprietary capacity, plaintiff had no obligation to prove the existence of a “special duty”, and the City was instead “subject to suit under the ordinary rules of negligence applicable to nongovernmental parties.” *Id.* at *8.

The Court of Appeals also agreed with the trial court and Second Department’s conclusions that the City was not entitled

to immunity for its discretionary highway planning and design decisions. The Court noted that qualified immunity may apply to a municipality where the entity “entertained and passed on the very same question of risk as would ordinarily go to the jury.” *Id.* at 12 (citations omitted). The Court concluded, however, that the evidence presented indicated that the studies performed by the ICU at four intersections to determine whether the installation of traffic control devices was appropriate, was not the same as conducting a study for speeding on the entire length of Geritsen Avenue. Because the studies conducted and the study suggested by plaintiff’s expert were *not the same*, the Court determined there was a rational process by which the jury could conclude that the

studies conducted were inadequate, and the City was not entitled to qualified immunity.

In his dissent, Judge Eugene Piggott Jr. noted that the majority decision was “antithetical” to previous case law governing qualified immunity, and warned that it opens municipalities to additional liability in the future. *Id.* at 13. Therefore, municipalities acting in a proprietary, rather than governmental capacity, may be limited in relying on qualified immunity as a defense to what they believed was a reasonable course of conduct.

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