

ORIGINAL

## Short Form Order

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN  
JusticePart 10-----X  
Marggie Batista, an infant by her mother  
and natural guardian, Raquel Antigua,

Index

Number: 19628/08

Plaintiffs,

- against -

Motion

Date: 1/31/12

Frederick R. Williams, Edwin A. Martinez,  
Luis O. Martinez, The City of New York,  
New York City Department of Transportation  
and Exxon Mobil Corporation,

Motion

Cal. Number: 5

Defendants.

Motion Seq. No.: 10

-----X  
The following papers numbered 1 to 10 read on this motion by  
plaintiff, for reargument and renewal or, in the alternative, for  
resettlement, and for leave to serve supplemental opposition  
papers.Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition(Martinez).....	5-6
Affirmation in Opposition(Exxon).....	7-8
Reply.....	9-10

Upon the foregoing papers it is ordered that the motion is  
decided as follows:

That branch of the motion by plaintiff to reargue her  
opposition to the motions by Martinez, Williams and Mobil for leave  
to amend their answers to assert the affirmative defense of  
collateral estoppel, which motions were granted pursuant to the  
order of this Court issued on October 17, 2011, is granted.

Upon reargument, the Court recalls and vacates its order of  
October 17, 2011 and substitutes the following order in its place  
and stead.

As a preliminary matter, Williams' notice of "cross-motion" is  
deemed a notice of motion, since plaintiff is not a moving party  
(see CPLR 2215). Motions by Martinez and Williams (Calendar No 2)  
and motion by Mobil (Calendar No 3) are consolidated for  
disposition.

FILED  
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Motion by Martinez to amend their answer to assert the affirmative defense of collateral estoppel is granted. Motion by Williams to amend his answer to assert the affirmative defense of collateral estoppel is also granted. Motion by Mobil to amend its answer to assert the affirmative defense of collateral estoppel is likewise granted.

Infant plaintiff sustained injuries as a result of a motor vehicle collision on the Grand Central Parkway in Queens County on September 11, 2005 between the motorcycle operated by Williams and on which plaintiff was a passenger and the vehicle operated by Martinez. The accident occurred at the eastbound acceleration lane exiting the Exxon Mobil gasoline station situated on the middle island on the Grand Central Parkway between the 188<sup>th</sup> Street and Francis Lewis Boulevard exits. Williams was stopped at the end of the acceleration lane when his motorcycle was struck by Martinez' vehicle which was traveling eastbound on the Parkway and which braked and swerved to the left onto the acceleration lane in an evasive maneuver to avoid colliding with an unidentified car which had been on the acceleration lane in front of Williams' motorcycle and which had accelerated onto the Parkway in front of Martinez' vehicle.

In addition to the present action against the parties herein, plaintiff also brought suit against the State in the Court of Claims (Batista v State of New York, Claim No. 113299). The Court of Claims, pursuant to the decision issued by Judge Faviola A. Soto on July 19, 2010, awarded judgment in favor of plaintiff against the State on the issue of liability, assessing 100 percent liability against the State upon the finding that the State had a nondelegable duty to maintain the highway in a reasonably safe condition, that contrary to the State's contention that the subject acceleration lane was not in a dangerous condition and that the shortening of the acceleration lane was not the proximate cause of the accident, but that "the accident was the result of the unknown driver's failure to yield, the motorcycle driver's stopping where he did, or Mr. Martinez's intoxication", the acceleration lane was in a dangerous condition because it was too short, that the State had notice of the condition and sufficient time to remedy it but failed to do so, that it consequently breached its duty and that its breach was a proximate cause of the accident. The Court of Claims also found that Martinez was not negligent, and that the alleged negligence of the unknown driver who failed to yield, Williams' alleged negligence in stopping where he did, and Martinez' admitted consumption of alcohol prior to the accident were not proximate causes of the accident.

The Court of Claims action was subsequently settled with the State during the damages portion of the trial for the sum of \$4,300,000.

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In the instant case, a stay from making any applications to the Court pending completion of discovery, imposed pursuant to the order of Justice Martin E. Ritholtz on February 5, 2010, was vacated on June 23, 2011 pursuant to the order of Justice Ritholtz issued on said date. Martinez, Williams and Mobil thereafter served their instant motions for leave to amend their answers to include the affirmative defense of collateral estoppel on July 8, July 15 and July 18, 2011, respectively.

The Court, upon reconsideration, is of the opinion that, in its order of October 17, 2011, it misapprehended the decision of Judge Soto, to the extent that it erroneously interpreted said decision as determining that the negligence of the City as found by the Court of Claims was not a proximate cause of the accident and that Mobil was not at fault because the Court of Claims assessed 100 percent fault against the State.

Th Court of Claims, as plaintiff's counsel correctly points out, did not pass upon the issue of proximate cause as to the City's negligence. It only passed upon the City's negligence, finding that the City created the dangerous condition of the acceleration lane by shortening it from its original proper length to accommodate a police turn-around. Therefore, the assessment of 100 percent fault against the State did not reflect an apportionment of fault as between the State and the City. Thus, this Court's extrapolation from the Court of Claims' finding of 100 percent fault against the State that the City's negligence was not a proximate cause of the accident was erroneous.

The only determination concerning negligence and/or proximate causation, other than with respect to the State, was with respect to Martinez (the driver of the vehicle that struck the motorcycle upon which plaintiff was riding), Williams (the operator of the motorcycle) and the unknown driver. Judge Soto explicitly found, contrary to the State's contention, that Martinez was faced with an unanticipated emergency situation and acted reasonably under the circumstances and, thus, was not negligent. Judge Soto also found that although Martinez had consumed alcohol, there was no evidence that he was intoxicated or operated his vehicle unsafely or that his consumption of alcohol was a proximate cause of the accident. He also found that neither the actions of Williams nor of the unknown driver were proximate causes of the accident.

This Court is now also of the opinion, after a more careful analysis of the decision of the Court of Claims, that its determination, "Nor has the State demonstrated here that the other factors it lists proximately caused the accident", does not refer to, and did not constitute, a determination that Mobil's alleged negligence was not a proximate cause of the accident and that the assessment of 100 percent fault against the State constituted a

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determination that no fault should be apportioned against Mobil. Rather, the "other factors" referred to the State's contention, as heretofore mentioned, that "the accident was the result of the unknown driver's failure to yield, the motorcycle driver's stopping where he did, or Mr. Martinez's intoxication", factors which do not involve a dangerous condition of the roadway itself.

Furthermore, the finding of 100 percent fault against the State was based upon the determination that the roadway was, in fact, in a dangerous condition and that the State had a non-delegable duty to maintain its roadway in a reasonably safe condition. The Court of Claims stated that the State's non-delegable duty does not make it an insurer of the safety of its roadways, but that liability on its part may only be based upon a finding that it either created the dangerous condition or had actual or constructive notice of the condition, and that it failed to remedy the condition or warn of it. The Court of Claims ruled out liability against the State based upon its creation of the dangerous condition, finding that the State's design of the roadway was proper and safe and that it was the City that created the dangerous condition. Therefore, implicit in its holding that the State breached its non-delegable duty was that it had actual or constructive notice of the condition created by the City.

Therefore, the assessment of 100 percent fault against the State was not a determination that no percentage of fault should be assessed against the City, but only that the accident was caused solely by a dangerous condition of the roadway over which the State had a nondelegable duty which it breached, and not by driver negligence, and therefore, that no percentage of fault should be assessed against Williams, Martinez or the unknown driver.

With respect to Mobil, however, although the Court of Claims did not specifically address the issue of Mobil's liability, since it did find that the dangerous condition that caused the accident was a condition of the roadway, that it was the State's duty to maintain the subject roadway and that it was the City that created the dangerous condition, and thus decided the issues of ownership, maintenance and control of the subject area as well as creation of the dangerous condition, findings which were obviously germane to the issue of the State's negligence, and which are binding against plaintiff and which Mobil is entitled to rely upon in its defense in the present matter, Mobil may reasonably interpose the affirmative defense of collateral estoppel to bar plaintiff from re-litigating those issues anew in this case.

Finally, in accordance with the above analysis, since the Court of Claims specifically found that Martinez was not negligent and that, in any event, his alleged negligence of intoxication claimed by the State was not a proximate cause of the accident, there is no question that he is entitled to assert the affirmative

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defense of collateral estoppel in the present action. That Martinez was not a party to the Court of Claims action, nor could he have been, is of no moment. The issue of Martinez' fault for the happening of the accident was determined by the Court of Claims after plaintiff had a full and fair opportunity to contest that issue. As heretofore noted, the State raised as a defense to plaintiff's Court of Claims action that the accident was the result of Martinez' fault in driving while intoxicated and not the result of a dangerous condition of the roadway. Therefore, the issue of Martinez' negligence was germane to plaintiff's Court of Claims action and was actually litigated in that forum. For the same reasons, the issue of whether the location and manner in which Williams stopped his motorcycle was a proximate cause of the accident rather than a dangerous condition of the roadway was also germane to the Court of Claims action and was litigated and determined. Therefore, Williams is also entitled to interpose the affirmative defense of collateral estoppel to prevent plaintiff from raising anew the issue of Williams' fault in causing the accident.

Contrary to the contention of plaintiff's counsel, the mere fact that Martinez, Williams and Mobil were not parties to the Court of Claims action (nor could they have been)<sup>1</sup> does not bar invocation of the affirmative defense of collateral estoppel by them against plaintiff in the present action. The concept of mutuality of estoppel, wherein "the prior determination...could not...be used against a party to the prior suit unless his current opponent had also been a party who would have been mutually bound by the determination had it been unfavorable to him" (Gilberg v Barbieri, 53 NY 2d 285, 291 [1981]) is no longer the rule, but rather, "New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (*id.*) (internal quotations and citation omitted). Thus, "[t]he defense may be asserted by a stranger to the prior action provided that the party against whom it is being used had a full opportunity to litigate the particular issue" (Meyer v Droms, 68 AD 2d 942 [3<sup>rd</sup> Dept 1979]).

Plaintiff in our case was also the plaintiff in the Court of Claims case and had a full opportunity to litigate the issues of

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<sup>1</sup>The Court notes that plaintiff's claim and amended claim in the Court of Claims matter originally included Mobil as a defendant and that her cause of action against Mobil was based upon the allegations that Mobil owned and was responsible to maintain the roadway.

whether driver negligence caused or contributed to the accident. Although not parties to the Court of Claims matter, Williams and Martinez appeared with their counsel at the trial and testified. The Court found that although Martinez was arrested for driving while intoxicated, his intoxication was not a proximate cause of the accident. Likewise, the Court found unmeritorious the State's contention that Williams' stopping of his motorcycle where he did was a proximate cause of the accident. Thus, the issues of negligence and proximate cause for the happening of the accident with respect to Martinez and Williams, as well as the unknown driver, was raised and decided in the Court of Claims, and that Court determined that no liability should be apportioned against those individuals. The Court of Claims accordingly apportioned 100 percent liability against the State.

No apportionment of fault was assessed against the City, even though it was determined that the City created the condition, since the State had a non-delegable duty to maintain its roadway in a safe condition. That the City created the condition was relevant only to the extent of eliminating that ground of liability against the State, but was irrelevant to the extent that the State's liability for the condition of the roadway which it owned and had the non-delegable duty to maintain was established upon a finding, presumably, of actual or constructive notice of the condition and a failure to remedy it. Likewise, there was no need to delve into Mobil's liability or lack thereof, since it was determined that the State owned the acceleration lane and had the non-delegable duty to maintain it.

In other words, the accident could only have been caused either by driver negligence, a dangerous condition of the roadway or a combination of both. If the accident were caused only by driver error, there would be no cause of action against the State, since the alleged liability of the State was premised, and could only be premised, upon a threshold finding that the accident was caused by a defective or dangerous condition of the roadway. If the accident were proximately caused by both an unsafe condition of the roadway and driver negligence, then the potential liability of the State would have to be reduced by the percentage of fault attributable to the drivers, regardless of whether they were parties to the Court of Claims action. But once the threshold determination was made that the accident was caused only by an unsafe condition of the roadway, then since the State has a non-delegable duty to maintain its roads in a reasonably safe condition, upon the additional finding that the subject roadway belonged to the State and that the State had notice of the unsafe condition and failed to take reasonable steps to remedy it, the State was found 100 percent liable. The actions of the City or Mobil, if any, with respect to the condition of the subject roadway were irrelevant and would not diminish the State's 100 percent liability.

Thus, although no mention is made in the Court of Claims decision of any allegations of negligence on the part of Mobil, that Court found that the Parkway, which included the acceleration lane in question, was constructed and owned by the State, that the State had a non-delegable duty to maintain such roadway and that the City created the dangerous condition of the subject acceleration lane. Therefore, Mobil's proposed affirmative defense of collateral estoppel is not patently unmeritorious since plaintiff's cause of action against Mobil is based upon the allegations that it owned and was responsible to maintain the roadway or that it created the dangerous condition. That Mobil was not a party to the Court of Claims matter is of no moment, since collateral estoppel is not being sought by plaintiff against Mobil, a party that was missing from the first case and had no opportunity to litigate it, but by Mobil against plaintiff who was also the plaintiff in the first action in the Court of Claims and had a full and fair opportunity to litigate the same issues of ownership and maintenance of the subject acceleration lane of the Parkway and creation of the dangerous condition thereof.

Moreover, with respect to the State's contentions that the accident resulted from factors which included the failure of the unidentified driver to yield and of Williams' negligence in stopping his motorcycle where he did, the Court of Claims found, "Nor has the State demonstrated here that the other factors it lists proximately caused the accident."

Leave to amend the pleadings "should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party" (see CPLR 3025[b]; Surgical Design Corp. v. Correa, 31 AD 3d 744 [2<sup>nd</sup> Dept 2006]). Plaintiff chose to sue the State in the Court of Claims first and obtained a judgment in her favor from that Court which assessed 100 percent fault against the State based upon a determination that the accident was not caused by the negligence of and/or was not proximately the result of the actions of Martinez or Williams, or of the unknown driver, but was caused solely by a dangerous condition of the roadway (i.e. the short acceleration lane) over which the State had a non-delegable responsibility, and that the State breached its non-delegable duty. Moreover, the decision of the Court of Claims was premised upon a finding that the accident occurred upon a public roadway owned by the State and maintained by the City, that the City created the condition that caused the accident and that the State had the duty to maintain the roadway. In this regard, plaintiff's cause of action against Mobil is premised upon allegations that it owned, possessed, controlled and/or maintained the acceleration lane or created the condition. Therefore, this Court cannot conclude, on this record, that an affirmative defense of collateral estoppel raised by Williams, Martinez and Mobil is so insufficient or devoid of merit as to

mandate denial of leave to amend the complaint to assert said affirmative defense or that the amendment would result in prejudice or surprise to plaintiff.

Plaintiff's counsel contends that plaintiff would be prejudiced by the amendments because if he knew that movants would seek to assert the affirmative defense of collateral estoppel, he "would have tried the [Court of Claims] case differently", in that he would have argued that the State should be found less than 100 percent liable so that plaintiff could preserve a percentage of fault to allocate among movants in this matter. Counsel's argument is without merit. The affirmative defense of collateral estoppel could not have been included by Martinez, Williams and Mobil in their answers in the present case since at the time they interposed their answers the Court of Claims action had not been decided. Moreover, plaintiff's counsel should have known that a determination by the Court of Claims of an issue adverse to plaintiff's claims against parties in the present action would most likely result in motions by those parties to amend their answers to include the affirmative defense of collateral estoppel. Plaintiff should have been aware of the estoppel consequences of choosing to sue the State first (the Court of Claims action was filed on February 7, 2007).

Also without merit is counsel's contention that plaintiff did not have a full and fair opportunity to litigate the issues decided by the Court of Claims concerning Martinez', Williams' or Mobil's negligence because those issues were not germane to the issue of the State's negligence in the Court of Claims matter. The issues determined by the Court of Claims concerning which movants seek collateral estoppel in the present action were clearly germane to plaintiff's case against the State, for the reasons heretofore stated, and plaintiff had a full and fair opportunity to address those issues. Indeed, as heretofore mentioned, plaintiff's counsel contended in opposition to the motions to amend that but for his lack of awareness that movants would seek to interpose a collateral estoppel defense, he would have argued for less than 100 percent liability against the State so as to preserve his claims against movants in the present action. He could have chosen to side partially with the State and contend that Martinez and Williams were partially at fault through their bad driving and thus diminish the State's percentage of fault. That he chose not to do so was a tactical choice, not a lack of opportunity to address the issue. And the fact that Mobil was not a party to the Court of Claims action is irrelevant, since the issues which it seeks to estop plaintiff from relitigating in the present action against it, namely, the ownership and responsibility to maintain the area where the accident occurred, and the creation of the condition, were essential issues in determining whether the State was negligent and which plaintiff bore the prima facie burden of establishing at the trial of the Court of Claims matter.



Finally, plaintiff's argument that movants waived their defense of collateral estoppel because they failed to raise such affirmative defense either by pre-answer motion to dismiss or in their original answers, pursuant to CPLR 3211(e), is without merit. Plaintiff's counsel concedes that CPLR 3025 allows amendment of the answer and that amendment shall be freely given absent prejudice or surprise. As heretofore stated, plaintiff would suffer no prejudice or surprise by amendment of movants' answers to assert the affirmative defense of collateral estoppel.

Accordingly, the motions are granted. The proposed answers annexed to the moving papers are deemed served and filed.

That branch of the motion for renewal is denied. An application to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1<sup>st</sup> Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1<sup>st</sup> Dept 1979]). Plaintiff's counsel fails to articulate any new material facts to merit renewal.

Finally, that branch of the motion for an order granting plaintiff leave to supplement her opposition to Mobil's motion for summary judgment upon the ground that plaintiff was "rushed" in submitting opposition and now wants the opportunity to add to it is denied.

Dated: February 14, 2012



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KEVIN J. KERRIGAN, J.S.C.

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