

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1350

CA 16-01924

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

JOSHUA A. JIMERSON, AS ADMINISTRATOR OF THE
ESTATE OF PATRICIA A. JOHN, DECEASED,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 121778.)

KENNETH VAN AERNAM, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 121782.)

LAW OFFICE OF JOEL L. DANIELS, BUFFALO (JOEL L. DANIELS OF COUNSEL),
AND MEYERS BUTH LAW GROUP PLLC, ORCHARD PARK, FOR
CLAIMANTS-APPELLANTS.

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COUNSEL), FOR DEFENDANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (CAROL E. HECKMAN OF
COUNSEL), FOR SENECA NATION OF INDIANS AND SAINT REGIS MOHAWK TRIBE,
AMICI CURIAE.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 2, 2016. The order, insofar as appealed from, denied that part of the motion of claimants for partial summary judgment on the issue of defendant's duty under Highway Law § 53.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and that part of the motion seeking partial summary judgment on the issue of defendant's duty under Highway Law § 53 is granted.

Memorandum: Claimants commenced their respective actions seeking to recover damages for the wrongful death of Patricia A. John and the injuries sustained by claimant Kenneth Van Aernam when they fell through a hole on the Red House Bridge (RHB). The RHB is a four-span Warren truss bridge, which was built by defendant State of New York (State) in 1930 as part of the former State Highway 1854. There is no dispute that the RHB is located within the sovereign nation of the Seneca Nation of Indians (Seneca Nation), but confusion over who is

responsible for the maintenance of the RHB dates back to as early as 1966.

On July 25, 1976, a Memorandum of Understanding (MOU) was signed by the New York State Department of Transportation (DOT) and the Seneca Nation. Therein, the DOT agreed to "maintain roads located within the boundaries of the Nation's reservations, and for which the [DOT] and the State . . . are obligated to provide maintenance." In July 1980, the DOT issued Official Order No. 1261, which provides in pertinent part that "[t]he State shall discontinue maintenance and jurisdiction over[, inter alia, State Highway 1854], or sections thereof, including any and all bridges and culverts located thereon as have been maintained by the State as part of the State highway system and effective April 1, 1980, these highways shall be maintained as Reservation roads pursuant to Section 53 of the Highway Law." On December 14, 2007, the DOT and the Seneca Nation signed a Project Specific Agreement (PSA) regarding the RHB. The PSA provides that the DOT, "pursuant to the [MOU], is willing to undertake a contract to remove, realign, and replace such Bridge and rehabilitate such roadway at no expense to the Nation." As authority for the DOT's commitment to replace the RHB, the PSA cites Highway Law § 53. The PSA also provides that, "[d]ue to the advanced structural deterioration of the [RHB], it is anticipated that the existing [RHB] will be considered unsafe for usage by vehicular traffic, and possibly may also be considered unsafe for usage by pedestrian traffic, and may accordingly be closed and barricaded." The parties anticipated that the project would be completed in "approximately 34.5 months." Although the PSA was signed in December 2007, the project had been significantly delayed and was not completed when Van Aernam and John fell through a hole on the RHB in 2012.

After commencing these actions, claimants jointly moved for partial summary judgment pursuant to CPLR 3212 on the issue of liability. The Court of Claims denied the motion, and explained, inter alia, that it "cannot find as a matter of law that the State possessed a duty to maintain the [RHB]."

We agree with claimants that the court erred in denying that part of their motion seeking a determination that the State had a statutory duty to maintain the RHB. Highway Law § 53 obligates the State to maintain highways and bridges that it constructed on Indian reservation land, inasmuch as the statute expressly provides that "[t]he [DOT] shall have supervision and control, in the construction, maintenance and improvement of all highways and bridges constructed or to be constructed by the [S]tate on any Indian reservations." Thus, we conclude that Highway Law § 53 creates an unambiguous duty, with no temporal limitation, for the State to maintain the RHB. We note that the State's prior conduct, including signing the MOU in 1976, issuing the DOT Official Order No. 1261 in 1980, and signing the PSA in 2007, is consistent with our determination that Highway Law § 53 requires that the State maintain the RHB.

Although claimants raised additional issues in their appellate brief, their counsel withdrew those challenges at oral argument of

this appeal, and thus we limit our review to the contention discussed above. We therefore reverse the order insofar as appealed from and grant that part of the motion seeking partial summary judgment on the issue of the State's duty under Highway Law § 53.

Mark W. Bennett

Entered: February 9, 2018

Clerk of the Court