

FACTS:

Plaintiff, then 40 years of age, was traveling northbound on State Rte 1 at 12:50 a.m. on September 23, 2003 when he collided with one of six wild boar lying dead or dying in the roadway. As a result of the accident, though wearing a helmet, he suffered irreparable brain damage and was in a coma for almost five months. Since his release from the hospital, he has been confined to a wheelchair and requires round the clock care.

At the time of the accident, the plaintiff was in excellent health, was the owner of a local martial arts studio where he was an inspirational teacher to young children helping them develop a feeling of self-confidence. His creed to them was that there should be no “can’t” in their vocabularies. He was married to Kristen Finn and the father of two children at the time of the accident.

PLAINTIFFS’ CONTENTIONS AND CAUSES OF ACTION:

Plaintiffs sued the State for personal injuries (Adam Rogers) and loss of consortium (Kristen Finn). The claims were based on the allegation that State Rte 1 for a one-half mile distance south of the Carmel River Bridge in Monterey County was in a dangerous condition for as many as three years prior to the accident and two years after the accident.

Evidence produced at trial showed that Caltrans (California Department of Transportation) owned and controlled the roadway and was responsible for its maintenance; that Caltrans entered into an agreement with the California Department of Parks and Recreation to utilize 43 acres of State Parks land as a “mitigation bank” in order to gain credits for any negative environmental effects future projects in the area would create. This 43 acre parcel lay just to the west of State Rte 1, adjacent to the roadway. For two years, beginning in 1998, Caltrans’ sub-contractors planted over 17,000 willows and brought in irrigation at the rate of over 1200 gallons per hour, watering the plants up to 12 hours per day.

Wild boar have been in Monterey County since 1925. Evidence from a local farmer, aged 94, established that in the 70 years he farmed artichokes on both the east and west sides of State Rte 1, no wild boar ever trekked across the highway onto the west side. Unfortunately, in the Spring of 2000, when the mitigation bank began to thrive, these boars began crossing the roadway in droves to get to the new and plentiful food and water source. Some of the pigs crossed under a bridge abutment and thus did not create a hazard to the traveling public. Others, always crossing at night, traveled over the asphalt surface of the roadway. Because of their dark color and the fact their eyes do not easily reflect light, many were hit and killed or injured by passing motorists.

Caltrans and State Park employees began seeing the carcasses of dead wild boar on the highway in the mornings when they reported for work, they began discussing the dangers such crossings posed to the motoring public. However, Caltrans supervising engineers ignored warnings from employees at the mitigation bank to the effect that “someone would be killed or seriously injured unless a fence was built on the east side of State Rte 1 to impede their crossings.”

The State did make “some effort” to staunch the flow of wild boars into the area by employing a USDA “depredator” to cage and/or shoot the pigs, but only AFTER they had crossed State Rte 1 to the west side. The depredator informed Caltrans and State Parks that he could not kill enough pigs because of their reproduction rate and recommended a fence to prevent pigs from crossing the roadway. That recommendation was not adopted.

Plaintiffs produced evidence of many incidents where motorists collided with wild boars after dark and in each incident the witnesses testified the accident was unavoidable as they could not see the animals prior to impact.

Plaintiffs produced a nighttime visibility study which dramatically showed that someone traveling at or below the speed limit would not have been able to avoid this collision. A local newspaper writer covering the trial wrote that the jury “gasped” when the wild boar suddenly and unexpectedly appeared in view.

Plaintiffs produced evidence of the economic damages suffered by Adam Rogers in terms of lost past and present earnings, past medical and miscellaneous costs and future medical needs, the latter amounting to over \$5 million.

DEFENSE POSITION:

The State vehemently denied the roadway was in a dangerous condition, primarily relying on the fact that the subject accident was the only bodily injury accident which had occurred on the stretch of roadway between 2000 and 2009.

The State denied that they had actual notice of the dangerous condition as no computer data had been produced (called “Table C”) which would suggest the roadway had a higher accident rate than others similarly situated in the state.

The State claimed, as an affirmative defense, that their failure to take sufficient action to correct the condition was reasonable under the circumstances.

Finally, the State claimed that Mr. Rogers was impaired, as a blood alcohol test, not specific for ethyl alcohol, taken during life saving treatment at the local hospital showed a level equal to .09% blood alcohol.

UNUSUAL LEGAL ISSUES OR INTERESTING TRIAL TECHNIQUES OR HAPPENINGS:

The jury reported that they were convinced the plaintiffs' visibility study was correct and the State's counter study was not valid because of the testimony of the taxi driver and others who encountered wild pigs in the roadway under similar conditions and could not see the animals in enough time to avoid a collision.

The jury also reported, as its verdict suggests, that alcohol had nothing at all to do with the injuries sustained by Mr. Rogers.

Plaintiffs' counsel used the services of Varinsky & Associates of Emeryville, CA to conduct a focus group eight months prior to trial and then used Howard Varinsky and his associate, Chad Lackey, to help select the jury. Counsel for plaintiffs believes that this was quite important to the ultimate result. The focus group demonstrated to counsel the difficulties that average citizens would have in coming to terms with the concept that a public entity would possibly ever have any liability or responsibility for the actions of wild animals. It did disclose, however, the ultimate strength of the plaintiffs' case if those initial barriers were surmounted. With that knowledge and with Mr. Varinsky's great expertise, a jury was ultimately selected which was open to the possibility of affixing liability on the State if sufficient evidence of a dangerous condition and notice was presented to them.

Plaintiffs' counsel also pays tribute to the team of experts who produced the HD video "Visibility Study" which demonstrated to the jury in the clearest manner that these wild boar crossing the highway simply could not be seen at any reasonable distance to avoid a collision. Indeed, a local newspaper reported that when the jury viewed the HD video for the first time, at least four jurors "gaspd" when they saw the wild boar on the roadway in what clearly would have been a collision had the video not been a simulation. Paul Kayfetz and his staff were responsible for the production of the study and accident reconstruction expert William Blythe, along with human factors experts Thomas Ayres and Kenneth Zeidman, contributed to its production and presentation to the jury.

Plaintiffs' counsel acknowledges the tremendous work done by Deborah Doherty, M.D., our rehabilitation medicine expert, and Karen Aznavoorian, our life care planner. They were each meticulous in working up the case and both testified in the most professional and convincing manner to the jury. The cost of future medical care reflected in the jury verdict is a testament to their effectiveness. Finally, Dr. Patrick Mason, our forensic economist made clear to the jury the cost of that future care, reduced to present value, using the "total off-set" method. Here again, the jury accepted Dr. Mason's economic forecasts and rejected the opinions of the defense economist who used a 3 1/2 % net discount rate to reduce future loss to present value.

POST TRIAL DISPOSITION:

Plaintiffs are currently preparing a Judgment on Special Verdict and a Cost Bill that approximates \$85,000. Attorney's fees are not recoverable as an element of costs on such a case in California.