

8 A.D.3d 239, 778 N.Y.S.2d 52, 2004 N.Y. Slip Op. 04296  
(Cite as: 8 A.D.3d 239, 778 N.Y.S.2d 52)

**FIND Request:** 8 A.D.3d 239

Supreme Court, Appellate Division, Second Department,  
New York.

Matthew KANE, respondent,

v.

TRIBOROUGH BRIDGE & TUNNEL AUTHORITY,  
appellant, et al., defendants.

June 1, 2004.

**Background:** In action by passenger of vehicle involved in accident on bridge to recover damages for personal injuries, bridge and tunnel authority appealed from interlocutory judgment of the Supreme Court, Kings County, Ruchelsman, J., entered upon jury verdict finding it 100% at fault in happening of accident, in favor of plaintiff and against it on issue of liability.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) certain evidence which was not included in passenger's notice of claim was not admissible;
- (2) proof of prior accidents on bridge failed to show existence of similar conditions at time; and
- (3) engineering reports were hearsay.

Reversed and remitted.

West Headnotes

**[1] Automobiles 48A ↪ 293**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak293 k. Notice of Claim for Injury.

Most Cited Cases

In personal injury action by passenger injured when vehicle in which he was riding skidded and crossed over center line on bridge and was struck by oncoming vehicle, evidence suggesting that bridge

and tunnel authority was negligent in failing to install median barrier or certain warning signs on bridge was not admissible; these theories were not included in passenger's notice of claim and substantially altered nature of his claim.

**[2] Automobiles 48A ↪ 305(6)**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(B) Actions

48Ak305 Admissibility of Evidence

48Ak305(6) k. Other Accidents. Most

Cited Cases

In action by passenger injured while riding in vehicle on bridge proof of prior accidents on bridge to establish dangerous condition or to prove notice was not admissible, absent showing that conditions prevailing at time of earlier accidents were substantially same as existed at time of subject accident.

**[3] Evidence 157 ↪ 318(4)**

157 Evidence

157IX Hearsay

157k315 Statements by Persons Other Than Parties or Witnesses

157k318 Writings

157k318(4) k. Reports. Most Cited Cases

**Evidence 157 ↪ 370(4)**

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k370 Necessity in General

157k370(4) k. Conveyances, Contracts, and Other Writings in General. Most Cited Cases

Engineering reports which related to studies

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conducted by independent engineering firms in connection with project to rehabilitate bridge, on which passenger of vehicle was injured, were hearsay, since they were introduced to prove truth of their contents and passenger failed to lay adequate foundation for their admission as business records. McKinney's CPLR 4518(a).

**[4] Evidence 157** ↪ **359(6)**

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k359 Photographs and Other Pictures;  
Sound Records and Pictures

157k359(6) k. Motion Pictures. Most Cited Cases

Question of whether videotape should be viewed by jury depends on facts and circumstances of each case and lies within sound discretion of trial court; if there is any tendency to exaggerate any of true features which are sought to be proved trial court may reject videotape.

**[5] Evidence 157** ↪ **150**

157 Evidence

157IV Admissibility in General

157IV(E) Competency

157k150 k. Results of Experiments. Most Cited Cases

Trial court improperly permitted computer-generated animation to be played for jury in action by injured passenger of vehicle against bridge and tunnel authority; passenger failed to lay foundation for its admission into evidence, circumstances portrayed in computer-generated animation were sufficiently different from those which existed at time of accident to render its utility questionable in light of high potential for prejudice inherent in allowing jury to view it, and, even if first two errors had not occurred, trial court improperly failed to give limiting instruction.

**[6] Appeal and Error 30** ↪ **1078(1)**

30 Appeal and Error

30XVI Review

30XVI(K) Error Waived in Appellate Court

30k1078 Failure to Urge Objections

30k1078(1) k. In General. Most Cited Cases

By failing to raise argument as to any alleged error in jury verdict, finding that driver of vehicle in which passenger was riding when he was injured in accident on bridge was not at fault in happening of accident, bridge and tunnel authority abandoned any such argument it might have had on appeal.

**\*\*53** Wallace D. Gossett, Brooklyn, N.Y. (Lawrence Heisler of counsel), for appellant.

Schneider, Kleinick, Weitz & Damashek (Sullivan Papain Block McGrath Cannavo, P.C., New York, N.Y. [Brian J. Shoot and Ivan S. Schneider] of counsel), for respondent.

Fixler & Associates, LLP, Elmsford, N.Y. (Paul F. Lagattuta III of counsel), for defendants.

DAVID S. RITTER, J.P., ROBERT W. SCHMIDT, SANDRA L. TOWNES, and STEPHEN G. CRANE, JJ.

**\*239** In an action to recover damages for personal injuries, the defendant **\*240** Triborough Bridge & Tunnel Authority appeals, as limited by its brief, from so much of an interlocutory judgment of the Supreme Court, Kings County (Ruchelsman, J.), entered November 21, 2002, as, upon a jury verdict finding it 100% at fault in the happening of the accident, is in favor of the plaintiff and against it on the issue of liability.

ORDERED that the interlocutory judgment is reversed insofar as appealed from, on the law, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of liability as to the defendant Triborough Bridge & Tunnel Authority only, with costs to abide the event, and the action against the remaining defendants is severed.

On May 5, 1998, the plaintiff was a passenger in a vehicle operated by the defendant Michael Wagner. As Wagner's vehicle entered the metal grating that comprises the lift span of the Marine Parkway-Gil Hodges Memorial Bridge, it skidded and crossed over the center line, where it was struck by an on-

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coming vehicle. In his notice of claim, the plaintiff contended that the appellant, the defendant Triborough Bridge & Tunnel Authority (hereinafter the TBTA) negligently maintained the bridge's metal grating in a worn and slippery condition. The plaintiff commenced this action to recover damages for personal injuries against, among others, Wagner and the TBTA. Following a trial on the issue of liability, the jury returned a verdict finding the TBTA 100% at fault in the happening of the accident. On appeal from the interlocutory judgment, the TBTA contends that the plaintiff failed to establish a prima facie case of negligence\*\*54 against it and challenges several of the trial court's evidentiary rulings. We reverse insofar as appealed from and grant a new trial as to the TBTA only, because of the trial court's evidentiary errors which substantially prejudiced the TBTA.

[1] The plaintiff was permitted, over the TBTA's objection, to present evidence suggesting that the TBTA was negligent in failing to install a median barrier or certain warning signs on the bridge. However, these theories were not included in the plaintiff's notice of claim and substantially altered the nature of his claim (see Barksdale v. New York City Tr. Auth., 294 A.D.2d 210, 741 N.Y.S.2d 697; Rodriguez v. New York City Tr. Auth., 286 A.D.2d 681, 730 N.Y.S.2d 135; Mondert v. New York City Tr. Auth., 224 A.D.2d 500, 638 N.Y.S.2d 480). Although the design defect and failure to warn claims were ultimately withheld from the jury, this evidence was still before it. The trial court did not rule on the TBTA's request to strike this evidence, and did not instruct the jury to disregard it.

[2] \*241 The trial court also erred in improperly permitting the plaintiff to present proof of prior accidents on the bridge to establish a dangerous condition or to prove notice without showing that the conditions prevailing at the time of the earlier accidents were substantially the same as existed at the time of the subject accident (see Sideris v. Town of Huntington, 240 A.D.2d 652, 659 N.Y.S.2d 1017; Vega v. Jacobs, 84 A.D.2d 813, 814, 444 N.Y.S.2d 132; cf. Hyde v. County of Rensselaer, 51 N.Y.2d 927, 929, 434 N.Y.S.2d 984, 415 N.E.2d 972).

[3] In addition, the trial court erred in admitting into evidence a redacted engineering report, and in permitting the plaintiff's counsel to read from two other engineering reports not in evidence, which re-

lated to studies conducted by independent engineering firms in connection with a project to rehabilitate the bridge. Those reports were hearsay, since they were introduced to prove the truth of their contents (see People v. Beckwith, 289 A.D.2d 956, 957, 734 N.Y.S.2d 770; Rosario v. New York City Health & Hosps. Corp., 87 A.D.2d 211, 214, 450 N.Y.S.2d 805), and the plaintiff failed to lay an adequate foundation for their admission as business records (see CPLR 4518 [a]; Standard Textile Co. v. National Equip. Rental, 80 A.D.2d 911, 437 N.Y.S.2d 398; cf. People v. Cratsley, 86 N.Y.2d 81, 88-92, 629 N.Y.S.2d 992, 653 N.E.2d 1162).

[4] The trial court permitted the plaintiff, over the TBTA's objection, to play for the jury a videotape of a computer-generated animation, which included still photographs, and purported to re-enact the accident to illustrate the expert's opinion as to the cause of the accident. The question of whether a videotape should be viewed by a jury depends on the facts and circumstances of each case and lies within the sound discretion of the trial court (see Austin v. Bascaran, 185 A.D.2d 474, 585 N.Y.S.2d 859; Mercatante v. Hyster Co., 159 A.D.2d 492, 493, 552 N.Y.S.2d 364; Mechanick v. Conradi, 139 A.D.2d 857, 858, 527 N.Y.S.2d 586; Caprara v. Chrysler Corp., 71 A.D.2d 515, 523, 423 N.Y.S.2d 694, *affd.* 52 N.Y.2d 114, 436 N.Y.S.2d 251, 417 N.E.2d 545). If there is "any tendency to exaggerate any of the true features which are sought to be proved" the trial court may reject the videotape (Boyarsky v. Zimmerman Corp., 240 App.Div. 361, 367, 270 N.Y.S. 134; see Mechanick v. Conradi, *supra*).

[5] The trial court improvidently exercised its discretion in permitting the computer-generated animation to be played for the jury. The plaintiff failed to lay a \*\*55 foundation for its admission into evidence (see 58 N.Y. Jur. 2d, Evidence and Witnesses, § 423; 2 McCormick on Evidence, Demonstrative Evidence § 214 [5th ed.]; 5 New York Prac. Series, Computer-Generated Graphics § 11:20). Moreover, the circumstances portrayed in the computer-generated animation were sufficiently different from those \*242 which existed at the time of the accident to render its utility questionable in light of the high potential for prejudice inherent in allowing the jury to view it (see Austin v. Bascaran, *supra* at 475, 585 N.Y.S.2d 859; Mercatante v. Hyster Co., *supra*; 2 McCormick on Evidence, Demonstrative Evidence §

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214 [5th ed.], *supra*; 5 New York Prac. Series, Motion Pictures and Videotapes, § 11:12; Computer-Generated Graphics § 11:20). Finally, even if the first two errors had not occurred, the trial court erred in failing to instruct the jury that the computer-generated animation was being admitted for the limited purpose of illustrating the expert's opinion as to the cause of the accident and that it was not to consider the computer-generated animation itself in determining what actually caused the accident (*see People v. Yates*, 290 A.D.2d 888, 890, 736 N.Y.S.2d 798; *U.S. v. Martinez*, 159 F.3d 1349, *cert. denied* 525 U.S. 939, 119 S.Ct. 357, 142 L.Ed.2d 295; *Datskow v. Teledyne Continental Motors Aircraft Prods., a Div. of Teledyne Indus.*, 826 F.Supp. 677, 685). Without such a limiting instruction, the trial court left open the possibility that the jury might "confuse art with reality" (2 *McCormick on Evidence* § 214 [5th ed.]; *see* 5 New York Prac., Motion Pictures and Videotapes, § 11:12, *supra*; Computer-Generated Graphics § 11:20, *supra*).

Despite these errors, the plaintiff nonetheless established a prima facie case of negligence against the TBTA (*see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145). Because a new trial is necessary, however, we do not reach the TBTA's contention that the jury's finding of negligence was against the weight of the evidence.

[6] In its main brief, the TBTA raised no argument as to any alleged error in the jury verdict finding that Wagner was not at fault in the happening of the accident. Therefore, despite its attempt to raise the issue in its reply brief, it has abandoned any such argument it might have had on this appeal (*see Khalona v. New York City Tr. Auth.*, 215 A.D.2d 630, 631, 628 N.Y.S.2d 306).

Accordingly, we grant a new trial as to the TBTA only.

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