

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-003490

07/02/2025

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
C. Lockhart
Deputy

F P B C P ENTERPRISES INC, et al.

LAWRENCE R MOON

v.

STATE OF ARIZONA, et al.

GEORGE MICHAEL TRYON

ROBERT EDWARD FEE
DOUGLAS C NORTHUP
ANDREA L MARCONI
MICHAEL N POLI
JUDGE WHITTEN

UNDER ADVISEMENT RULING

BACKGROUND

Kinsley's Ranch started in the 1920s as a bar and grocery store located along what would later become Interstate 19, between Nogales and Tucson, in Amado, Arizona. In the 1950s it was converted into a restaurant and renamed Cow Palace. In 1987 Frank Bertolino, through the two entities named as Plaintiffs in this case, purchased and began operating the Cow Palace. Over the next twenty years, he expanded it from a 2,200 square foot, 130 seat restaurant to one that was 8,500 square feet and could seat 350. It was, by all accounts, a classic Arizona landmark in Southern Arizona.

The Cow Palace is located about one-third of a mile north of the Sopori Wash, on the West Frontage Road for Interstate 19. It sits in what FEMA has designated as a one-hundred-year floodplain. Between 1987 and 2018 the Cow Palace occasionally flooded with rainwater during the monsoon season but was never flooded with water from the wash. None of those events interrupted the business.

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The Sopori Wash is a natural and alluvial wash, meaning that sediment that is deposited in the wash by running water does not stay in one place. It is moved, deposited or scoured during storm events. The wash starts in the Tumacacori Mountains, eventually flowing into the Santa Cruz River.

In 1929 the State constructed a bridge for the West Frontage Road for Interstate 19 over the Sopori Wash (“Bridge”). The Bridge is a 4-span structure with a total waterway opening width of approximately 141 feet, measured from abutment to abutment. The Bridge and wash, for one hundred feet upstream and an even further distance downstream, are within the State’s right-of-way.

1980 FEMA floodplain studies and maps in both Santa Cruz County and Pima County note the existence of a probable overflow path going from twelve hundred feet upstream of the Bridge and continuing down to the Bridge itself. The maps indicate this flow path is where water will divert in flood events greater than a 50-year storm. They suggest further that, in the event of such a flood, the overspilling water from the Sopori Wash would probably flow north along the West Frontage Road—towards the Cow Palace restaurant. The 1980 map actually notes that “on Sopori Wash, a portion of any flood exceeding the 50-year discharge will be diverted north along U.S. Highway 89 and would inundate a café, a service station, and several residences...”. The Cow Palace is the only café in the area.

Starting around 9:00 PM on September 2, 2018, and continuing into the early morning of the next day, there was a historic storm in the area of the Cow Palace.¹ The storm had two major cells. The first was located just west of Amado. The second was located about seven miles upstream from the bridge. As a result, the water in the Sopori Wash overtopped its banks and flooded parts of Amado, including the Cow Palace, just as the note on 1980 FEMA map predicted.

The flood caused tremendous damage to the Cow Palace; so much so that it has never reopened. The reason that the Cow Palace flooded is the central issue in this case. Plaintiffs claim the flood was the result of the State’s failure to remove sediment, debris and vegetation that was blocking water from flowing under the Bridge. As a result, Plaintiffs claims, the flood water that should have traveled under the Bridge was forced north and ended up in the Cow Palace.

¹ Joe Henson lives on eight acres along the Sopori wash and the West Frontage Road and has farmed and ranched in the area for more than 40 years. He knows the land well. In all that time, he had never seen the Sopori Wash overtop its banks. Josh Hamilton is from the fourth generation of his family to live in Amado. He testified that this storm brought the “most water (he’s) ever seen” in the Sopori wash and that he “got out of Dodge” at about 11:00 PM on September 2. John Hays is the Floodplain Coordinator for Santa Cruz County. He testified that the storm was, at a minimum, a 500-year event.

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DUTY

In denying the State's Motion for Summary Judgment, this Court previously found that "impeding the natural flow of a waterway so as to risk flooding neighboring properties is negligence. ... [R]easonable care requires it (the State) to maintain the bridge in a way that keeps the bridge from impeding water flow in the wash" (see August 26, 2022, order by Hon. Randall Warner).

The duty thus imposed is that of ordinary negligence – the duty to act as a reasonable governmental entity charged with the maintenance of a bridge over an alluvial wash.

STANDARD OF CARE AND BREACH

Although this Court previously held that no expert testimony was *necessary* to create an issue of fact as to what actions a governmental entity would take to reasonably maintain a bridge over an alluvial wash, such expert testimony, presented solely by Defendants, was *very persuasive*.

Because the Bridge crosses an alluvial wash, the sediment levels will, by definition, fluctuate. The question is not whether the openings under the Bridge were maintained to be in the same condition as when they were built. Given the nature of alluvial washes, that would be almost impossible. Rather, the question is whether the area around the Bridge was reasonably maintained.

Plaintiffs' claims that the area was not reasonably maintained focus on two alleged shortcomings:

- (1) allowing sediment to build up under and downstream from the Bridge, and
- (2) not removing debris and vegetation under the bridge.²

Plaintiffs attempted to establish that the State acted unreasonably by using three types of evidence:

- (1) evidence related to an investigation done after the flood by the Pima County Regional Flood Control District ("PCRFC"),
- (2) ADOT's records of Bridge maintenance, and
- (3) ADOT's own witnesses.

Each is addressed separately below.

² Although Plaintiffs often group these two complaints into one category, they were treated separately by all the experts on bridge maintenance. The Court analyzes them separately.

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Pima County Flood Control District Evidence

Because flood waters damaged property in Pima County, even though the Bridge is located in Santa Cruz County, the PCRFCDD conducted a preliminary and informal investigation into what caused the flood. That preliminary investigation did not result in any report or final findings.

Plaintiffs attempted to use the testimony of employees of the PCRFCDD concerning how they believed the Bridge should be maintained. The Court precluded them from doing so for several reasons, all of which are part of the trial record.

ADOT Records

I. Scope of Duty of Care Described in the Guidelines and Reports

When inspecting its bridges, ADOT follows both federal requirements³ and its own guidelines - the Bridge Inspection Guidelines. Although the main focus of ADOT's guidelines and inspections were to ensure the structural integrity of bridges, they also looked at whether the waterway under the bridges and the channels around them were adequately maintained. Plaintiffs argue that the guidelines should also have considered any flooding danger to neighboring property when it inspected the Bridge.⁴

Plaintiffs offered absolutely no evidence that protecting private property owners in the vicinity of the Bridge from the danger of flooding should have part of the job of this Defendant, as opposed to some regional flood control entity. Neither was there any evidence suggesting that the standard of care required giving greater weight to such danger.

II. Determining Reasonableness by Applying the Guidelines and Reports

Every other year ADOT inspected the Bridge and surrounding area. It followed the ADOT Bridge Inspection Guidelines and National Bridge Inspection Guidelines in doing so. Plaintiffs offered no alternative standards for bridge inspections.

³ The State follows the National Bridge Inspection Standards, which incorporate the U.S. Department of Transportation, Recording and Coding Guide for the Structure Inventory and Appraisal of the Nations Bridges. Plaintiffs offer no alternative set of standards.

⁴ Plaintiffs were allowed to file a Second Amended Complaint after the trial. In it, they allege only one cause of action – that the State negligently maintained the area around the Bridge, including by “not consider(ing) the potential for flooding of the surrounding area.” To the extent that they have added a theory that the State’s bridge maintenance policy should have focused more on protecting nearby property owners from the danger of flooding, their claim fails because such a claim is squarely aimed at a policy decision. A.R.S. § 12-820.01(B) provides absolute immunity against claims aimed at such fundamental governmental policy decisions.

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Each inspection was documented in a report. The Bridge Inspection Reports were Plaintiffs' Exhibit 40. The inspections included a study of the waterway overall, the adequacy of the waterway and condition of the channel and the sediment levels, vegetation and debris around the bridge. The table below summarizes the results of those inspections.

Date of Inspection	Overall Waterway ⁵	Waterway Adequacy ⁶	Channel ⁵	Notes	Recommended Maintenance or Repair
March 1996	8/10	8/10	Not reported		None
April 1998	8/10	8/10	Not reported	Channel is silting in	None
November 2000	7/10	8/10	7/10	Minor debris buildup at piers	None
April 2002	7/10	7/10	7/10	Channel silting in	None
June 2004	7/10	8/10	7/10	Channel silting in; Vegetation growth in Channel	None
January 2007	7/10	8/10	7/10	Channel silting in; Vegetation growth	None
June 2008	6/10	8/10	6/10	Channel silting in; Medium density vegetation growth; Large tree is growing downstream end of Pier #1"	Clean debris buildup at Piers # and #2 and remove large tree at downstream end of pier #1 Repair Priority 3 ⁷

⁵ It's not clear what 8/10 means. 7/10 means "good." 6/10 means "Satisfactory."

⁶ 8/10 means "equal to present desirable criteria." 7/10 means "better than present minimum criteria." 6/10 means "equal to present minimum criteria."

⁷ Priority 3 means the recommended work "can be done."

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April 2010	6/10	6/10	6/10	Spans at north have sediment buildup with 7 feet below soffit; Medium density vegetation growth on downstream end of pier #1	None
April 2012 (page two of report not included)	Not reported	Not reported	Not reported	Sediment buildup at piers #1 and #2	None
April 2014	6/10	8/10	6/10	Medium density vegetation growth	None
April 2016	Not reported	6/10	6/10	Medium density vegetation growth; Sediment buildup between piers #1 and #2	Clean debris accumulation at piers #1 and #2 upstream side Repair Priority 3
April 2018	Not reported	8/10	6/10	Moderate debris and vegetation noted	Remove debris Repair Priority 3

A. Sediment

The sediment level around the Bridge was regularly noted in the Bridge Inspection Reports, as described in the table above. The sediment level was not, however, ignored by Defendant. The reports often included schematic drawings depicting the buildup level under each span and noting any changes over the years.

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Importantly, the experts who inspected the Bridge never once recommended any repair, maintenance or modification of the silt or sediment buildup around the Bridge.

Mr. Benton testified that the level of sediment was monitored and documented. According to him, as long as the level of sediment buildup remained relatively consistent and the bridge continued to be able to handle the flow of water, there was no need to remove sediment. That was the case for the Bridge for at least twenty-two years, from 1996 to the historic flood of 2018.

There is nothing in the Bridge Inspection Reports suggesting that it was unreasonable for ADOT to have failed to remove the noted sediment buildup.

B. Vegetation and Debris

A few of the Bridge Inspection Reports attached Bridge Maintenance Reports which suggested cleaning debris and removing vegetation near the Bridge

ADOT did not clear the debris and vegetation from around the Bridge as was recommended. While seemingly damning at first blush, this issue is more nuanced. The Bridge Maintenance Reports which recommended that the debris and vegetation be cleared, all prioritized the recommendation as a “3,” meaning the recommendation had a low priority.⁸

The evidence was uncontradicted that ADOT did not have the resources to conduct all of the changes recommended in all the reports for all of the bridges in its control. It had to use its limited resources in the manner it thought best. Thus, the prioritization system for recommended changes.

ADOT’s discretionary decision not to use its limited funds to give greater priority to the recommended removal of debris and vegetation is protected by absolute immunity. A.R.S. § 12-820.01(A)(2); *Myers v. City of Tempe*, 212 Ariz. 128 (2006) (absolute immunity applies to decision involving weighing risks and gains or concerning the distribution of resources and assets).

Even without this protection, however, the Plaintiffs’ allegation of negligence for not giving higher priority to the removal of the vegetation and debris around the Bridge would not be successful.

It is Plaintiffs’ burden to prove by a preponderance of the evidence that the State was unreasonable in not removing the vegetation and debris around the Bridge. While they have shown that there were several recommendations to clean the debris and vegetation in the wash around the Bridge, the evidence was uncontested that such recommendations were not of such urgency that

⁸ A level 3 recommendation means the recommended work “can be done.” Level 2 means “not immediate, but schedule soon.” Level 1 means there is a safety concern, and the work must be done soon. The undisputed trial testimony was that it is not uncommon, given budgetary limitations, for level 3 work not to be scheduled.

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reasonable bridge maintenance practices mandated that removal be done within a certain time period.

III. ADOT Witnesses' Testimony on Reasonableness

A. Sediment

The Plaintiffs' expert, Dennis Richards, is the only witness who was critical of the State's failure to clear the accumulation of sediment under the Bridge. Mr. Richards, however, is a civil engineer specializing in fluvial hydraulics – the study of how water with silt behaves. He was asked to assess the water flow at the Bridge at the time of the flood. He is not an expert on bridge maintenance. Although he offered valuable testimony about the cause of the flood of Cow Palace, his opinions on how the Bridge should have been maintained were either precluded or not at all persuasive.

Mr. Lane and Mr. Benton,⁹ both of whom have some level of expertise on the proper maintenance of bridges, were unanimous and unwavering in their belief that it was reasonable for ADOT not to have removed the silt and sediment buildup under the Bridge, despite aggressive cross-examination on the subject. In fact, no witness testified that a reasonable governmental agency would have removed the sediment.

B. Vegetation and Debris

Mr. Benton testified that it was not unreasonable for the State to defer acting on the recommendations to remove debris and vegetation for as long as they did. Plaintiffs' counsel vehement argument to the contrary (that the recommendations obviously should have been acted on more immediately) are not supported by any evidence, only argument.

CAUSATION

Even if Plaintiffs had been successful in proving that ADOT acted unreasonably in not removing the sediment from around the Bridge or in failing to act on the recommendations to remove debris or vegetation, the Plaintiffs' claim would still fail for lack of proof of causation.

In order to prevail, Plaintiffs must show that but for the State's failure to maintain the bridge in a reasonable manner, the Cow Palace would not have flooded. Alternatively, if the Cow Palace would still have flooded, but not as badly, it is Plaintiffs' burden to show how much of the flood damages were caused by the negligence.

⁹ Mr. Benton is a civil engineer and certified bridge inspector.

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Dennis Richards, the Plaintiffs' expert, testified that had there been absolutely no sediment, debris or vegetation around the Bridge at the time of the flood, "the flooding at Cow Palace would have been minimized or eliminated."¹⁰

Defendant's expert, Dr. Brian Wahlin, opined that, even if all the sediment, debris and vegetation had been removed prior to the storm, the high mark of the flood water in the Cow Palace would only have been reduced by a few inches - to 2.4 feet on the east side and 4.2 feet on the west side of the building, as opposed to 2.6 feet and 4.4 feet respectively.

For several reasons, the Court accepts, almost entirely, Dr. Wahlin's opinion and finds it much more persuasive than that of Mr. Richards.

First, the modeling Dr. Wahlin used was far superior to the modeling used by Mr. Richards. Mr. Richards' model was able to consider far less information in making its projections and therefore produced a much less realistic representation of the flood. Even Mr. Richards' referred to the type of modeling software used by Dr. Wahlin's as the "gold standard."

Second, it is undisputed that the Sopori Wash just upstream from the Bridge could only handle about 10,000 cfs of water before overspilling its banks, regardless of the condition of the Bridge. At the peak flow of the storm, there was over 23,000 cfs of water flowing in the wash as it approached the Bridge. As such, overflow and flooding of the Cow Palace was a near certainty. In light of this, Mr. Richards opinion that "the flooding at Cow Palace would have been minimized or eliminated" if sediment, vegetation and debris had been removed around the Bridge is difficult to accept.

Finally, the flooding of the Cow Palace in a storm of this magnitude was completely consistent with what all experts who studied the Sopori Wash over the years before the flood predicted. The magnitude of this storm is described in different terms - but is universally recognized as being at least a 100-year event.

Examples of independent studies done prior to the flood which predicted exactly the disaster that occurred here include:

1. the 1980 FEMA Map, which predicted that the Sopori Wash would overflow and flood the Cow Palace in anything greater than a 50-year event;

¹⁰ There was no analysis done by either expert of what would have happened to the Cow Palace if the vegetation and debris had been removed, as recommended in the Bridge maintenance Reports, but the sediment level had remained unchanged.

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2. the 1983 Pima County Map showing any overflow would be in the direction of the Cow Palace; and
3. the FEMA flood insurance map, which also predicted overflow of the Sopori Wash in a storm event like the September 2018 storm.

For these reasons, the Court finds that Plaintiffs have failed to meet their burden of proving causation.

Conclusion

Having considered all the trial testimony and evidence, the Court finds:

1. The State owed a duty to exercise reasonable care in maintaining the Sopori Wash Bridge.
2. The applicable standard of care was that of a reasonable state transportation agency under similar circumstances.
3. The State met that standard by performing regular inspections and responding appropriately to identified conditions.
4. To the extent that Plaintiffs argue that the State's policy for inspecting its bridges should have focused more on the flooding danger to neighboring properties, the evidence does not support that conclusion.
5. To the extent that Plaintiff argues that the State's policy for inspecting its bridges should have focused more on the flooding danger to neighboring properties, the State is immune under A.R.S. § 12-820.01(A)(2).
6. No evidence supports the conclusion that reasonable maintenance of the Bridge required removal of sediment around the Bridge.
7. To the extent that Plaintiffs contend that the State was required to give greater priority to recommendations in the Bridge Inspection Reports to remove debris and vegetation to reasonably maintain the Bridge, the evidence does not support that conclusion.
8. To the extent that the State did not give greater priority to recommendations from those inspections, it is immune under A.R.S. § 12-820.01(A)(2).

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9. The expert testimony presented on bridge maintenance did not support Plaintiffs' claim of breach.
10. Plaintiffs failed to prove, by a preponderance of the evidence, any actions or omissions by the State caused the flooding of the Cow Palace.

For the above reasons, the Court finds in favor of the Defendants.

Defendants are ordered to submit a proposed form of judgment within 30 days of this order being issued.