COURT OF APPEALS

STATE OF NEW YORK

BROWN,

Appellant,

-against-

No. 66

STATE OF NEW YORK,

Respondent.

BROWN, AS ADMINISTRATRIX,

Appellant,

-against-

No. 67

STATE OF NEW YORK,

Respondent.

---

20 Eagle Street
Albany, New York
May 1, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

JONATHAN D. HITSOUS, ASG
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Appellant
The Capitol
Albany, NY 12224

MICHAEL STEINBERG, ESQ.
LAW OFFICE OF MICHAEL STEINBERG
Attorney for Respondent
109 Rutgers Street
Rochester, NY 14607

Sara Winkeljohn
Official Court Transcriber

CHIEF JUDGE DIFIORE: Number 66 and 67, Brown v. the State of New York, Brown, as administratrix, v. the State of New York.

MR. HITSOUS: Good afternoon, Your Honors; Jonathan Hitsous for the State. May I have three minutes for rebuttal?

CHIEF JUDGE DIFIORE: Did you say three?

MR. HITSOUS: Three.

CHIEF JUDGE DIFIORE: You may, sir.

MR. HITSOUS: Thank you, Your Honor.

CHIEF JUDGE DIFIORE: You're welcome.

MR. HITSOUS: The Fourth Department erred here when it held that proximate cause may be measured only against the dangerous condition. Highway cases such as these indisputably proceed according to ordinary negligence principles, and under those principles, proximate cause is not measured against only a dangerous condition but the breach of duty. And in negligence, the breach of duty is the failure to act as a reasonable person under similar circumstances. That's at the heart of all negligence cases. In the highway context, it's - - - the reasonable person is a reasonable custodian of the roads. To measure whether or not the State's failure to - - - to act as a reasonable custodian of the roads would have had an effect on the accident, we necessarily need proof of what the

State would have done had it acted reasonably.

JUDGE STEIN: Well, isn't that what - - - isn't that what happens when you get qualified immunity? And here you didn't get qualified immunity because you didn't do the study and you didn't come up with - - - you didn't do anything. And so why - - - how could it be that the same standard applies whether you get qualified immunity or not?

MR. HITSOUS: Well, Your Honor, they're not the same standard. Qualified immunity applies if the State has completed a study. In that case, the State is immune regardless of negligence so long as the study was reasonable. Without immunity, the State - - - the State - - - well, if the State doesn't - - -

JUDGE STEIN: State's like everybody else at that point, isn't it?

MR. HITSOUS: Well, exactly, Your Honor. And the case proceeds - - -

JUDGE STEIN: They have a duty to - - - to keep their roadways in a reasonably safe condition, right?

MR. HITSOUS: That's correct, Your Honor.

JUDGE STEIN: Okay. So if it's not in a reasonably safe condition and that failure to be in a reasonably safe condition results - - - is a proximate cause of somebody's injury, isn't that the standard that we

use for negligence?

MR. HITSOUS: Well, Your Honor, the failure to keep a road in a reasonably safe condition is broad. Like all negligence cases, how the State goes about - - -

JUDGE FAHEY: You're - - - you're - - - to follow-up on Judge Stein's point, focusing in on proximate cause, the PJIs (phonetic) had the same proximate cause analysis which is that there has to be a substantial factor in - - - in connecting that to damages, and what we're talking about is duty breach. A duty exists, there's a breach of the duty. The breach of the duty was caused by a negligent act. We're assuming here that there was a negligent act, and then did that negligent act - - - can it be causally linked to damages? So here the question is design defect, is it a substantial factor in causing this accident? You seem to be imposing two arguments, and you can address these. First, you seem to be saying that it has to be the only cause of the accident rather than a substantial factor. And secondly, you seem to be arguing that the petitioners or the plaintiffs here should be required to show that if - - - that there is no remedy to this solution and therefore they're entitled to success on their - - - on their argument where the obligation to provide a remedy is not what the law requires. You seem to be creating a new requirement for proximate cause.

MR. HITSOUS: No, Your Honor.

JUDGE FAHEY: Okay.

MR. HITSOUS: What we're saying is that the claimant here in a highway case, just like any other plaintiff in a negligence case, to show that the defendant here, the State, acted unreasonably necessarily implies that there has to be something that the State could have done that was reasonable.

JUDGE WILSON: Well, it could have completed the study.

MR. HITSOUS: Well, that's one of the things that the State could have done, and that was what the Court of Claims - - -

JUDGE WILSON: It didn't - - - it didn't do that.

MR. HITSOUS: - - - had measured.

JUDGE WILSON: They didn't do that, right?

JUDGE FAHEY: Could have put a - - - could have put a four-way stop in. There were seventeen T-bone accidents from 1996 to 2002 at this particular location. The Ontario Town Board asked it to reduce the speed on Route 350 from fifty-five miles an hour to forty-five miles an hour.

MR. HITSOUS: Well - - -

JUDGE FAHEY: None of - - - those are not onerous obligations on any government body. We're not - - -

they're not asking them to rebuild the road. They're asking them to put in a four-way stop. After seventeen T-bones it's kind of - - - I think you're on notice. You've had the notice that your duty's been breached. It's - - - it's hard for me to understand why you're not trying to impose an obligation on the plaintiff to show that there's an absence of remedy when the town board itself had asked for these remedies.

MR. HITSOUS: Well, Your Honor, your question presumes what we would be saying is the - - - the appropriate analysis here. Claimant didn't come in and simply say that the intersection was unsafe and leave the State to guess how it could have been safe. Claimant came in and said this intersection was unsafe and the State didn't act reasonably to the conditions at the intersection because had the State acted reasonably it would have put in a four-way stop sign. The failure at the trial stage was not about the standard which is what we're arguing about here. It was about the proof. The problem with claimant's case is that even though claimant's expert initially opined that a reasonable custodian of the roads would have put a four-way stop sign in, claimant's expert then equivocated, admitted that a reasonable custodian of the roads would have taken incremental steps and in fact proposed incremental steps in his disclosure.

JUDGE RIVERA: Let me - - - let me ask you a different kind of question. I don't know how - - - you say we should understand the following statement by this court in Friedman v. State: "When, however, as in Friedman and Muller," the cases involved in that appeal, "analysis of a hazardous condition by the municipality results in the formulation of a remedial plan, an unjustifiable delay in implementing the plan constitutes a breach of the municipality's duty to the public just as surely as if it had totally failed to study the known condition in the first instance." How are we to interpret that sentence in Friedman?

MR. HITSOUS: Your Honor, in all of these cases, irrespective of the statement in Friedman, I think it supports the notion that ordinary - - -

JUDGE RIVERA: No, no, no, but I'm asking you about this statement.

MR. HITSOUS: This statement - - -

JUDGE RIVERA: I don't want you to escape that statement.

MR. HITSOUS: It's - - - it's a long statement, Your Honor, and as I understand - - -

JUDGE RIVERA: Well, I'm particularly interested in this last section: "A breach of the municipality's duty to the public just as surely as if it had totally failed to

study the known condition in the first instance." Isn't that saying - - -

MR. HITSOUS: Your - - -

JUDGE RIVERA: - - - if you don't study the condition in the first instance you have breached your duty?

MR. HITSOUS: Well, Your Honor, that would be - - - that would sound like the failure to study an intersection can itself be a form of negligence which is something that I'll note the claimant alleged here in which case the failure to study would be the breach, and you have to measure proximate cause against the breach which is exactly what the Court of Claims did here. So that would tend to support our argument. The Court of Claims recognized that the breach of duty here was not the absence of a four-way stop sign because claimant didn't establish that.

JUDGE WILSON: But this statement from Friedman: "The State breaches its duty when the State is made aware of a dangerous highway condition and does not take action to remedy it."

MR. HITSOUS: Your Honor, reasonableness still remains at the center of this. We - - - if - - - and - - -

JUDGE WILSON: Is taking no action at all when you're on notice reasonable?

MR. HITSOUS: Only if reasonable care would leave the State duty-bound to take a particular action. The fact that the State does nothing is no different than any case of negligence by - - -

JUDGE FAHEY: But isn't your argument really that - - - that it wasn't the State's fault it was Friend's fault? Isn't - - - he's the driver of the other car, right? Isn't that really the core of your argument?

MR. HITSOUS: No, Your Honor.

JUDGE FAHEY: Okay.

MR. HITSOUS: That is our alternative argument. We want this court to find that the State couldn't be held liable as a matter of law here because claimant didn't prove proximate cause. How - - -

JUDGE STEIN: Let me ask you this. In Hain v. Jamison, you're - - - you're aware of that where the cow was in the - - - or the calf was in the road, right?

MR. HITSOUS: Yes, Your Honor.

JUDGE STEIN: Right. Okay. And we - - - and there was negligence there, right? And did we say that the plaintiff had to prove what the farmer should have done to keep the calf in - - - in - - - secured? Did we say that we - - - that she had to prove the specific thing that the farmer should have done to prevent the calf from getting in the road, or did we just say that there was a duty to do

something?

MR. HITSOUS: Well, Your Honor, we're talking about proximate cause here, and the duty to do something isn't enough. To know whether or not that something would have reduced the risk of an accident we need to know what that something is.

JUDGE STEIN: Well, you'd agree that there's - - - there's an overlap between breach and proximate cause, right? Because you have to show that there was something, right, that the defendant could have done?

MR. HITSOUS: Oh, absolutely, Your Honor. And - - -

JUDGE STEIN: And here there - - - there was something that the defendant could have done, and that was shown.

MR. HITSOUS: Yes, Your Honor, but our - - -

JUDGE STEIN: Not necessarily that the defendant would have done that if it had done a study, but - - - but it seems to me that that meets the plaintiff's burden.

MR. HITSOUS: Well, and this - - - this is an important distinction here. It's not simply a matter of would the State have done it, it's a matter of whether the State was duty-bound to do it. If we could measure proximate cause simply by a danger or the absence of safety - - -

JUDGE RIVERA: But see there is where, despite your response to Judge Fahey, you really are arguing that it's not a hazardous condition. That's really what this is boiling down to, that it's not a hazardous condition so we really didn't have to do anything. It's - - - it's the truck driver who's to blame in this because they could have seen the car.

MR. HITSOUS: No, that - - - that's not correct, Your Honor. In this scenario, we have a breach here, and we admit that there was a breach. And it was a failure to take incremental steps in response to the conditions at the intersection. We had both experts agree that - - -

JUDGE RIVERA: Well, why isn't the four-way stop an incremental step?

MR. HITSOUS: The four-way - - -

JUDGE RIVERA: Even his - - - even her, excuse me, her expert said that.

MR. HITSOUS: Well, Your Honor, the four-way stop sign has been conditioned by claimant's expert on the failure of those earlier steps, and claimant's expert couldn't determine with any kind of certainty when that four-way stop sign would be put in. As a result of that, claimant's expert wasn't able to carry claimant's burden to establish that the State had a duty to put in a four-way stop sign before the accident. In light of claimant's

failure to carry that burden, the Court of Claims necessarily measured proximate cause based on the actual breach which was the failure to take the earlier steps which had been proposed as dual-posting, enhancements to the intersection warning signs on 350, and clearing foliage. Both experts agreed upon that, and all we're asking the Court to do is agree that proximate cause has to be measured against the actual breach, not against something that the State wasn't found to have had a duty to do. Now if - - - if I may just very briefly, Your Honor - - -

CHIEF JUDGE DIFIORE: You may.

MR. HITSOUS: - - - because we do have a secondary issue, the Fourth Department was alternatively mistaken, if this court finds that the State can be held liable as a matter of law, for finding that - - - that the State was 100 percent at fault. We understand that there are affirmed findings of fact here, but under those affirmed findings of fact the only way that the Fourth Department could have found that the State was 100 percent at fault would be to infer that Mr. Friend, the other driver, was no better off than if he had entered this intersection blindfolded. The evidence not only fails to support that, it establishes the opposite. We have evidence here about the sight distance. We have evidence

about the time that Mr. Friend waited after he looked south. And we have evidence about the speed of the motorcycle when - - -

JUDGE STEIN: But if there was - - - if there was a speed limit change, if there was a four-way stop then anything that would slow down, right, the meeting of these two vehicles very well could have avoided the accident completely, and Mr. Friend - - - I mean I - - - you'd have to say that there's no evidence in the record to support the conclusion that Mr. Friend coming to that stop sign with the - - - with the - - -

MR. HITSOUS: The vertical curve, Your Honor.

JUDGE STEIN: - - - vertical curve, right, and the speed of the other car that - - - that he could - - - that it was impossible for him to see that other car - - - or motorcycle, I should say, and - - - never mind, and motorcycle in time to have prevented that collision.

MR. HITSOUS: Well, precisely, Your Honor. If we combine the information we know about him looking to - - - to the south between five and ten seconds beforehand and we combine that with the sight distance that - - -

JUDGE WILSON: The record is not - - - the record is not really clear what the beforehand is before, right? Whether it's before the crash or before he enters the intersection?

MR. HITSOUS: Your Honor, on page 73 of the record he's asked when - - - how long passed before you - - - after you last looked south, he says less than ten seconds. On a follow up on I think it's page 76 he says between five and ten seconds. So - - -

JUDGE WILSON: Between what and what though? Between when he entered and what?

MR. HITSOUS: Between when he entered and when he last looked south on Route 350. So in light of that information, we know that given the speed of this motorcycle had he exercised reasonable care he would have been at least able to see part of it. Now maybe that lends itself to an inference that the motorcycle was - - -

JUDGE WILSON: Well, the - - - one-third of a vehicle is one-third of a car presumably, and a motorcycle is a lot lower than a car, no?

MR. HITSOUS: Your Honor, there was nothing in the testimony to say that there were any kind of material deviations between that sight distance and what was at play here. And in fact, if we're talking about the averages that the claimant's expert provided, those would have to be taken as a given for her own case because those were central to her showings about what the limitations were with the vertical curve.

JUDGE WILSON: Doesn't that sound like a fact

argument to you?

MR. HITSOUS: No, Your Honor. Because these facts are - - - are given. We don't dispute the facts, and under these facts they would tend to show that this motorcycle would have been visible from eleven seconds out at 897 feet and fully visible at about seven seconds out at 550 feet. We'd also note that the five to ten seconds that Mr. Friend says that he last looked south should be construed as negligence per se. What it means is that he pulled up to the intersection, looked to the right, and counted to ten or even to five, and then he pulls in blindly. And where he has a duty to see what's there to be seen this should itself be a form of negligence. In this alternative argument, we're not trying to vindicate the conditions at the intersection. We're simply trying to say that as a matter of law the State shouldn't be held 100 percent at fault here.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. HITSOUS: Thank you.

CHIEF JUDGE DIFIORE: Counsel.

MR. STEINBERG: May it please the court, Michael Steinberg for Ms. Brown. There are a few things I'd like to clear up at the beginning. Our argument has never been that the State was negligent in failing to conduct a study. We did say that they were negligent in failing to do

something about a dangerous condition of which they had notice over a property which they controlled. The State had said this is an abstract duty. They even managed to get Palsgraf into the case. But it's not an abstract duty. It's a concrete duty. It is a duty to take a focused response to specific information about a given danger at one intersection. And the obligation of the State once it finds that out - - -

JUDGE RIVERA: Well, their argument is if they had moved in a way that your expert agrees they could, incrementally, that at the point of time that the accident occurred whatever they had done by that point would not have avoided that accident.

MR. STEINBERG: Yes, their - - - their argument - - - and I'll get to the incremental - - -

JUDGE RIVERA: What's your - - - what's your response to that?

MR. STEINBERG: First of all, Mr. Parrone was somewhat rattled on cross-examination, and on redirect he said yes, there should have been a four-way stop. I think it is accepted by everyone that the only thing - - - everyone who's passed on this case below that a four-way stop was the only way of dealing with it. The incremental measures Mr. Sherman says wouldn't have done anything. What would be the point of double signage or flashing

lights?

JUDGE FAHEY: Is that the accident reconstruction specialist?

MR. STEINBERG: No, he was the State's expert actually.

JUDGE FAHEY: I see, okay. All right.

MR. STEINBERG: That the problem with this was not that people on Paddy Lane were unaware that there was a stop sign. You could make the stop sign as big as a billboard. It wouldn't make any difference. It - - -

JUDGE STEIN: He stopped as a matter of fact. He stopped.

MR. STEINBERG: He stops. And in fact, over and over and over again people stopped there and didn't see somebody coming north, a fact which is completely inexplicable if we accept the State's - - -

JUDGE RIVERA: So then - - -

MR. STEINBERG: - - - argument.

JUDGE RIVERA: - - - doesn't that boil down to your position is the only thing they could have done is a four-way stop sign which is exactly what he's saying we've never said that you have to designate - - -

MR. STEINBERG: We do not - - -

JUDGE RIVERA: - - - from their side that they can take other steps?

MR. STEINBERG: With respect, Your Honor, we do not believe that we have to show what could have been done. We believe that the duty on the State is to make the highways reasonably safe.

JUDGE STEIN: But you have to show that something could have been done.

MR. STEINBERG: The State never argued that nothing could be done. They didn't make an impossibility argument. They said we wouldn't have gotten around to it. We don't have to show what they would have gotten around to. We have to show that they have a danger on their property. They knew about the danger and they didn't do anything.

JUDGE RIVERA: But as I understood part of their argument was that the one thing that your expert said this is the only way to resolve this. They were concerned that that might have resulted in other arguments on that north-south road.

MR. STEINBERG: I think at this point it gets into a technical question which takes away from the fact that there is a known danger here about which the State did nothing. I don't see any evidence in the record, sort of speculation, that this might create a bigger problem. If we do get into the impossibility of - - - if they had gotten into the impossibility of resolving the question,

making this roadway reasonably safe the case might have taken a different turn. But the duty - - - it is - - - it is accepted in our law that the highways can be made reasonably safe.

JUDGE FAHEY: Let me ask you this just turning to the alternative argument for a second. What's the effect of Friend's conviction on 1142(a)?

MR. STEINBERG: Friend's conviction after trial is, we submit, inadmissible. This - - - this court has - - - and he wasn't even a party. It's not admissible as res judicata against a litigant. I don't see how it can be introduced here. In any case, we have a perfectly good explanation.

JUDGE FAHEY: Well, it's always that problem between Court of Claims negligence actions and Supreme Court negligence actions then. But you can get the - - - if the - - - all the parties were together in Supreme Court you would solve this problem.

MR. STEINBERG: Perhaps.

JUDGE FAHEY: Yeah.

MR. STEINBERG: In any case, we have an explanation which is the vertical curve, the sight-line problem.

JUDGE FAHEY: Well, that was Mr. Parrone's testimony; is - - - is that correct?

MR. STEINBERG: It was accepted by the Court of Claims as an affirmed finding of fact that we have a vertical curve problem there.

JUDGE FAHEY: So are you saying to me that he took Parrone's description of the vertical curve, the speed over the police accident reconstruction specialist?

MR. STEINBERG: The police accident reconstructionist did not pay any attention to the vertical curve, and that - - - that creates a kind of ambiguity which the State makes use of in Judge Midey's decisions. Judge Midey says, yes, it's uncontested there are no obstructions, and this is true. An obstruction is something that is in front of you. There is in fact a sight-line problem that is a kind of hidden defect that can only be found out by doing some surveying which Mr. Parrone did and which the courts have affirmed existed there.

And because of that there's certainly - - - I mean there's - - - as far as Mr. Friend's negligence it's a legal sufficiency question, and there is evidence from which a rational finder of fact could find that indeed he acted reasonably. He looked south at an appropriate time. When he said and it is testimony, is evidence, I said I looked south and I did not see anything. He didn't see anything, and we know why he didn't see anything. We know why it's plausible at least that he didn't see anything.

Because of the vertical curve and in fact because of the accident history where other people in Mr. Friend's situation acted the same way and had the same kind of disastrous consequences.

Now the State does bring in Weiss v. Fote in a way in again talking about what would have been done, what would have been the product of a study and so on. And the thing is that since the State is not entitled to Weiss v. Fote immunity here and since Weiss v. Fote doesn't set up any standard of reasonableness - - - it simply says we can't pass on the reasonableness of a duly-arrived at decision of the Executive Branch. What the State is doing is really announcing a new law for - - - for dangerous conditions.

In every case, in the case of a cow, it would be incumbent on the claimant or plaintiff to show not just what could be done but when it would have been done. You know, when - - - when would that hole in the - - - you know, when would that quarry have been fenced off? Would it be reasonable to - - - to take other steps to put up a warning sign first? It would destroy centuries of premises liability law because every plaintiff would have to come forward with a kind of speculative reconstruction of what a reasonable decision-making process would be.

There's a reasonable - - - reasonableness

standard incorporated here. You have a reasonable time to make the roadways reasonably safe. How you go about doing that is not a reasonableness question. It's a technological question. And when the State has failed to - - - to make any steps at all in the face of a known danger that in itself is unreasonable. That in itself is negligence. And the State says that we are trying to have essentially liability without negligence. The Fourth Department erred Mr. Hitsous writes because it said we merely had to show that the danger was a proximate cause and not any negligence. But in fact it is your negligent - - - your negligent action in allowing a dangerous condition to persist that makes you liable for the consequences of that danger. And that I think is really where it is. The State knew about this. The State could have done something about it, but the State did absolutely nothing. And they want us to say, well, if we had something - - -

JUDGE FAHEY: These are - - - these are slippery concepts. But was - - - and I don't recall seeing it so I'm asking you and you can respond to it. Was there anything in the record about DOT standards on - - - on the number of accidents before the - - - an alteration or a change in the stop sign arrangement is required?

MR. STEINBERG: Nobody brought in the Manual on Uniform Traffic Control Devices or anything like that.

JUDGE FAHEY: Okay. Thank you.

MR. STEINBERG: But, you know, basically the State's argument is, yes, we were negligent. We were negligent because we didn't conduct a study and we didn't do anything, but if we had not been negligent, if we had been reasonable this intersection would be just as dangerous as it was before. And that can't be the law. The reasonable response to a known danger cannot be to do things which leave it dangerous.

JUDGE RIVERA: No, again, I think - - - when he stands up he can correct me. As I understand their argument they can take incremental steps as they're determining what's the best way to respond, and I think their argument is that if - - - if it's a four-way stop you're looking for that might not have been the step that they would have been at at the time of the accident.

MR. STEINBERG: Well, we are getting speculative here for - - - for a certainty. That is why we think this is a bad argument. But let's assume that the State simply looks at it and trims some brush and so on, and let's even assume - - - I'll even grant maybe the State did a study. And nobody sent a surveyor out there, nobody found out about the vertical curve, nobody understood why a particular kind of T-bone accident was so common there. We might be very well here arguing that no, this isn't the

kind of study that is - - - entitles the State to Weiss v. Fote liability because they overlooked one of the essential obvious elements of the geometry of the intersection.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel.

MR. HITSOUS: Your Honors, our argument is not that the State can get away with leaving an intersection dangerous. It is simply that in this case claimant proved breach but not that the breach was the proximate cause. Claimant has an obligation to prove all of the elements of negligence, and one of these elements was missing. The State takes issue with claimant's argument that because these incremental steps wouldn't have resulted in a safer intersection for her, that the accident still would have occurred despite those incremental steps, that it means that the incremental steps were unreasonable. There are a host of steps that can be taken, and just because something can be imagined - - -

JUDGE STEIN: But might it not be a different case here if they did take incremental - - - if they did their study and they took incremental steps? It seems to me this would be a very different case, but that's totally theoretical.

MR. HITSOUS: That's theoretical at this stage, but I don't think it matters actually, Your Honor, if the

State had or had not taken incremental steps. What claimant's burden is is still the - - - the same. Claimant has to come in - - -

JUDGE STEIN: So what is the difference between meeting their burden in order to obtain immunity and - - - and this situation? How is their burden different, if at all? Are you saying it's the same whether they - - -

MR. HITSOUS: No, Your Honor.

JUDGE STEIN: - - - whether they qualify for immunity because they did the study, they took it - - - they did whatever was reasonable under that study versus if they do nothing at all?

MR. HITSOUS: No, Your Honor. We're simply - - -

JUDGE STEIN: What's different? I'm not understanding your argument.

MR. HITSOUS: If the State has immunity then - - - or the State can claim immunity, claimant can come in and say that that study was unresponsive to the exact condition here or that that study was - - - was completely unreasonable. In a case where claimant proceeds in the ordinary course, however, claimant still has to come in and establish that the State acted unreasonably not simply because it did nothing but because a reasonable custodian of the roads would have taken a particular action and then for proximate cause purposes - - -

JUDGE STEIN: I thought that's what their expert said.

MR. HITSOUS: That is what their expert said, Your Honor, and that's - - - that goes to our point that their expert understood what the burden is, claimant understood what the burden is.

JUDGE STEIN: No, no, no. I mean their expert said there should have been a four-way stop here.

MR. HITSOUS: That's correct, Your Honor.

JUDGE STEIN: Okay.

MR. HITSOUS: And - - - and they were unable to show that there was a duty to put a four-way stop in in time to prevent this accident. The fact that - - -

JUDGE RIVERA: Well, just to be clear, does the State concede that you should have done something?

MR. HITSOUS: Yes.

JUDGE RIVERA: I get your point that you're saying you're not - - - you're not the proximate cause here of this accident, but does the State concede that you should have done something?

MR. HITSOUS: Yes, the State concedes a reasonable custodian of the roads would have taken incremental steps. And I'll note that the reason incremental steps are reasonable here is that DOT is not - - -

JUDGE RIVERA: Do you concede that a four-way stop would have been one of the things that you would have considered?

MR. HITSOUS: Only - - - only if prior - - -

JUDGE RIVERA: Not that you would have put it in, that it would - - - you would have considered?

MR. HITSOUS: Not at the outset, Your Honor. Not at the outset.

JUDGE RIVERA: At some point?

MR. HITSOUS: A four-way stop sign is an extreme remedy. That's something that bears itself out in the testimony. The fact that it might have conceivably prevented the accident doesn't mean you jump right to it. Closing down the road would have prevented the accident. It doesn't mean that the State is negligent for not closing down the road immediately.

JUDGE FAHEY: No, but I guess the question you have to ask, this is a more - - - more of a rhetorical question so I'm not asking you to provide answers - - - how many accidents have to happen here before you do something?

MR. HITSOUS: Well - - -

JUDGE FAHEY: Before you'd make either a change in the design, the number of - - - of stop signs you put up there, put up lighting, put up strips which I - - - they do now sometimes in dangerous areas. There's a variety of - -

- of new techniques. But how many before something's done?

MR. HITSOUS: Well, and, Your Honor, I understand your concern, and that's one of the reasons why the State is - - - is forced to admit here that it breached its duty because it should have done something. And the question becomes what is the nature of the breach by which you measure proximate cause.

JUDGE FAHEY: The question for us is does it fall within that substantial factor category.

MR. HITSOUS: Well, it - - - the question for this court is whether - - - what is the breach by which you measure proximate cause because the law is that proximate cause is measured by the breach. Our argument is that you can't simply say that a dangerous condition is the proximate cause because that would erase the reasonable person from the analysis.

JUDGE RIVERA: There could be more than one cause, right?

MR. HITSOUS: You certainly could have more than one proximate cause for an accident, and that goes to our - - -

JUDGE RIVERA: And that could be that the State at different points in time has more than one, right? Their negligence at different points in time could be a proximate cause?

MR. HITSOUS: Sure, Your Honor. But that's something that would have to be proven by the evidence. Here claimant had a fair shot to come in and say the State was negligent because it failed to put in a four-way stop sign. I'll also note just a quick correction. Whereas claimant says that the study was - - - not alleges negligence you could find that on pages 281 to -82, I - - - I feel compelled to say that because we are absolutely not bringing Weiss v. Fote immunity into this. Without Weiss v. Fote immunity this case simply proceeds in the ordinary course, and it is claimant who has the burden of proof to show that the State did not act as a reasonable custodian of the roads and that its failure to act a reasonable custodian translated to the failure to take the corrective measures that a reasonable custodian would have taken was the proximate cause of the accident.

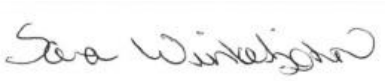
CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. HITSOUS: Thank you.

(Court is adjourned)

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Brown v. State of New York, No. 66 and Brown, as administratrix, v. State of New York, No. 67 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: May 08, 2018