Przesiek v State of New York
2012 NY Slip Op 33905(U)
November 8, 2012
Court of Claims
Docket Number: 112217
Judge: Michael E. Hudson

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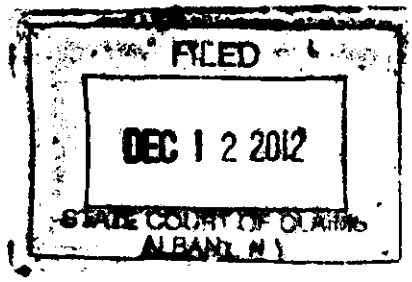

STATE OF NEW YORK COURT OF CLAIMS

MARLYN PRZESIEK AND ROBERT A. PRZESIEK, HER SPOUSE,

Claimants, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 112217

Defendant.

BEFORE: HON. MICHAEL E. HUDSON
Judge of the Court of Claims

APPEARANCES:

For Claimants:
HALL, RICKETTS, MARKY & GURBACKI
BY: ROBERT H. GURBACKI, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
BY: WENDY E. MORCIO, ESQ.

Claimants have sought to recover for injuries allegedly sustained by Marlyn Przesiek (hereafter, Claimant)[1] in a vehicular accident. By agreement of the parties on the record at the start of trial on May 3, 2012, liability issues became bifurcated from damage claims, with the latter issues to be scheduled, as needed, at a future date. In the course of 9 days of trial 15 witnesses appeared to testify, and 84 exhibits were introduced into evidence.[2] At the conclusion of proof I reserved decision, to allow for my review of the testimony and exhibits, and to honor

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[1] The cause of action of Robert A. Przesiek is derivative in nature.

[2] Two additional exhibits were entered into evidence following the close of proof.

the parties' requests to tender post-trial memoranda, together with excerpts from the 1983 Manual of Uniform Traffic Control Devices (MUTCD), and the 1990 edition of "A Policy on Geometric Design of Highways and Streets" from the American Association of State Highway and Transportation Officials (AASHTO).[3] On consideration, I now find and conclude as follows.

FINDINGS

This claim arises from a two-vehicle accident on the afternoon of May 4, 2004, in a rural area of eastern Erie County. At the time of the collision Claimant was a front-seat passenger in an automobile owned and operated by a friend, Maryann T. Kiczewski, who was then 74 years old. The two friends were both retired, and had spent several hours that day at lunch at a restaurant in the Town of Marilla, and shopping at a store close to where they had eaten. They then decided to visit the Marilla Country Store, which was located on Two Rod Road (Two Rod) at its intersection with Bullis Road (Bullis), in the Town of Marilla. That intersection is part of a small hamlet within what otherwise is a rural community. To reach the store Mrs. Kiczewski drove east on Bullis, a route she had not previously driven. By all accounts traffic patterns in the area that afternoon were light, and weather conditions were sunny and dry. The two friends arrived at the intersection of Bullis and Two Rod just after 3:00 p.m. Since the Marilla Country Store is located on the southeast corner of that intersection, Mrs. Kiczewski was required to proceed across Two Rod to reach their destination. As she crossed the intersection her automobile, a white Mercury sedan, was struck broadside on its passenger side by a northbound dump truck owned by Swimline Trucking, Inc. (Swimline), and operated by an employee,

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[3] The entire MUTCD had been marked for identification at trial as exhibit DD. The excerpts are now entered into evidence as exhibit DD-1. Similarly, the AASHTO volume was marked for identification at trial as exhibit 76, and the excerpts are now entered into evidence as exhibit 76-A.

Richard Martin.[4] As a result of the accident Mrs. Przesiek reportedly sustained serious and permanent injuries, such that she was unable to appear and testify at trial.

I will next address the ownership and configuration of the intersection itself. Two Rod in the area of the Marilla hamlet is a two-lane asphalt highway owned by the State, and configured in a north-south direction. The road is also identified as route 954 G, and at times route 358.[5] The paved roadway appears to date back to the 1930s, although the roadbed had been used for an unknown period prior to that time. The speed limit in the area of the hamlet is 35 miles per hour, having been reduced from 40 miles per hour by Defendant's Department of Transportation (DOT) in February 1990. That determination followed a previous speed reduction from 45 to 40 miles per hour in March 1988. Each travel lane is 11 feet wide,[6] with an adjoining paved shoulder, and beyond that, a strip of crushed stone. However, at the approaches to the intersection within the hamlet concrete drainage gutters are positioned along the outer edges of the paved surface. A double yellow line separates the two lanes of traffic in that area. The outside of each travel lane is marked with a white "fog line." Significantly, Two Rod slopes on a steep grade downhill to the north as it runs through the hamlet. The roadway then levels briefly at its intersection with Bullis, before resuming a downhill grade to the north of the intersection.

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[4] The Przesieks are pursuing related litigation in Supreme Court against Mrs. Kiczewski, Swimline, and Mr. Martin.

[5] At one point Two Rod was also known as SH 529.

[6] Based upon post-accident measurements taken by the Erie County Sheriff's Department Accident Reconstruction Unit on the afternoon of the accident. Lawrence M. Levine, a professional engineer retained by Defendant, testified that each lane is 12 feet wide.

Wallace Ochterski, a professional engineer retained by the Przesieks, measured that downward slope at 7.8 degrees as it approached the Bullis intersection from the south.

Bullis, in turn, is an east-west asphalt highway owned by the County of Erie, and generally consists of two lanes, each approximately 12 feet in width, with stone shoulders averaging 2-4 feet in width. Again, however, on the approaches to the Two Rod intersection a concrete drainage gutter adjoins each outside edge of the roadway. A double yellow line separates the two travel lanes, and white fog lines mark their outer edges. The section of Bullis to the immediate west of Two Rod – the area of significance herein – is level.[7] Shortly to the east of the intersection Bullis slopes upward to some unstated degree.

It is undisputed that the regulation of all traffic at the intersection fell within the responsibility of the State.

As of the May 4, 2004 accident date the State had installed a number of devices to regulate the flow of traffic at the intersection. For eastbound traffic on Bullis those regulatory devices included a "Stop Ahead" sign 405 feet from the intersection. A separate yellow sign noting the approaching intersection was also located along that route. A 36-inch stop sign was positioned at the right edge of the roadway, approximately 35 feet from the west fog line for Two Rod. An elevated flashing light also had been installed over the center of the intersection itself in February 1984. That light signaled red for Bullis traffic in each direction, as a further reinforcement that traffic along that county road was required to stop at the intersection. For traffic proceeding in both directions along Two Rod the overhead light flashed yellow, to warn of

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[7] There is some minor downward slope further to the west of the intersection.

the intersection. Mr. Ochterski acknowledged that the northbound vehicles could see that light from a distance of 500 feet. In addition, the DOT had placed a yellow caution sign along Two Rod some 450 feet south of Bullis to inform northbound vehicles that an intersection was ahead.

The Przesieks have made note of the absence of any signage to warn drivers that the intersection was not a four-way stop, and Mr. Ochterski opined that the DOT should have installed signs along Bullis to advise drivers that cross traffic on Two Rod did not stop. In response, Defendant established that the 1983 MUTCD did not provide for any such signs, and the DOT did not adopt a cross-traffic warning sign until a point that followed the accident.[8]

In urging recovery the Przesieks have also made note of several changes in the signage in the area of the intersection over the years prior to the accident. First, they reported that a supplemental 25 mile-per-hour yellow advisory speed sign that had been positioned below a sign that once warned northbound traffic on Two Rod of the approaching intersection with Bullis had later been removed by the DOT. Claimants similarly asserted that at one point the DOT had installed a second stop sign at the northwest corner of the intersection, as an added notice to eastbound traffic on Bullis, but then removed that sign prior to the accident. In response, Susan Surdej, a DOT engineer who previously had worked as a road designer, explained that she directed the removal of the advisory speed panel in 1994, in the course of a road study she conducted to update signage to conform with the then-current MUTCD standards. Ms. Surdej noted that the 1983 edition of the MUTCD did not authorize the installation of an advisory speed panel underneath an intersection ahead sign. With respect to the stop sign issue, she agreed that

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[8] Variously described as 2004 or 2007.

the DOT's records supported that the State had installed both a traditional and supplemental stop sign on Bullis at its west intersection with Two Rod (*see* exhibit 49, pp 1-2 [DOT memorandum]) as of June 1988,[9] and observed that the supplement had been removed without explanation prior to her 1994 signage assessment. Although Ms. Surdej acknowledged that she possessed the authority to recommend the reinstallation of a second stop sign in 1994, she had limited her review to the replacement of the one remaining stop sign, which was 30 inches in diameter, with a single 36-inch stop sign.

Lastly, Claimants noted that on August 23, 1976, the DOT repealed a prior order that prohibited vehicles from standing on both sides of Two Rod within 60 feet of the intersection both north and south with Bullis (*see* exhibit 49, p 12). It is the Przesieks' position that the prohibition against vehicular standing near the intersection had represented an effort to mitigate sight line problems for travelers on Bullis who approach the intersection, and that the repeal of that parking ban was never explained. I fully agree. Conversely, I accept Mrs. Kiczewski's claim that her view to the south along Two Rod was not impaired by the presence of parked cars.[10]

More generally, I find that the configuration of the intersection and its structures gave rise to serious sight line problems for all approaching vehicles. As reflected in the Sheriff's Department's map of the intersection (exhibit 45), the four corners of the intersection consist of

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[9] Based upon the testimony of Brian Skok, a DOT maintenance employee, the supplemental stop sign would have been installed at that intersection prior to 1988.

[10] The 1976 rescission of the parking prohibition nevertheless remains relevant in assessing the DOT's 1999 review of the safety of the intersection.

arcs that are broad, and not uniform.[11] The stop signs for east and westbound drivers on Bullis are located near the start of their adjoining arcs, well back from the edge of the nearest travel lane on Two Rod. I find that the distance between the eastbound Bullis stop sign and west fog line for Two Rod is approximately 35 feet. The location of structures at the intersection further impedes sight lines for traffic on both Bullis and Two Rod. The Marilla Grill restaurant is situated almost adjacent to the southwest corner of the intersection, to the south of the Bullis stop sign. Two utility poles, as well as the restaurant's extended porch or stairway, further impair the ability of eastbound drivers at the Bullis stop sign to look south along Two Rod, or for northbound drivers on Two Rod to see the start of that intersection. Multiple photographs introduced at trial reflect that condition (*see e.g.* exhibits 1-4, 19-21). Those photographs further support that as a driver on Bullis moves beyond the stop sign toward the west Two Rod fog line, sight lines to the south become unobstructed up to the top of a hill within the hamlet. Following the accident the Sheriff's Department determined the distance from the intersection to the crest of the hill to be 262 feet. Mr. Ochterski subsequently determined the total downhill sight distance to the intersection for a typical vehicle operator to be 347 feet,[12] using what he reported to have been a

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[11] The exterior edges of those arcs consist of the concrete drainage gutters that I previously described. They are quite distinct.

[12] On occasion that distance was described as 348 feet.

standard to apply in such measurements,[13] i.e., a driver positioned 42 inches from the ground, viewing a marker that rose 48 inches from the ground.[14]

Buildings have also been constructed on the other three corners of the intersection. An automobile repair shop is located on the northwest corner. Although Mr. Martin noted that that building is positioned some 20-30 feet back from the edge of Bullis, its east side is fairly close to Two Rod. I find that that structure impedes the ability of an eastbound driver at the Bullis stop sign to look for southbound traffic on Two Rod, such that the operator is required to move slowly forward to look beyond the corner of the building, as well as any vehicles parked adjacent to that repair shop, to determine if vehicles are approaching. A second automobile repair shop is located at the northeast corner of the intersection. That building is set back somewhat further from the two roadways, and Mr. Martin and Joseph Piasecki, a motorist who witnessed the accident, both made note of the better sight lines at that corner. Lastly, the Marilla Country Store is located at the southeast corner of the intersection. The photographs and testimony similarly support that the store structure is positioned close to both roadways, with resulting sight line impairment.

I make one further comment with respect to the sight lines for eastbound traffic at the Bullis stop sign, and certain photographs taken by Mrs. Kiczewski's son, Mark Kiczewski,

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[13] MUTCD § 202.3 (a) provides that the standard for measuring intersection-related sight distances is a uniform 45 inches (*see* exhibit DD-1, p 29). The AASHTO standard relies upon a driver 42 inches from the ground, viewing a marker 51 inches from the ground (*see* exhibit 76-A, p 753). Still, the State did not challenge Mr. Ochterski's testimony on the point, or otherwise introduce evidence of standard sight distances by a DOT representative. I will accept Mr. Ochterski's measures and methodology, and find any deviation from either standard to be de minimis.

[14] Defendant's expert engineer, Lawrence M. Levine, later observed that Mr. Martin sat some 8 feet from the ground in a truck that was some 10 feet in height, which would have afforded even longer sight lines between the Martin and Kiczewski vehicles. Mr. Martin acknowledged that as a general matter his vehicle's elevation would have afforded him a longer line of sight, although not in this instance, since the Marilla Grill blocked his view of eastbound vehicles on Bullis until they pulled beyond that structure.

within a few days of the accident. Based upon the foundational testimony I find that those photographs (exhibits 1-4, 19-21) accurately reflect the perspective of a typical vehicle operator positioned on Bullis in the area of the stop sign, and specifically the visual obstructions to the south. Exhibit 59, a photograph taken by Mr. Ochterski two days after the incident, confirms that visual impairment from the opposite perspective, that being a northbound view on Two Rod. To the extent that the State later proffered testimony from Vincent Fininzio, a former DOT employee who visited the site as part of a traffic study in October of 1999, to the effect that the views depicted in some or all of Mr. Kiczewski's photographs do not accurately reflect what a driver would see, I simply cannot credit that statement, for reasons later addressed.

I will next address the manner of occurrence of the accident itself. In so doing, I will review the testimony of Mrs. Kiczewski and Mr. Martin, who were involved in the collision, as well as that of Mr. Piasecki, another motorist who witnessed the event. I will also consider the testimony of three other trial witnesses – Mr. Ochterski, Erie County Deputy Sheriff David R. Karney[15] and Defendant's expert engineer, Lawrence M. Levine – that weigh on the accident, primarily with respect to measurements, time and distance considerations, and established operator reaction/response delays.[16] Those factors have helped me assess the weight to attach to the varying recollections of Mrs. Kiczewski, Mr. Martin and Mr. Piasecki.

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[15] Deputy Karney is now retired.

[16] Mr. Levine offered a reconstruction of aspects of the accident in the course of his testimony, some of which I reject. Deputy Karney testified to certain observations and computer-generated measurements in the course of his accident investigation, but did not engage in a full reconstruction of the accident. Mr. Ochterski similarly testified to various measurements, and some engineering considerations, but did not offer a reconstruction of the accident.

Mrs. Kiczewski testified that as she approached the intersection she stopped at the stop sign positioned at that location. While it is possible that Mrs. Kiczewski did not come to a completely stationary position at that point, I accept that she did effectively stop at the intersection, before continuing east to her destination on the opposite corner at a low rate of speed. On that basis I must reject the assertion of Mr. Piasecki that he observed the Mercury automobile simply drive through the stop sign without slowing, as well as Mr. Levine's amended trial opinion that Mrs. Kiczewski made a rolling stop at the stop sign, before continuing through the intersection at approximately 30 miles per hour. A number of factors cause me to believe Mrs. Kiczewski's testimony on the point. First, I observed her demeanor as she testified, and found her to be an open and forthright witness. Second, I believe that her acknowledged lack of familiarity with the intersection would cause her to exercise increased caution as she neared her destination. Third, Deputy Sheriff Karney, who investigated the accident, offered the opinion that Mrs. Kiczewski was traveling at a "low" speed at the time of the collision. Further, while Mr. Levine opined at trial that Mrs. Kiczewski simply rolled through the stop sign before proceeding at 30 miles per hour to the point of contact, he acknowledged that in his expert disclosure prior to the trial he instead had concluded that the vehicle had only been traveling at approximately 15 miles per hour[17] when it was struck by the truck. So also, I am mindful that the Marilla Country Store could not have been more than 90-95 feet beyond the eastbound stop sign on Bullis (*see* exhibit 45 [intersection drawing with scale]), and the accident occurred far closer to that stop sign. That short distance afforded Mrs. Kiczewski little in the way of time or

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[17] Mr. Levine's change of opinion regarding Mrs. Kiczewski's speed was reportedly based upon his having heard her trial testimony.

incentive to quickly accelerate. The fact that Mrs. Kiczewski had no prior experience in parking around the store provides further support that she would have approached the area at a fairly low rate of speed.

Lastly, based upon time and distance considerations for the movement of the Swimline dump truck I fail to see how the accident could have occurred unless the Kiczewski automobile had stopped at the stop sign, and then crossed the intersection at a low rate of speed. Deputy Karney measured the truck's pre-impact skid marks as 92 feet long, and I credit Mr. Martin's testimony that he applied his brakes only after he observed the white Mercury appear in front of him. Mindful that the restaurant building would have represented as much of a visual impediment to northbound Two Rod traffic as it did to eastbound Bullis vehicles, Mr. Martin could only have noticed the Kiczewski vehicle after it had reached the stop sign, and began to enter the 35-foot open roadway area that approached the west Two Rod fog line. Since the Mercury was still within the northbound Two Rod travel lane at the point of the collision, Mrs. Kiczewski would have traveled no more than 57 feet between the time where Mr. Martin first observed her and the point of the accident. If Mrs. Kiczewski traveled at a consistent 30 mile-per-hour rate of speed, without stopping for the stop sign – as Mr. Piasecki testified – she would have driven that distance in 1.27 seconds. That time is less than the recognized motorist reaction time[18] that Mr. Martin would have needed to process and respond to the danger presented, even assuming that his focus was specifically directed toward the front edge of the restaurant building the instant Mrs. Kiczewski passed the stop sign. When I also consider that it took time for Mr.

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[18] I credit Mr. Ochterski's assertion that a typical reaction time would be 1.5 seconds, but can vary with age and other factors, such that the State uses a 2-second period as its standard.

Martin to engage in 92 feet of braking,[19] I can only conclude that Mrs. Kiczewski would have fully cleared the intersection without being struck by Mr. Martin, if she had traveled at anywhere near that speed that Mr. Piasecki had estimated. I make that same conclusion in response to Mr. Levine's rolling stop analysis. Considerations for the length of the Kiczewski automobile, or the need to move beyond the stop sign, would not readily change that time/distance analysis.

Having found that Mrs. Kiczewski did stop at the intersection I further accept her testimony that she looked in both directions before she proceeded across Two Rod to her destination. Nevertheless, she clearly failed to observe that the Swimline dump truck was approaching the intersection.[20] She similarly failed to see and yield the right of way to the southbound Piasecki vehicle. From those obvious facts I must conclude that notwithstanding her comment that nothing impaired her ability to look to the south, Mrs. Kiczewski's effort to look both ways along Two Rod must have occurred at a location where she did not have an adequate view up and down the crossing roadway, and that she did not continue to check for oncoming traffic as she neared the intersecting fog line.[21] The "X" mark that Mrs. Kiczewski placed on a photograph (exhibit 19) to depict her sight line south along Two Rod provides some support for

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[19] Even at the highest estimated rate of speed for the Martin vehicle, 45 miles per hour, it wouldhave taken 1.4 seconds to travel 92 feet. Obviously, the heavy application of brakes would have worked to reduce the truck's speed over that distance, such that the post-reaction braking time would have been longer.

[20] To the extent the State elicited proof that Deputy Karney issued Mrs. Kiczewski a traffic summons for a claimed violation of Vehicle and Traffic Law § 1172 (a) following the accident, I find that testimony, without more, to be irrelevant (*see Mena v New York City Tr. Auth.*, 238 AD2d 159, 160 [1997]; *Franco v Zingarelli*, 72 AD2d 211, 216 [1980]).

[21] I have considered whether Mrs. Kiczewski may have simply assumed that the intersection was a four-way stop, in part based upon the conduct of Mr. Piasecki in stopping well prior to the approach of the Swimline truck. However, her testimony does not support such a conclusion.

that limited view at the point where she stopped. It also provides the only plausible explanation as to how she could fail to see two oncoming vehicles after having stopped.

I will next address Mr. Piasecki's recollections of the accident. I credit the witness's testimony that he had traveled south on Two Rod just prior to the accident, with the intention of turning left, or east, onto Bullis, in order to pick his daughter up from a school located a short distance to the east of the intersection. In so doing, he brought his vehicle to a complete stop to the north of the intersection, with his left turn signal activated. I further find that the witness delayed his left turn onto Bullis to yield the right of way to Mr. Martin's dump truck, which he observed approaching the intersection from the south. I credit that as he waited for the truck to clear the intersection, Mr. Piasecki moved slightly forward, and observed the Kiczewski automobile traveling eastbound on Bullis Road. At some point he also saw that the operator's head was turned to the right, toward her passenger. Mr. Piasecki continued to look back and forth as the two vehicles approached the intersection, and ultimately collide within the northbound lane of Two Rod, at the intersection.

I also accept Mr. Piasecki's recollection of traffic conditions just prior to the accident, i.e., that there were no other vehicles directly ahead or behind him at the intersection, and no other vehicles to the front of either the northbound truck or the eastbound automobile.

Although I found Mr. Piasecki to have been a sincere and unbiased witness, there were areas of his testimony that I must discount or reject, particularly in relation to time and distance. First, accepting that the witness came to a complete stop to the north of the intersection to wait for Mr. Martin's truck to pass, it is simply incredible that he would have remained stopped in that area for the 40 to 60 seconds that he estimated at trial, or even the 20 to 30 seconds that he had

stated in an earlier deposition. In that regard, I note that if the dump truck was approaching at about 35 miles per hour from a distance of 150 to 200 feet, as Mr. Piasecki estimated, that vehicle would have needed between three to four seconds to reach the intersection. To me, that estimate of speed and distance would have caused a cautious driver to wait for the truck to clear the intersection before turning. If the truck had been traveling 40 to 45 miles per hour, the act of yielding the right of way would have been quite prudent, even if a somewhat longer distance had been presented, but again measured over a period of several seconds. In contrast, even at 20 seconds and a higher rate of speed the truck would have been well south of the crest of the hill, and thus likely beyond Mr. Piasecki's view, and certainly beyond any need to yield the right of way. His observations, therefore, could only have been made over a total period of approximately three to four, or possibly five to six seconds.

I must similarly reject Mr. Piasecki's recollections with respect to the operation of the Kiczewski vehicle. At trial the witness reported that he first observed the white Mercury traveling east on Bullis from a distance of 100-120 feet back from the intersection itself, and only after he stopped for the oncoming truck, and moved up slightly closer to the intersection. That statement again differed markedly from Mr. Piasecki's deposition testimony, in which he claimed to have first observed the Kiczewski automobile from a distance of only 60 feet. In contrast, the witness was consistent in asserting that the white Mercury approached the intersection at a speed of approximately 30 miles per hour, and without stopping for the stop sign/red overhead light, or otherwise slowing as it entered the intersection. Mr. Piasecki acknowledged, however, that over the period that he waited near the intersection he varied his focus between the northbound truck, the eastbound Mercury, and potential westbound traffic on Bullis. In my assessment Mr.

Piasecki's initial views of the intersection occurred from the perspective of his own prudent operation of his vehicle, and without appreciating that an accident would subsequently occur. His viewings of the Mercury were admittedly intermittent, and occurred over far less a period of time than he estimated. I believe that Mr. Piasecki mistakenly interpreted Mrs. Kiczewski's resumed operation of her car after stopping at the stop sign as a continuous act of driving. Moreover, to the extent Mr. Piasecki observed Mrs. Kiczewski's head turned toward her passenger, that observation is actually consistent with Mrs. Kiczewski's testimony that she looked for crossing traffic as she reached the Two Rod intersection. Beyond those comments I would simply add that despite Mr. Piasecki's sincerity and lack of bias, his recollections regarding time and distance were so implausible and inconsistent that his testimony must be discounted.

Richard Martin testified to having been a licensed commercial truck driver since 1985. He began working for Swimline in 1993, and remained an employee of that company as of the time of trial. His job duties involved the hauling of stone, blacktop or dirt. In 2004 he drove an International Pay Star, a heavy-duty 28,000 pound dump truck that operated on four axles when carrying a load, and three axles when empty. His work that day, and for months or even a year before that time, consisted of hauling stone from a quarry to a road reconstruction site. He would follow the same route to and from the quarry some four or five times each workday. He estimated that each round trip was some 50-60 miles, in each instance traveling south, and then north, along Two Rod in the Marilla hamlet.

Mr. Martin recalled that the accident occurred as he was returning to the quarry after hauling his third load of stone that day. His truck was empty, and its fourth axle was in a retracted position. He planned on making one further delivery that afternoon.

The witness had a detailed recollection of speed limits and corresponding geographic features for northbound traffic on Two Rod, and reported that the maximum travel speed became reduced from 40 to 35 miles per hour in the area of a cemetery at the south end of the hamlet, approximately one-half mile, or a little more, from the Bullis intersection. He also noted that the downward slope of the roadway commences with a slight initial drop in the area of the cemetery, and then a leveling that precedes a second slight drop, followed by a steeper slope down toward Bullis. The downward grade then continues to a bridge located an unstated distance north of Bullis, at which point the roadway begins to proceed uphill. He acknowledged that a yellow marking sign advised northbound traffic of the Bullis intersection, and that a flashing yellow overhead light was positioned at the intersection itself. He agreed with Defendant that the seat of his truck was approximately five feet from the ground, and higher than a car's seat, and that he was able to see the flashing light from the flat area of the roadway just north of the cemetery. To me, however, that increased ability to view the oncoming flashing light is of no significance in and of itself, given Mr. Martin's familiarity with the intersection. Moreover, while Mr. Martin agreed that the truck's elevation would generally have allowed for some longer sight lines along Two Rod, the witness also made clear the Marilla Grill building blocked his view of eastbound vehicles at the Bullis stop sign until he got close to the intersection, although he could observe cars that pulled beyond the stop sign toward the intersection when he was approximately halfway down the main part of the hill. Significantly, Mr. Martin was also familiar with the approach to

the intersection along Bullis, and commented on the difficulty that he experienced in observing oncoming traffic as he would cross Two Rod in his truck.

Mr. Martin recalled that as he proceeded downhill on Two Rod and approached the Bullis intersection he "coasted" at what he recalled was 35 miles per hour, without applying power to the vehicle. That testimony is significant to the extent that the truck driver would also not have been braking as he proceeded downhill – a factor that would readily support an increase of speed to the 40 mile-per-hour estimate made by Deputy Karney, or the 45 mile-per-hour estimate by Mr. Levine.[22] I accept Mr. Martin's testimony that he never saw the white Mercury at the eastbound Bullis stop sign, since his view of that specific location would have been obstructed by the restaurant structure. I also accept that the truck driver did not see Mrs. Kiczewski initially pull forward from the stop sign. Conversely, and again based upon considerations of time, distance and reaction times, I reject Mr. Martin's comment that he first saw the Mercury within the roadway, at least to the extent he intended that statement to mean the travel lanes of Two Rod. On those same grounds I reject Mr. Martin's equivocal testimony that the crossing vehicle was traveling "fast." Again, if Mr. Martin had been traveling at Deputy Karney's maximum estimate of 45 miles per hour, and his act of coasting would have shortened a standard two-second reaction time by half, he still would have needed almost 2½ seconds to react to the crossing vehicle and place 92 feet of pre-contact skid marks, even assuming that braking did not work its obvious function of slowing his truck below that highest estimate of speed. Over that time Mrs. Kiczewski would have driven more than 50 feet at 15 miles per hour, and

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[22] Deputy Karney's speed estimate did include a variation of up to 5 miles per hour in either direction, that is a range of 35 to 45 miles per hour.

approximately 100 feet at 30 miles per hour. I must conclude, therefore, that Mr. Martin began to react to the white Mercury as it entered the 35-foot section of Bullis that approached the west fog line of Two Rod, and at a speed that only seemed to be faster – and closer – as he recognized the danger suddenly presented.[23]

I find that Mr. Martin did apply his brakes as hard as he could in response to the crossing vehicle, and that his wheels locked up as a result. Despite 92 feet of skid marks, which slowed his vehicle by some unstated measure, the dump truck struck the passenger side of the Kiczewski automobile within the northbound lane of Two Rod. The two vehicles then moved in tandem to the north, and slightly to the east, before stopping. Although the Mercury sustained significant passenger-side damage in the collision, Mr. Martin's truck sustained only minor front-end damage – mostly in its left fender area – and he was able to back his vehicle away from the Mercury, and later drive it to an unspecified location for post-accident inspection. While Mrs. Przesiek and Mrs. Kiczewski were both transported to Erie County Medical Center following the accident, Mr. Martin was not injured in the collision.

As noted, at the point of collision both vehicles moved north and slightly to the east. In the course of his testimony Mr. Levine cited that eastward movement in opining that the Mercury must have been traveling at 30 miles per hour at the point of impact, since considerable force would have been needed to push a large truck sideways. That opinion is hard to credit, since the State's expert was well aware of that accident factor when he previously had concluded that the

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[23] Mr. Levine's testimony that Mr. Martin might have coasted downhill with his foot ready to brake, potentially out of concern that Mr. Piasecki might turn in front of him, is somewhat speculative. I do accept that the act of coasting, and Mr. Martin's general awareness of the intersection, would support a shortened response time on his part. I also note that Mr. Levine has consistently believed that the Swimline truck traveled at 45 miles per hour before applying its brakes.

Kiczewski vehicle had only been traveling at half that speed. Further, while Mr. Levine testified generally about the weight of the truck, and the forces required to move it to the east, he offered no analysis of speed, weight and roadway friction to support that revised conclusion. I also am mindful that Deputy Karney believed that the truck was angled as it first struck the automobile, which contributed to the movement of both vehicles to the east. The photographs of damage to the left front of the truck provided support for that opinion. Moreover, as the Przesieks have urged, the skid marks themselves reflect a pre-impact movement of the truck slightly to the east. Those factors cause me to conclude that Mr. Martin turned somewhat to the right just prior to striking the car, notwithstanding his denial of any deliberate turning as he braked. That conclusion further undermines the State's expert's trial revisionism on the issue of speed.

I will next discuss one other observation that Mr. Levine made about traffic control at the intersection. At trial several witnesses had made note of Vehicle and Traffic Law § 1172 (a), which requires vehicles to stop where so directed by a stop sign. Since there undisputedly was no marked stop line across the eastbound lane of Bullis in the area of the Marilla Grill, witnesses had stated or implied that under the statute Mrs. Kiczewski was obligated to drive beyond the sign, and stop "at the point nearest the intersecting roadway where the driver ha[d] a view of the approaching traffic on the intersecting roadway before entering the intersection." Mr. Levine, in contrast, focused on a superseding requirement within section 1172 (a) that where a crosswalk also exists the driver must "stop before entering the crosswalk on the near side of the intersection." The State's retained expert noted that a sidewalk extended along Two Rod in front of the Marilla Grill, ending at the edge of Bullis just east of the stop sign, and opined that the

walkway would constitute a "crosswalk" for purposes of section 1172 (a).[24] On that basis he believed that Mrs. Kiczewski was obligated to stop to the west of the stop sign.

I make several comments in relation to Mr. Levine's testimony on the point. First, I acknowledge that the sidewalk that extends from the front of the Marilla Grill to the Bullis road edge would appear to an approaching driver to constitute a crosswalk for purposes of the Vehicle and Traffic Law. However, the sidewalk to the north of the intersection instead extends west along Bullis, adding ambiguity to whether lateral lines could connect the sidewalks on the opposite side of that roadway, such that traffic should stop at that point. To the extent that the stop sign was instead intended to direct traffic to stop further to the east, where a view of approaching traffic along Two Rod was optimized, the stop sign was positioned 15 feet beyond the maximum 20-foot distance recommended under MUTCD § 211.3 (b) (1). I would add that section 1172 (a) makes an express reference to being subject to Vehicle and Traffic Law § 1142. That latter provision directs inter alia that traffic stopping at a stop sign yield the right of way to vehicles that have entered or are closely approaching the intersection from another highway (*see* section 1142 [a]).

It is Defendant's position that the intersection was reasonably safe, and that accident resulted solely from the negligence of Mrs. Kiczewski, Claimant and/or Mr. Martin.[25] The State has further urged that under the municipal planning doctrine (*see generally Weiss v Fote*, 7 NY2d 579 [1960]), it cannot be held liable under traditional principles of negligence for the condition

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[24] *See* Vehicle and Traffic Law § 110, defining a crosswalk as not simply an area of the road surface marked for pedestrian crossing, but also the unmarked part of a roadway at an intersection that connects the lateral lines of the sidewalks on the opposite sides of the highway that adjoin its curbs and edges.

[25] Questions of burden of proof will be later discussed.

of the intersection, since the DOT had purportedly engaged in a considered review of the safety of the intersection for which it is entitled to discretionary immunity. I will next address the evidence elicited at trial with respect to that issue.

I find that on July 20, 1999, the Town Board of the Town of Marilla formally requested, as a governmental body, that the DOT convert the intersection of Two Rod and Bullis to a four-way stop (*see* exhibit 49, p 0026 [letter]). In making that request the Town cited "the numerous accidents that have occurred at this intersection" (*id.*). That request was directed to James Barnack, who was then in charge of the DOT's Regional Traffic and Safety Office, which performed traffic studies in response to requests by government officials, police agencies or even private individuals for changes in traffic devices or other safety improvements on State highways. On August 10, 1999, Kenneth Kosnikowski, a professional engineer who supervised the Regional Traffic Operations Unit at that time, responded to the Town Board's request in a letter advising that a study of the request had been initiated (*see* exhibit 49, p 0025 [letter]). At some point Mr. Kosnikowski assigned Vincent Fininzio, who was then employed by DOT as a "Civil Engineer-1,"[26] to study the Town's request, and make recommendations regarding the matter to his supervisors within the DOT. Such studies were a routine part of Mr. Fininzio's job functions. He recalled that Mr. Kosnikowski discussed the Town's letter with him, and specifically directed him to travel to the scene to determine if a four-way stop was justified. He acknowledged that his study was confined to that specific purpose, while acknowledging that he

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[26] Despite his title Mr. Fininzio was not a licensed professional engineer, and did not possess an engineering degree.

could have made other recommendations to improve the safety of the area in the course of his investigation.

In pursuing the matter Mr. Fininzio first obtained summaries of the accident reports for the intersection over the three preceding years, which were maintained within his office (*see* exhibit 49, pp 0033-0035 [reports]). He determined that while 11 accidents had been reported at the intersection between November of 1995 and January of 1998,[27] only 5 were serious enough to be "reportable," and he confined his analysis to charting those more serious matters. All of those five reportable accidents involved right angle collisions at the intersection,[28] although only one involved an eastbound vehicle on Bullis colliding with a northbound vehicle on Two Rod, as later occurred in this instance. He believed that his office's accident summaries would have extended to all collisions at that site, even if reported under the road name Bullis, rather than Two Rod. Still, he did not contact the Erie County Sheriff's Department to determine whether that office maintained accident records under the County's road name. Nor did he, nor any other representative of the DOT, contact the Town Board to determine what had inspired it to assert in 1999 that a large number of accidents had occurred at the intersection.

Mr. Fininzio next examined the road history that his office maintained, which he did not find to be particularly helpful, although it did indicate that in 1995 a contractor had made some

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[27] I understand that the accident history records covered a three-year period from October 1, 1995 through September 30, 1998.

[28] The report of the accident on November 21, 1995 did not expressly recite "right angle," but was so deemed by Mr. Fininzio as accident number 3 in his diagram (*see* exhibit 49, p 36).

changes to the intersection.[29] He then traveled to the site to physically inspect the intersection.[30] Mr. Fininzio noted that in conducting his inspection he would have driven along each approach to the intersection approximately 5-6 times, in part to observe signage, traffic patterns and sight lines. He also exited his vehicle to examine shoulder widths, pavement markings and sight distances. However, he did not speak with anyone at the scene, and did not take any specific measurements of distances, road grades, stopping times, or the 85th percentile speed for vehicles traveling on Two Rod. After making notes at the site he returned to his office, where he completed a drawing of the location. At that point he also reviewed 1997 traffic count data for a section of Two Rod near the intersection that his office maintained, but did not obtain traffic count data from Erie County for that area approaching Bullis.

Following his study Mr. Fininzio drafted a letter denying the Town's request (exhibit 49, p 0024). That letter, dated October 14, 1999, was prepared on behalf of Richard E. Pratt, a professional engineer who served at that time as the Assistant Regional Traffic Engineer, and thus supervised both Mr. Fininzio and his immediate supervisor, Mr. Kosnikowski. On the submissions it appears clear, that as a matter of routine, such study determinations were initially drafted by the nonengineer who had been directed to review the request for a road modification, and then ratified by a professional engineer within that office, evidently to accommodate the volume of road study requests that are made to the DOT. That routine was followed in this

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[29] On the proof it appears that the 1995 contract would have implemented the signage changes recommended in Ms. Surdej's 1994 study of the area, including the removal of the advisory 25 mile-per-hour speed sign.

[30] Mr. Fininzio could not remember the exact date on which he viewed the site, although he was certain that it would have been a weekday. He also possessed little in the way of a recollection of the exact procedures that he followed in conducting his inspection.

instance, although it appears that Mr. Pratt approved Mr. Fininzio's recommendation in the place of Mr. Kosnikowski due to the latter's unavailability. Regardless, I find that Mr. Pratt's letter reflected the approval of a professional engineer within the DOT, based upon justifications made to him by Mr. Fininzio, and possibly the tender of supporting documentation. Thus it was Mr. Pratt who denied the Town Board's specific request to install stop signs on Two Rod at the Bullis intersection, and in so doing adopted the brief explanation that Mr. Fininzio had drafted, as follows:

> A number of factors were considered during our field investigation, including highway geometrics and the amount of sight distance at the approach to the intersection.
>
> As a result of our investigation and a review of the accident history, we believe that, due to the limited sight distance and steep grade on Two Rod Road approaching Bullis Road, a multi-way stop at this location could possibly increase the number of accidents, especially during the winter season (exhibit 49, p 0024).

Mr. Pratt confirmed at trial that he continued to agree with the letter's conclusion that a four-way stop sign was inappropriate for that intersection, since the placement of a stop sign toward the bottom of a grade would likely increase the number of accidents at the intersection.

In weighing the testimony of Mr. Fininzio I must reject his effort to challenge the accuracy of Mr. Kiczewski's photographs of the eastbound Bullis stop sign and Marilla Grill (exhibits 1-4, 19-21). Mr. Fininzio did not take any photographs or measurements of the stop sign location in his own review, and acknowledged a lack of recollection of many details of his inspection. For Mr. Fininzio to say that Mr. Kiczewski's perspective when he took photographs of the site was closer to the sign than a driver would have experienced requires a precision of memory for the event that he did not otherwise demonstrate in his testimony. I also note that Mr.

Fininzio himself reported that he needed to drive beyond the stop sign to be able to obtain a clear view to the south on Two Rod.

By far the greatest failing in the Fininzio study had to do with sight lines. As previously noted, Mr. Fininzio did not measure sight distances for the Two Rod/Bullis intersection, and simply estimated – inaccurately – that the view for northbound traffic would be 200-300 feet. Based upon that estimated sight distance, and the steep downward grade on Two Rod, Mr. Fininzio and Mr. Pratt believed that the installation of a stop sign would actually increase the number of accidents at the intersection, particularly in winter months. The DOT's study thus recognized a sight distance problem, but failed to extend its analysis to the difficulties that crossing traffic would experience at the intersection. While Mr. Ochterski would later – and quite easily – measure the true sight distance at 347 feet, and on that basis apply certain AASHTO computations to determine safe crossing times for a 35 mile-per-hour intersecting highway, Mr. Fininzio and Mr. Pratt did not make any similar computations of crossing times in their assessment of the intersection.[31]

I accept that at the time of his study Mr. Fininzio had reviewed documentation reflecting that the DOT's "no standing" directive near the intersection had been rescinded in 1976, and that his inconsistency on the point in a prior deposition again represented a simple failure of recollection. However, in his study he did not assess whether parking along Two Rod near the intersection could itself present a sight line problem.

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[31] Both the MUTCD and AASHTO excerpts in evidence include diagrams and formulas for measuring sight distances and stop and yield sign use. There is no evidence that the DOT considered those items in the course of the 1999 study.

More generally, and based upon the corroborating testimony of Charles J. Getz, a fellow DOT employee who similarly conducted road studies, as well as testimony from Mr. Pratt, Mr. Kosnikowski and Mr. Levine, I find that much of what Mr. Fininzio did in his review involved questions of engineering judgment in a routine, but sincere, assessment of the request made by the Town of Marilla. Those matters of judgment extended to what, with hindsight, have been proffered by the Przesieks as failings on his part. They also apply to factors that, while articulated, are themselves guides rather than mandates.

For his part Mr. Ochterski relied upon his own measure of sight line distance, as well as an assumed speed of 35 miles per hour for northbound Two Rod traffic, and then applied an AASHTO formula to determine that automobiles on Bullis would need a minimum of 330 feet of sight distance to safely cross the intersection. Claimants' expert cautioned, however, that his measured sight distance of 347 feet would not be sufficient for trucks or buses[32] to safely cross Two Rod under the AASHTO design standards. Similarly, his computation assumed a 35 mile-per-hour speed, while there is no evidence as to what the prevailing 85th percentile speed on Two Rod actually was. In that regard, Mr. Ochterski noted that vehicles traveling along a downward slope tended to increase their speed. I would add that the AASHTO safe crossing design provisions relied upon by Mr. Ochterski did not reflect the additional complications that the eastbound Bullis stop sign and structures at the corner also presented for motorists attempting to traverse the intersection.

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[32] Mr. Piasecki had testified that his daughter's school was located on Bullis, a short distance to the east of the intersection. He also explained that he initially stopped short of the intersection to facilitate any bus traffic that might want to turn north onto Two Rod.

I am mindful that in the course of his testimony Mr. Levine made clear that AASHTO standards only applied to the DOT by reference within the Highway Design Manual and related guidelines. For that reason the figures cited by Mr. Ochterski – 330 feet for automobiles and as much as 425 feet for truck clearance – would apply to the design of new highways, and not existing intersections. Nevertheless, vehicles do need to safely interact on existing highways, and Mr. Ochterski's reference to a design standard for safe crossing represents the only objective factor cited in this case. While not a binding mandate, the figures reinforce the inadequacy presented by the Fininzio sight line estimate, and the difficulties presented to all eastbound Bullis vehicles in crossing the intersection. That difficulty is compounded if the 85th percentile speed for downhill vehicles on Two Rod exceeded 35 miles per hour, and/or if stop sign placement causes confusion for Bullis traffic.

Mr. Levine offered several additional measurements and opinions relevant to this determination. First, he noted that based upon his own inspection of the scene Mrs. Kiczewski should have been able to observe the top portion of the oncoming Swimline truck from a distance of 550 feet from the intersection,[33] and Mr. Martin should have been able to view the intersection from a distance of approximately 500 feet. Since Mr. Martin would then have needed close to 10 seconds to reach the intersection at 35 miles per hour, Mr. Levine opined that in this instance there was more than enough sight distance for the two vehicles to observe and respond to each other, without colliding. Thus, in Mr. Levine's view any deficiencies on the part of the State would not have contributed to the accident.

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[33] At one point Mr. Levine increased his estimate to 550-600 feet.

The State's expert further opined that a 35 mile-per-hour speed limit on Two Rod was appropriate, noting the two speed limit reductions that previously had occurred in that area. Mr. Levine noted that speed limits are typically based upon the 85th percentile of the range of speeds measured for an area of highway. He added that where speed limits are fixed too low drivers will tend to disobey them. He agreed that a four-way stop at the intersection was inappropriate, and should generally be considered only as a prelude to the installation of a three-color regulatory light, which he also believed was not appropriate. He asserted that the Fininzio study was adequate, and that the lack of traffic volume information for Bullis and more recent accident data was of no significance, since the exercise of engineering judgment strongly favored a denial of the Town's request in any event. He observed that any nonconformance with ideal design criteria was a consequence of the manner of development of the intersection, with older buildings adjoining older roads that simply had developed over time.

Although Mr. Levine was consistent in attributing the accident to driver error, and in absolving the State from liability, he clearly – and in my view, with no justification – amended this theory of Mrs. Kiczewski's speed and manner of operation at trial. As previously discussed, I have rejected Mr. Levine's revised analysis of Mrs. Kiczewski's conduct. That change of opinion has been a factor in the reduced weight that I have afforded his opinion testimony more generally.[34]

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[34] At times testimony regarding secondary matters can impact on overall credibility. I note that at one point Mr. Levine testified to a lack of awareness as to where the Marilla municipal offices were located, but later reported that while inspecting the accident scene he tried to visit that building, but found it to be closed. No further explanation for that seeming inconsistency was offered at trial. Those comments have impacted negatively in my review of his testimony.

DISCUSSION

Without question the State owes the public a nondelegable duty of care to maintain its roadways in a reasonably safe condition (*Friedman v State of New York*, 67 NY2d 271, 283 [1986]). However, governmental entities do not serve as insurers of the safety of their roadways, and so long as a highway may be said to be reasonably safe for people who obey the rules of the road, that duty is satisfied (*see Tomassi v Town of Union*, 46 NY2d 91, 97 [1978] [addressing liability of municipality for construction of highway with drainage ditches on each side]). The State's negligence cannot be presumed from the mere happening of an accident, and instead must be affirmatively established by competent evidence of a breach of a duty of care (*Mochen v State of New York*, 57 AD2d 719, 720 [1977]). The Przesieks bear the burden of proving an entitlement to relief by a fair preponderance of the credible evidence (*Rinaldi & Sons v Wells Fargo Alarm Serv.*, 39 NY2d 191, 196 [1976]). Conversely, to the extent Defendant seeks to urge Claimant's comparative fault, as well as third-party culpability for the accident on the part of Mrs. Kiczewski and Mr. Martin/Swimline, the State would possess the burden of proof, again by a preponderance of the evidence.[35]

An added consideration exists in circumstances where claims of negligence arise from municipal planning and decision-making functions. In the field of traffic design engineering governmental entities are afforded a qualified immunity from liability arising out of a highway planning decision (*Friedman*, 67 NY2d at 283-284; *Weiss v Fote*, 7 NY2d at 585-587). For that reason courts are not permitted to review planning determinations under the guise of negligence

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[35] The State raised "the culpable conduct and/or want of care and/or assumption of risk on the part of the Claimant and/or other persons or entities" as an affirmative defense in paragraph fourth of its answer.

litigation, and "something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public" (*Weiss v Fote*, 7 NY2d at 588). Instead, the State's qualified immunity can only be overcome with proof that a highway planning decision evolved without adequate study or lacked a reasonable basis (*see Friedman v State of New York*, 67 NY2d at 284; *Weiss v* Fote, 7 NY2d at 589; *Zecca v State of New York*, 247 AD2d 776, 777 [1998]). Several other factors impacting on qualified immunity must be noted. First, "[o]nce the State is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger" (*Friedman,* 67 NY2d at 284). Second, after it implements a traffic plan the State remains under a continuing duty to review its plan in light of its actual operation (*id.*). Lastly, the qualified immunity that results from the State's exercise of discretionary judgment is limited to the scope of the matter studied (*Weiss v Fote*, 7 NY2d at 588 [qualified immunity applies where public planning body has entertained and passed on very same question of risk]; *see also Affleck v Buckley*, 96 NY2d 553, 556-557 [2001]; *Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 673-674 [1999] [discretionary immunity does not apply where study addressed a different risk]).

Here, I find that the Fininzio/Pratt study in response to the Town Board's request was plainly inadequate. In that regard, I have placed little weight on comments from Mr. Fininzio's coworker, Charles J. Getz, regarding his own preferred procedures in conducting such studies, or Mr. Ochterski's opinions as to a prudent manner of evaluating the safety of the intersection. Conversely, I have afforded great weight to the role that engineering judgment would play in such reviews. I also have credited Mr. Levine's observation that persons with engineering

experience can readily estimate slopes and distances without the need to conduct a survey, such that even decisions as to whether to take such measurements become matters of judgment. However, Mr. Fininzio's responsibility in this instance was not simply an ad hoc review. Rather, it fell – at least in part – within certain criteria set forth within the MUTCD, and on that basis the reasonableness of his assessment of whether a four-way stop should have been implemented became subject to certain specific considerations, as provided within that manual's section 211.5 (a) (5):

> (ii) The occurrence within a twelve-month period of five or more reported accidents of a type susceptible to correction by multi-way stop control. Such accidents include turn collisions, as well as right-angle collisions.
>
> (iii) A total of at least 4000 vehicles enter the intersection during any eight hours of an average day, with at least 1600 vehicles and pedestrians from the side road during the same eight hours, and delays to side road vehicles average at least thirty seconds during any one hour. When the eighty-five percentile speed of traffic approaching on the artery exceeds forty miles per hour, the above minimum volumes are reduced to 2800 and 1100, respectively.

Notwithstanding the provision within subsection ii above that the DOT evaluate "reported" accidents within a 12-month period, Mr. Fininzio determined to focus solely upon those accidents that were serious enough to be mandatorily reportable to the Department of Motor Vehicles. His lack of concern as to what caused the Town Board to report that "numerous accidents" had occurred at the intersection in its July 1999 letter, or whether other intersection accidents had been reported under the name Bullis Road, also detracts from the thoroughness of his study. Similarly, while subsection iii anticipates that a review occur for traffic volume on both intersecting highways, Mr. Fininzio did nothing to obtain data regarding vehicular/pedestrian volume on Bullis. Nor did he determine whether delays to crossing vehicles

on Bullis averaged at least 30 seconds during any given hour, or whether the 85th percentile speed of traffic approaching the intersection exceeded 40 miles per hour, such that a different manner of analysis of traffic volume should have occurred.

Other inadequacies in the Fininzio/Pratt study relate to the rationale offered for rejecting an all-way stop. While the letter to the Town Board makes reference to sight lines, Mr. Fininzio simply estimated the distance from the intersection to the crest of the closest uphill rise, rather than measure or estimate a true vehicular sight distance. Moreover, in my view the letter's expressed concerns with the difficulty that northbound drivers would experience in observing and stopping for an all-way stop, particularly in winter months, effectively acknowledged that the sight line distance for those vehicles as they crested the hill on Two Rod was inadequate. Significantly, Mr. Fininzio did not consider other methods to mitigate those sight line problems for northbound traffic on Two Rod. Nor did the DOT consider the concurrent sight line problem that necessarily existed at the intersection, i.e. that just as northbound drivers on Two Rod had a limited view of crossing Bullis traffic, drivers on Bullis also faced sight line problems as they looked south along Two Rod. The inadequacy and limitations of the study undermine the State's assertion of discretionary immunity in weighing the allegations of negligence in the functioning of the intersection.

With respect to the issue of negligence, I initially note that the failure of the State to conduct an adequate safety study does not in and of itself serve as a basis for liability (*see Brown v State of New York*, 79 AD3d 1579 [2010]). Rather, that failing simply precludes reliance upon the qualified immunity doctrine, and it remains the burden of a claimant to establish that the State was aware of and failed to remedy a dangerous condition, and thereby caused or contributed

to the occurrence of an accident (*id.*). On the evidence I cannot find that Claimants have established that the State's failure to convert the intersection to an all-way stop constituted negligence. Mr. Pratt and Mr. Levine testified to the increased danger that a four-way stop would present at the intersection, and Mr. Ochterski declined to affirmatively opine on the topic, citing the lack of supporting data from the study process.[36]

So also, I must deny the claim of negligence to the extent premised upon the earlier removal of the supplemental stop sign at the northwest corner of Bullis. Mrs. Kiczewski was clearly able to observe and respond to the larger stop sign that was installed after Ms. Surdej's 1994 sign review,[37] and supplemented by the flashing red light. I further reject Claimants' assertions that the State was negligent in failing to erect a sign warning Bullis traffic that intersecting traffic on Two Rod did not stop, since it has been established that the State's MUTCD was not amended to authorize such signage until a point that followed Mrs. Przesiek's accident.

Conversely, I accept Claimants' assertion that Defendant was negligent in failing to correct a dangerous condition that existed at the intersection, notwithstanding the notice provided by reason of the letter from the Town of Marilla dated July 20, 1999, and the observations made by the DOT in its subsequent review. Quite simply, Mr. Fininzio's estimated 200-300 feet of sight line distance for northbound traffic on Two Rod was insufficient to safely afford eastbound

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[36] I observe that Mr. Ochterski commenced his own investigation of the accident within hours of the incident. I see nothing within the record that would have precluded him from securing accident data for the intersection, as well as the traffic counts for Bullis in the area of the intersection.

[37] Although not specifically raised by the State, it would appear that Ms. Surdej's signage decision would also have been subject to discretionary immunity under *Weiss v Fote*.

automobiles on Bullis the ability to cross the Two Rod intersection, even assuming that those vehicles moved beyond the stop sign to stop/repeat a stop closer to the intersection, and that northbound traffic on Two Rod was not traveling at a speed in excess of 35 miles per hour. To the extent that Mr. Ochterski measured sight distance at 347 feet, that distance may have been adequate for automobile passage, but remained inadequate for crossing bus and truck traffic, again assuming that those vehicles stopped at or near the Two Rod fog line, and that northbound traffic on Two Rod did not exceed 35 miles per hour. As vehicles increased their speed – a known and thus foreseeable factor on a downhill slope – sight distance problems would become exacerbated.

Compounding the danger was the placement of a stop sign for eastbound traffic on Bullis at a point where views both north and south along Two Rod were severely impaired, and confusion existed as to where vehicles should stop to comply with that sign. Defendant's retained expert believed that the positioning of a sidewalk just to the southeast of the stop sign compelled eastbound traffic to stop behind the sign pursuant to Vehicle and Traffic Law § 1172. However, the absence of a clear corresponding sidewalk along the north side of Bullis may instead have served to require that vehicles just drive beyond the stop sign, and stop near the Two Rod fog line. However, that intersection – 35 feet from the stop sign – was beyond the 20-foot recommended limits for a direction to stop under MUTCD § 211.3 (b) (1), if indeed stopping at the intersection, rather than stopping behind the crosswalk, had been the intended purpose of the stop sign. The mixed message as to where to initially stop, at a location where clearance margins for crossing Two Rod were at best barely adequate for cars, and inadequate for buses and trucks, added to the danger presented for crossing vehicles.

As previously addressed, Mr. Pratt and Mr. Fininzio necessarily knew of the problem of sight line impairment by reason of their response to the Town of Marilla. Yet neither of them thought it prudent to direct a further reduction in speed, notwithstanding that the records Mr. Fininzio reviewed reflected that at one point the State had posted an advisory 25 mile-per-hour speed through the hamlet. While Mr. Fininzio asserted that he had concluded that a 35 mile-per-hour speed limit was appropriate in the area, he offered nothing that would support that he had considered that question in the course of his study. He also acknowledged that State highways within villages in this region do at times have 30 mile-per-hour speed limits. Mr. Ochterski opined, and I accept, that a reduction of allowable speed,[38] would have worked to mitigate the sight line problem that the DOT implicitly acknowledged in its letter, and would have afforded all traffic a safer passage through the intersection.

In apportioning fault I find that Mrs. Kiczewski, Mr. Martin and the State all contributed to the occurrence of the accident. However, there is no basis for finding that Mrs. Przesiek assumed any risk of injury in riding as a passenger in the Kiczewski vehicle, or otherwise bears culpability in this matter. Of the three tortfeasors Mrs. Kiczewski by far is the most culpable, for failing to again stop as she moved beyond the stop sign at Bullis, and neared the intersection itself, in order to observe the two vehicles that possessed the right of way. That failure greatly outweighs all other considerations in this matter. Mr. Martin and the State share lesser culpability for causing the accident. In that regard, even minor variations of speed mattered in this accident, and I accept that the truck operator was driving between 5 and 10 miles per hour

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[38] Although Mr. Ochterski suggested a 25 mile-per-hour speed limit, he also recognized the improvement in time and distance for driver responses in the area of the intersection as the speed along Two Rod became reduced from 35 to 30 miles per hour.

over the speed limit when he first observed the Kiczewski vehicle crossing the intersection. The State, however, is more culpable than Mr. Martin, in that it failed to address the known sight line dangers that existed at the intersection.

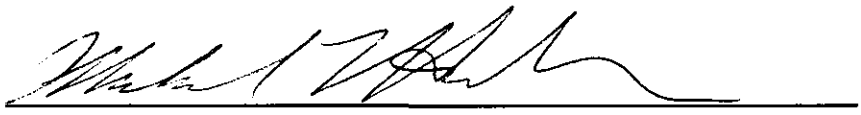
Defendant has noted that notwithstanding any difficulties that automobiles might possess in observing other automobiles approaching the intersection, those claimed deficiencies could not have contributed to this accident, since the Swimline truck was approximately 10 feet tall, and Mr. Martin's viewpoint was some 8 feet from the ground. I agree that the height of the vehicle and its cab worked to significantly increase its visibility to other vehicles, as well as Mr. Martin's viewing distance. Nevertheless, the sight impairment presented at the eastbound Bullis stop sign negated any benefit that the truck's height might otherwise have presented, such that the dangerous condition of the intersection otherwise remained, and contributed to the accident.

I hereby apportion liability for purposes of this claim at 20% against the State, 70% against Mrs. Kiczewski, and 10% against Mr. Martin.

A status conference is hereby scheduled for Wednesday, February 6, 2013, at 9:30 a.m., to schedule a trial date for damage issues.

Let interlocutory judgment be entered accordingly.

Buffalo, New York
November 8, 2012



MICHAEL E. HUDSON
Judge of the Court of Claims