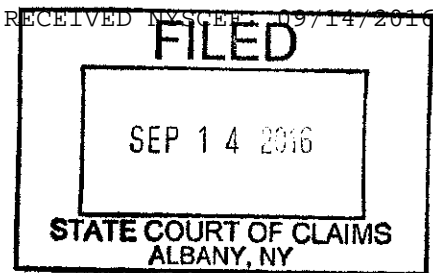


Driscoll v State of New York
2016 NY Slip Op 32892(U)
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Court of Claims
Docket Number: 122488
Judge: Francis T. Collins
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STATE OF NEW YORK COURT OF CLAIMS

MARISSA DRISCOLL and EMILIA DRISCOLL,

Claimants, DECISION

-v-

THE STATE OF NEW YORK,

Claim No. 122488

Defendant.

**BEFORE: HON. FRANCIS T. COLLINS
Judge of the Court of Claims**

**APPEARANCES: For Claimants:
Conway and Kirby, PLLC
By: Dana M. Boniewski, Esquire**

**For Defendant:
Honorable Eric T. Schneiderman, Attorney General
By: Belinda A. Wagner, Esquire
Assistant Attorney General**

Claimant¹ Marissa Driscoll seeks damages for injuries sustained in an automobile accident on September 26, 2012. The claim was bifurcated for trial and this decision relates solely to liability.

At the time of the accident, claimant was a passenger in a 2006 Kia operated by her then boyfriend Kenneth Desautels. Mr. Desautels was 19 at the time and had passed his road test to obtain his New York State driver's license approximately two weeks prior to the date of the accident. Mr. Desautels picked up the claimant at her house on Cooks Court in Waterford and turned westbound on Lansing Lane with the intention of turning left onto Route 9 in order to go to

¹ Emilia Driscoll's claim is derivative in nature, therefore, all references to claimant will be to Marissa Driscoll.

the Cheesecake Factory in Colonie, New York. Mr. Desautels stopped at a stop sign at the intersection of Lansing Lane and Route 9. Although he initially testified that he looked right and left at that point before making a left turn onto Route 9 from the stop sign, he had previously testified at an examination before trial (EBT) that he made two additional stops on Lansing Lane before proceeding to turn left on Route 9:

“Question: ‘All right. So as you pull up [to] the stop sign, we’ll call that one stop’?”

‘Yeah’.

Question: ‘And then the white line, that was the second stop’?”

‘Yeah’.

‘And then you pulled up a little more and stopped’?”

‘Yeah’.

‘So three stops?’

‘Yes’ ”. (T. 57, *see also* T. 88-89).²

Mr. Desautels then explained that he first made a stop at the stop sign but, because his view was obstructed by a house and bushes, he proceeded to the stop line where, according to testimony at his EBT used to refresh his recollection at trial, he looked to the left and was “ ‘able to see the whole road, except going downhill’ ” (T. 54, *see also* T. 87-89). He explained that the condition “downhill” on Route 9, south of the intersection, obstructed his view of oncoming traffic “because you couldn’t see coming – anything coming up” (T. 87, *see also* T. 89). Mr. Desautels testified that he then pulled forward to a position beyond the stop line, looked to his left, then to his right and back to his left again before initiating his left turn onto Route 9. He testified that he first saw the other vehicle, which impacted his driver’s door, when it was only one inch away from his vehicle.

² Quotations are from the trial transcript (T.).

Although Mr. Desautels testified that the impact occurred in the center median, the responding police officer, State Trooper Gregory Franchini, testified that his investigation determined the impact occurred in the right northbound lane of Route 9. After the accident, Mr. Desautels' vehicle came to rest in the center median, as depicted in Exhibits C, H, I and J. Mr. Desautels received tickets for "driving out of class" and for failure to yield the right of way.³

Claimant contends the defendant created a dangerous condition when it reconstructed Route 9 in 1959 without adequate sight distance for a driver looking south on Route 9 while stopped on Lansing Lane. In addition, claimant contends that the defendant had notice of the dangerous condition but failed to take appropriate action to remedy it. It is alleged that the defendant's negligence was the proximate cause of the claimant's injuries.

In response to citizen complaints, two sight distance studies were performed at the intersection of Lansing Lane and Route 9 in the Town of Halfmoon. Now former Department of Transportation (DOT) employee, Joseph DeSorbo, performed a sight distance study of the intersection in 1996 which yielded a sight distance of 1,140 feet for northbound traffic on Route 9. No remedial action was taken as a result of the study because, as noted in the report, there was "Excellent SD". The report notes "[t]here is a dip in roadway to the south . . . vehicles do not fully leave view of driver intending to exit Lansing Lane" (Exhibit 74). Mr. DeSorbo's report also included an accident history for the period beginning January 1, 1991, which revealed a total of three accidents in the vicinity of the subject intersection, only one of which involved a vehicle turning left from Lansing Lane onto Route 9 (*see* Exhibit 74).

³ Mr. Desautels pleaded guilty to a violation of Vehicle and Traffic Law § 1110(a) (Obedience to and required traffic-control devices). The ticket issued for driving out of class was dismissed.

In February 2009 a citizen, Martha Wickham, complained regarding conditions at the intersection of Lansing Lane and Route 9. Notes contained in a DOT phone log state: “Martha Wickham . . . called re: was in a MVA Friday @ 10 pm. Tells area is dangerous. Wants lights installed, change signage and sight distance issue due to knoll in road – can’t see NB traffic” (Exhibit 63). Nancy Connolly, Chief Engineer I in the Region 1 Traffic Safety and Mobility Unit, performed a sight distance study of the intersection in response to the complaint. While stopped on Lansing Lane 12 feet from the pavement edge line⁴ of Route 9, Ms. Connolly used a radar gun to measure the sight distance from Lansing Lane both south and north of the intersection. According to Ms. Connolly, then current DOT standards called for measuring sight distances from a point 12 feet from the edge line. She did not refer to the 2001 AASHTO (American Association of State Highway and Transportation Officials) publication entitled “A Policy on Geometric Design of Highways and Streets” (Exhibit QQ) because AASHTO guidelines are not typically used for sight distance studies of existing roads. She determined that the sight distance for vehicles approaching the intersection from the left (northbound on Route 9) was 1,100 feet, and for vehicles approaching the intersection from the right (southbound on Route 9) it was 1,900 feet, plus or minus. Utilizing a chart entitled “Table NY2C-4 Guidelines for Advance Placement of Warning Signs (English Units)” from the 2008 New York State Supplement to the 2003 National MUTCD (Exhibit 80), Ms. Connolly determined that the stopping sight distance at the intersection far exceeded the 495 feet required for vehicles traveling at a speed of 55 miles per hour.

⁴ The edge line is the area where the white line (fog line) on the side of the road would be located in the absence of an intersecting road (T. 115).

Ms. Connolly's evaluation of the intersection also included an accident analysis in which she found that there were 24 accidents in the vicinity of the intersection from January 1, 2002 through February 28, 2009 (Exhibit 66). Of those accidents, six were right-angle accidents involving vehicles turning left from Lansing Lane. However, the intersection of Lansing Lane and Route 9 was never identified as a Priority Investigation Location or a Priority Investigation Intersection, areas where accidents exceed the statewide average. Although not required, Ms. Connolly testified that the placement of signs was considered beneficial and intersection warning signs were installed for both north and southbound traffic on Route 9 prior to the date of the subject accident. Ms. Connolly testified that she worked under the supervision of her supervisor, Reed Sholtes, PE, who reviewed the adequacy of the available sight distance by referring to the 2005 MUTCD (Exhibit Y), which similarly indicated that sight distance at the subject location was more than adequate.

Claimant's expert witness, John Serth, is a Professional Engineer. He received his Bachelor's degree in Civil Engineering in 1981 and a Master's degree in Civil Engineering with a specialty in transportation in 1983. His employment history includes work both for the DOT and in private practice for a consulting firm. Mr. Serth testified that Route 9 runs north and south with two lanes in each direction and a center median. Referencing both the 1954 and 2001 AASHTO standards, Mr. Serth testified that 8 seconds is required for a driver to complete a left turn across a road "with two lanes coming at you", including a two-second reaction time (T. 113). He explained as follows:

"So in those eight seconds, you need to be able to see the vehicles coming eight seconds away. At 55 miles-per-hour, take 55 and multiply it by 1.47 for the conversion between miles-per-hour and feet per second, multiply it by the eight seconds, and you get 650 feet approximately of sight distance that is

required and was required in 1945, which – I’m sorry, 1954, which would be the 1959 design standard. Its always been there” (T. 113).

Mr. Serth testified that the sight distance requirements contained in the 1954 AASHTO standards applied because Route 9 was reconstructed in 1959. In support of this contention Mr. Serth testified, by reference to Exhibit 48, p 22, that not only was Route 9 widened and straightened in the area of Lansing Lane, the vertical alignment, which he described as the elevation of the road, was also changed as part of the 1959 reconstruction. Referencing drawing number 22 of Exhibit 48, Mr. Serth also indicated that a notation on the drawing indicates that reconstruction actually started slightly before the intersection.

In accordance with the 1954 AASHTO standard, Mr. Serth measured the sight distance at the intersection of Lansing Lane and Route 9 by placing a cone with a flag at a height of 3.75 feet (44 inches) in the middle of Lansing Lane, 20 feet from the pavement edge line on Route 9. Taking into consideration the fact that an automobile operator’s seat is approximately 8-10 feet from the front of a car, the 20-foot distance from the edge line and 44-inch high cone and flag were used to approximate a driver’s position in a car stopped on Lansing Lane at or on the stop line, which is located 12 feet from the edge line of Route 9. After placing the cone at the appropriate location, Mr. Serth then walked down Route 9 in order to:

“see how far down the road I can see the cone, and that’s how far the driver will be able to see down the road. The answer is somewhere between 350 and 400 feet for the first lane, which would be the low speed lane, the right-hand lane, you can’t see that cone anymore. So the sight distance . . . is between 350 and 400 feet” (T. 116).

Applying the 1954 AASHTO standards, Mr. Serth opined that the sight distance required for a vehicle stopped at the intersection of Lansing Lane and Route 9 was 650 feet, not 495 feet as used by Ms. Connolly and her supervisor, Mr. Sholtes. Mr. Serth therefore concluded that the sight

distance available to the driver of a vehicle stopped at Lansing Lane – 350 to 400 feet – was less than the distance required by the 1954 AASHTO standard.

Mr. Serth testified that although in formulating his opinion he did not rely upon the more recent 2001 AASHTO guidelines, which require that sight distance measurements be taken at a distance of 14.4 feet from the edge line (Exhibit QQ), he did measure sight distance from Lansing Lane at a distance of 15 feet from the edge line which yielded a sight distance of 600 feet, still less than the 650 feet required by both the 1954 and 2001 AASHTO standards. Mr. Serth stated that at a distance of 12 feet from the edge line of Route 9, which is the location of the stop line, there is no obstruction caused by the grassy knoll located immediately south of the intersection.⁵

Mr. Serth explained that in performing both the 1996 and 2009 sight distance studies DOT incorrectly utilized guidelines and standards applicable to stopping distance rather than the intersection sight distance standard set forth in AASHTO. According to Mr. Serth, to obtain the required sight distance, DOT utilized a chart from the March 19, 2005 New York State Supplement to the National MUTCD designated NY2C-4 (Exhibit 80).⁶ Mr. Serth opined that the chart used by DOT applies only to stopping sight distance used for determining the proper placement of warning signs, not for the determination of whether adequate sight distance exists at a particular intersection.

To remedy the dangerous sight distance condition, Mr. Serth opined that the grassy knoll at the southeast corner of the intersection could have been removed or the stop line moved closer to

⁵ According to the 2007 New York State Supplement, in the absence of a marked crosswalk, stop lines “should be placed at the desired stopping . . . point, but should be placed no more than 9 m (30 ft) nor less than 1.2 m (4 ft) from the nearest edge of the intersecting traveled way” (Exhibit 1, p 2).

⁶ Footnote 3 of the March 19, 2005 New York State Supplement states that it is “taken from the 2001 AASHTO Policy, Stopping Sight Distance” (Exhibit 80).

the edge line. Mr. Serth testified that the New York State Supplement to the 2003 edition of the National MUTCD provides “Stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection” and opined that this was not done at the intersection of Lansing Lane (Exhibit XX).

In addition to deficient sight distance at the intersection, which Mr. Serth directly attributed to the embankment or grassy knoll in the southeast corner of the intersection, the witness testified that if the purpose of the intersection warning signs was to advise approaching motorists to slow their vehicles prior to the intersection, speed advisory signs and or a flashing beacon should have been installed but were not. Finally, according to the witness, the warning signs erected by DOT were placed an incorrect distance from the intersection.

Reed Sholtes, P.E., is a Civil Engineer 2 in charge of supervising the Traffic Operations Section of DOT Region 1. He has been employed by the DOT since 1990 and has been the supervisor of the Traffic Operations Section since 1994. Mr. Sholtes explained that in 2007 New York State adopted the 2003 edition of the National MUTCD. At the same time it implemented a New York State Supplement to the National MUTCD (*see* Exhibit S). However, neither the 2003 National MUTCD nor the newly adopted New York State Supplement provided direction regarding the proper procedure for determining sight distances. Absent such direction, it was the policy within Region 1 to utilize provisions of the New York State MUTCD employed prior to the State’s adoption of the National MUTCD, which provided guidance regarding the methodology used to measure sight distances at intersections (Exhibit V) and criteria for determining whether available sight distance is adequate, less than desirable or critically limited (Exhibit Y). According to Mr. Sholtes:

“It had been our standard and practice since prior -- since 1970’s. There -- without any direction in the 2003 MUTCD or New York State supplement to the MUTCD, we based our - I based my judgment on those practices that we had used for 40 years prior to that” (T. 391).

Mr. Sholtes testified AASHTO standards were not used in performing sight distance studies in 2009 because “The AASHTO guidelines are for design of highways and bridges . . . the MUTCD is for existing conditions” (T. 380). Instead, Region 1 used the procedures set forth in the 2001 New York State MUTCD, which requires that sight-line measurements be taken from a point 12 feet in advance of the nearest travel lane and from points 42 inches above the pavement (*see* Exhibit V, § 202.3 [a], [b]).⁷ Based upon the sight distance study performed by Ms. Connolly, DOT concluded “Although the sight distance was more than adequate, based on the pattern of accidents from the accident history, we determined that a warning sign might be beneficial for traffic on Route 9” (T. 401). According to Mr. Sholtes, such warning signs may assist drivers exiting Lansing Lane by slowing approaching traffic on Route 9. DOT also determined that turn restrictions on Lansing Lane such as proposed by Martha Wickham were unwarranted because “although there had been accidents there, there was not a significant pattern of accidents to warrant such a restriction” (*id.*). The DOT did bring the possibility of implementing these restrictions to the attention of the Town of Halfmoon, although the Town did not respond to the DOT’s inquiry (Exhibit 2). According to Mr. Sholtes,

⁷ This section states:

“[a] General. Sight distance is an important consideration in evaluating traffic operation at intersections. All intersection-related sight distances are measured between points 42 inches above the pavement. . .

[b] Sight distance along the highway. (1) This sight distance is the travel distance for which a vehicle approaching on a highway would be visible to a driver waiting to enter from an intersecting road. Conversely, it also represents the distance from which an approaching driver can normally see a waiting vehicle. . . The sight distances to the left (L) and right (R) are the travel distances for which vehicles approaching on the major highway would be continuously visible from a point 12 feet in advance of the nearest travel lane.” (Exhibit V, § 202.3 [a], [b]).

because turning and one-way restrictions on Lansing Lane were determined to be non-essential, they could be established only if they were acceptable to local officials (Exhibit MM; T. 403-405).

The defendant called William Logan, P.E. as its expert witness. Mr. Logan is a licensed Professional Engineer and received his Bachelor of Science degree in civil engineering, with an emphasis in highway engineering. Mr. Logan joined DOT in 1970 and was assigned to various positions within the DOT prior to being promoted to Region 1 Regional Traffic Engineer in 1994. As the Regional Traffic Engineer, Mr. Logan was responsible for administering, monitoring and coordinating the activities of the Traffic and Safety Group, among other units (*see* Exhibit CC). Mr. Logan testified that he remained in this position until his retirement in 2005. After his retirement, Mr. Logan worked for a private engineering firm performing traffic engineering studies and quality assurance reviews on various projects and as a consultant providing expert witness services to attorneys.

Mr. Logan testified that although portions of Route 9 were reconstructed in 1959, the reconstruction ended at station 527, approximately 900 feet south of Lansing Lane, and resumed at station 536 plus 20 feet, which is 26 feet north of Lansing Lane (*see* Court Exhibit 1 [consisting of sheets 21 and 22 of Exhibit 48, but to scale]). Insofar as Route 9 at its intersection with Lansing Lane was specifically denominated in the plans as being outside the area to be reconstructed Mr. Logan concluded, contrary to Mr. Serth, that the intersection was not reconstructed in 1959.

Like Mr. Sholtes, Mr. Logan testified that AASHTO guidelines are applicable to “design projects, new or reconstructed highways, not for existing highways” (T. 450). He noted that, notwithstanding its inapplicability to the subject intersection, the 1954 AASHTO policy states that “[m]ost drivers stop their vehicles as close to the edge of the intersecting pavement as convenient,

but many leave several feet” (T. 451, quoting Exhibit 43, p 317). As a consequence, AASHTO instructed users to measure a distance of 10 feet from the edge line to the front of the stopped vehicle (Exhibit 43, p 317). Although the 1954 AASHTO policy did not provide guidance on the distance from the front of a passenger vehicle to the driver’s seat, Mr. Logan agreed that 8 feet was a reasonable distance to assume. The 1954 AASHTO policy also instructed that “ ‘the distance should be measured from eye to top of object, both 4.5 feet above the pavement’ ” (T. 455, quoting Exhibit 43, p 318). According to Mr. Logan, although Mr. Serth purported to follow the 1954 AASHTO policy in performing his sight distance measurement, he placed the cone at a height of only 3.75 feet (44 inches) rather than 4.5 feet (54 inches). He also placed the cone in the middle of the road rather than the middle of the travel lane, in this case the westbound lane of Lansing Lane. As a result, the sight distance Mr. Serth derived was less than it would have been had he more precisely followed the 1954 AASHTO guideline. In addition, lane width changed from 12 feet to 11 feet in 2015 rendering the underlying assumption regarding lane widths in the 1954 AASHTO policy inaccurate. Utilizing the 1954 AASHTO policy the witness testified that the required sight distance is in the range of 550 feet, not the 650 feet opined by Mr. Serth. Mr. Logan again made clear, however, that the AASHTO guidelines are inapplicable to existing highways and that, if one were to reference AASHTO at all, it would be more recent AASHTO guidelines than those that applied in 1954.

The more recent 2001 and 2004 AASHTO policies instruct that sight distance should be measured at a height of 3.5 feet (decreased from the 4.5-foot height requirement contained in the 1954 AASHTO policy) and from a point, respectively, 14.4 and 14.5 feet⁸ from the “edge of the

⁸ The 2001 AASHTO guidelines state “the vertex (decision point) of the departure sight triangle” for a vehicle turning left from a minor road should be 14.4 feet. The same provision in the 2004 AASHTO guideline indicates a point 14.5 feet from the edge of the traveled way. Both documents state “this represents the typical position of the minor road

major-road traveled way” (Exhibit QQ, pp 657, 660; Exhibit VV, pp 653, 657). Performing sight distance measurements in accordance with the methodology set forth in both the 2001 and 2004 AASHTO policies, Mr. Logan testified that the sight distance from Lansing Lane to the center of the right northbound travel lane of Route 9 was 812 feet, significantly more than the 650 feet which Mr. Serth testified was necessary. In fact, from a point one foot west of the stop line, Mr. Logan was able to photograph his vehicle parked 1,000 feet away on the east shoulder of Route 9 (Exhibits 50 and 51).

Mr. Logan also measured sight distance using the criteria set forth in the MUTCD. In accordance therewith, he used an object 42-inches in height placed 12 feet from the edge line and determined, like Ms. Connolly, that the sight distance was approximately 1,100 feet. Using a 2005 MUTCD graph, he determined that a sight distance of 1,100 feet in a zone subject to a 55 mile-per-hour speed limit straddled the line between the white (more than adequate) and yellow (less than desirable, but not critically limited) portions of the graph (Exhibit Y, Fig. 232-1).

In Mr. Logan’s opinion, there was more than adequate sight distance to enable a driver executing a left turn from Lansing Lane to complete the turn safely pursuant to not only the MUTCD but the 2001 and 2004 AASHTO standards as well. Mr. Logan also opined that a stop line should be placed between 4 and 30 feet from the pavement edge line and that the placement of the stop line on Lansing Lane, 12 feet from the edge line of Route 9, was appropriate (Exhibit XX). Mr. Logan testified that vehicles are permitted to move forward from the stop line after an initial stop to gain

driver’s eye when a vehicle is stopped relatively close to the major road”.

greater sight distance, as Mr. Desautels did before executing his turn. Both parties moved for a directed verdict at the close of the evidence.

The Court of Appeals made clear in *Weiss v Fote* (7 NY2d 579 [1960]) that while the concept of sovereign immunity lost its legal force and effect with the passage of the Court of Claims Act, the State has retained its immunity for highway planning decisions involving the exercise of expert judgment (*see also Joyce v State of New York*, 152 AD2d 306 [1989]). The Court explained that “[t]o accept a jury’s verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexperienced hands what the Legislature has seen fit to entrust to experts” (*Weiss v Fote*, 7 NY2d at 585-586). To prevail in such a case, “something more than a mere choice between conflicting opinions of experts is required” (*Weiss* at 588.). The claimant must show “not merely that another option was available but also that the plan adopted lacked a reasonable basis” (*Affleck v Buckley*, 96 NY2d 553, 557 [2001]). Moreover, after the State implements a traffic plan it is “under a continuing duty to review its plan in the light of its actual operation” (*Weiss v Fote*, 7 NY2d at 587). Thus, liability may be imposed when the State is made aware of a dangerous traffic condition but fails to “undertake reasonable study thereof with an eye toward alleviating the danger” (*Friedman v State of New York*, 67 NY2d 271, 284 [1986]).

Here, claimant failed to establish that sight distance at the intersection did not comply with current standards or that a traffic plan evolved without a reasonable basis. Throughout the years, defendant twice responded to complaints regarding the intersection by performing sight distance studies and gathering accident information. On each occasion, defendant exercised engineering

judgment in selecting the appropriate standard and methodology by which to perform the sight distance studies. Because neither the 2003 National MUTCD nor the 2007 New York State Supplement set forth a process or procedure for measuring sight distance at intersections, a determination was made to refer to the former New York State MUTCD. Section 202.3 of the 2001 New York State MUTCD entitled “Sight distance at intersections” provided that sight distance measurements should be taken between two points 42 inches above the pavement and from a point 12 feet from the pavement edge line (Exhibit V). That this methodology differed from that set forth in the 1954, 2001 and 2004 AASHTO policies is irrelevant because all of the defendant’s witnesses credibly testified that AASHTO guidelines are used only for design purposes, not for the purpose of evaluating existing roads for compliance with current standards. To accept claimant’s expert’s opinion that the 1954 AASHTO policy applied over the more recent MUTCD standards, and prefer it over the judgment of the engineers which considered and passed on the matter, would be contrary to the evidence at trial and place in inexpert hands what the Legislature has seen fit to entrust to experts (*Weiss v Fote*, 7 NY2d at 585-586).

Likewise, both the National MUTCD and the New York State Supplement to the National MUTCD permit stop lines to be placed 4 to 30 feet from the nearest edge of the intersecting traveled way (*see* Exhibits XX and YY). While the guidance offered in the supplement indicates “stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection” (Exhibit XX), sight line placement is a discretionary determination left to the expertise of those charged with ensuring the safety of the roads.

The determination regarding the appropriate signage on Route 9 was also a discretionary determination for which the defendant is immune from liability. The sight distance studies

performed by both Mr. DeSorbo and Ms. Connolly indicated no intersection warning signs were warranted. Accordingly, decisions regarding the type and placement of the signs were discretionary matters not subject to judicial scrutiny.

With regard to the defendant's response(s) to complaints regarding the safety of the intersection by performing sight distance studies and accident analyses of the intersection, the Court finds that its determinations were the product of governmental studies for which the defendant is immune from liability (*cf. Brown v State of New York*, 79 AD3d 1579, 1582 [4th Dept 2010]). Inasmuch as defendant fulfilled its continuing duty to review the highway plan in light of its actual operation (*see Friedman v State of New York*, 67 NY2d at 284), it would be inappropriate for the Court to substitute its judgment for that of the DOT which considered and passed upon the very issue (*see Affleck v Buckley*, 96 NY2d 553 [2001]; *Kelley v State of New York*, 133 AD3d 1337 [4th Dept 2015]; *Racalbuto v Redmond*, 46 AD3d 1051 [3d Dept 2007]; *cf. Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664 [1999] [defendant failed to respond to repeated notice concerning the need for sidewalks or other safety devices]; *Mare v City of New York*, 112 AD3d 793 [2d Dept 2013] [defendant failed to establish that it undertook a study which passed upon the very same issue]).

The Court is unpersuaded that compliance with the 1954 AASHTO standard was required due to what claimant contends was a reconstruction of the intersection of Lansing Lane and Route 9 in 1959. The drawings of the work to be performed clearly delineated the parameters of the reconstruction and specifically omitted Route 9 at its intersection with Lansing Lane. Insofar as "upgrades are necessary only when a roadway has a history of accidents or undergoes significant repairs or reconstruction" (*Hubbard v County of Madison*, 93 AD3d 939, 943 [3d Dept 2012], *lv denied* 19 NY3d 805 [2012]; *Hay v State of New York*, 60 AD3d 1190 [3d Dept 2009]; *Fan Guan*

v State of New York, 55 AD3d 782 [2d Dept 2008]; *Guzov v State of New York*, 48 AD3d 751 [2d Dept 2008], *lv denied* 11 NY3d 710 [2008]; *Cave v Town of Galen*, 23 AD3d 1108 [4th Dept 2005]; *Vizzini v State of New York*, 278 AD2d 562 [3d Dept 2000]), compliance with the 1954 AASHTO policy was not required when the work on Route 9 was performed in 1959.

Moreover, AASHTO policy has changed since the 1954 edition was issued. Unlike the older AASHTO policy, the 2001 and 2004 AASHTO guidelines require that a sight distance measurement be performed at a distance of 14.4 or 14.5 feet, respectively, from the edge line utilizing an object that is 3.5 feet above the surface of the road. The 1954 AASHTO policy assumed a stopping distance of 10 feet from the edge line and added the length of a car, as they then existed, to provide the point from which the intersection sight distances should be measured utilizing an object 4.5 feet above the pavement. Thus, both the object height and distance from the edge line were significantly decreased since the 1954 AASHTO policy was published. As noted in the 2001 and 2004 AASHTO policies:

“This object height is based on a vehicle height of 1330 mm [4.35 feet], which represents the 15th percentile of vehicle heights *in the current passenger car population* less an allowance of 250 mm [10 in.]. This allowance represents a near-maximum value for the portion of a passenger car height that needs to be visible for another driver to recognize it as the object” (*see Exhibits VV and QQ*, pp 653 and 657 respectively [emphasis added]).

The Court does not find Mr. Serth’s reliance on the 1954 AASHTO policy persuasive, particularly in light of its finding that the subject intersection was not reconstructed in 1959 and the 1954 AASHTO design guidelines were therefore inapplicable. Applying the 2001 and 2004 AASHTO methodology, Mr. Logan found a sight distance of 812 feet. Mr. Serth, on the other hand, purported to utilize the 1954 AASHTO policy to arrive at a sight distance of between 350 and 400

feet. While Mr. Serth used an object that was only 3.75 feet in height rather than the 4.5 feet required by the 1954 AASHTO policy, the differing methodologies nevertheless resulted in grossly differing sight distance measurements. Given the change in vehicle dimensions over time, even if the Court concluded, which it does not, that the DOT's use of the MUTCD rather than the AASHTO guidelines was unreasonable, application of the more recent AASHTO guidelines rather than AASHTO policy as it existed in 1954 would be the appropriate standard. Inasmuch as Mr. Logan utilized the 2001 and 2004 AASHTO policies to determine an intersection sight distance of 812 feet, sight distance at the intersection fully complied with the more recent AASHTO guidelines. Thus, in addition to finding the defendant immune from liability on the facts presented at trial, the Court also finds that the claimant failed to establish defendant's negligence by a preponderance of the evidence under the most recent AASHTO policies.

Even were the defendant not found to be immune, and assuming a finding that the State was in some manner culpable, the claim would be dismissed as claimant failed to establish that the defendant's alleged negligence was a proximate cause of the accident and any resulting injuries. At trial the claimant's expert repeatedly and definitively testified that the accident involving the claimant occurred because the sight distance available to a driver looking south while stopped at the intersection of Route 9 and Lansing Lane was inadequate, and that the limited sight distance was a direct consequence of the "grassy knoll" at the southeast corner of the intersection impeding the driver's view. On direct examination Mr. Serth stated:

"On the east side of Route 9, just south of the intersection, there's a lawn there that rises up sharply, it's a knoll, and that is what is blocking the intersection sight distance there" (T. 131).

When asked by claimant's counsel to explain in what manner the intersection was not reasonably safe at the time the accident occurred, Mr. Serth replied "It wasn't reasonably safe, because that knoll was there" (T. 171). Importantly, when asked his opinion what to a reasonable degree of engineering certainty caused the accident in which the claimant was injured, Mr. Serth stated the following:

"The driver on the side road did not have sufficient sight distance to make an informed decision and avoid the driver coming up the hill because of the grassy knoll" (T. 177).

Unfortunately for the claimant, there was little or no evidence that the grassy knoll immediately south of the intersection in any way impaired Kenneth Desautels' view of oncoming northbound Route 9 traffic.

At trial, Mr. Desautels first testified that after stopping at the stop sign he looked left and right and observed, to the left, that "Nothing [was] coming" (T. 51). He testified that he then proceeded "to go forward to take a left-hand turn" because "there was nothing coming either way" (T. 51). Reminded of responses at his examination before trial in which he stated that, after stopping at the stop sign, he then moved to the stop line and came to a stop, the witness stated that he "vaguely" recalled making the statement.

According to Mr. Desautels' trial testimony he came to a complete stop at the stop line, and looked left and right. When asked what he could see when he looked to the left he stated "There was nothing coming" (T. 53). When asked whether he could see the entire road he replied "I don't recall" (*id.*). The witness was again presented with his EBT testimony in which he stated that after stopping at the stop line he looked left and "was able to see the whole road, except going downhill" (T. 54). He explained the "downhill" reference in his EBT by stating "it was on Route 9, the left

hand side". He was unable to estimate the distance between the position of his vehicle and the location of the "downhill" feature, although he replied in the affirmative when asked by claimant's counsel "Would that be in the northbound lanes of Route 9" (T. 54-55).

Initially, Desautels testified that he did not recall a third stop at a point past the stop line and that he entered Route 9, turning left, after completing his second stop, at the stop line. Refreshed by his EBT testimony that he had made three stops, the third somewhere past the stop line, he stated "I honestly don't remember" when asked at trial whether he made a third stop prior to entering Route 9 (T. 57).

On cross-examination Mr. Desautels confirmed that he did, in fact, execute three complete stops prior to entering Route 9. At the third stop, past the stop line, he looked left, right and then left again. He then testified, through his affirmative response to counsel's questioning, that there were at that time no obstructions to what he could see looking south on Route 9. On redirect the witness confirmed his testimony on cross-examination that there were no obstructions impeding his view looking left from Lansing Lane. Reminded of his testimony on direct examination (confirming his earlier EBT testimony) that when looking left while stopped at the stop line he could "see the whole road, except going downhill" the witness was asked "did the hill that was on Route 9 obstruct your vision in any way", to which he responded that it did "Because you couldn't see coming - anything coming up" (T. 87).

Finally, on re-cross-examination, Mr. Desautels testified that when looking left after completing his third stop, at a point beyond the white stop line, he could see south on Route 9 "except for going downhill" (T. 89). Examination of the witness concluded with the following:

“ Q. You could see cars that were in a distance, but you couldn’t see cars that were below the hill line. Is that what you’re saying?

A. Yes,

Q. You could see far enough that you thought it was safe to execute your left turn, correct?

A. Yes”.

It is a well established principle that the State is under a non-delegable duty to maintain its highways in a reasonably safe condition (*Friedman*, 67 NY2d 271; *Lopes v Rostad*, 45 NY2d 617 [1978]; *Weiss*, 7 NY2d 579). However, “[t]he State of New York is not an insurer of the safety of its roads and no liability will attach unless the State’s alleged negligence in maintaining its roads in a reasonable condition is a proximate cause of the accident” (*Vega v State of New York*, 37 AD3d 825 [2d Dept 2007], *lv denied* 9 NY3d 812 (2007) quoting *Sinski v State of New York*, 2 AD3d 517 [2d Dept 2003]). “[N]o liability will attach unless the ascribed negligence of the State in maintaining its roads in a reasonable condition is the proximate cause of the accident” (*Hearn v State of New York*, 157 AD2d 883 [3d Dept 1990], *lv denied* 75 NY2d 710 [1990]; *Crawford v Village of Millbrook*, 94 AD3d 1036 [2d Dept 2012]; *Santiago v City of New York*, 61 AD3d 574 [1st Dept 2009]; *Bennett v Town of Brookhaven*, 56 AD3d 403 [2d Dept 2008]; *Rios v City of New York*, 33 AD3d 780 [2d Dept 2006]; *Johnson v State of New York*, 27 AD3d 1061 [4th Dept 2006], *rearg denied* 30 AD3d 1115 [4th Dept 2006], *lv denied* 7 NY3d 711 [2006]).

In the instant matter, it is abundantly clear that the negligence ascribed to the State is the failure to remedy an inadequate sight distance caused by the existence of the “grassy knoll” immediately south of Lansing Lane. However, there is no evidence in the record that the grassy knoll in any way limited Kenneth Desautels’ view of northbound traffic on Route 9. In the first instance, Mr. Desautels’ testimony was at times confused, and at other times inconsistent with either

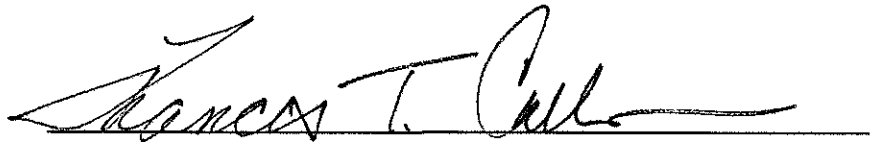
his prior trial testimony and/or statements contained in his EBT. It is therefore unpersuasive. More importantly, despite the fact that the embankment or grassy knoll is clearly depicted in numerous photographic exhibits received at trial (e.g., claimant's Exhibits 7, 50, 51, 59, 61; defendant's Exhibit WW), Mr. Desautels at no time identified the embankment on the southeast corner of the intersection of Lansing Lane and Route 9 as having caused or contributed to an inability to adequately view northbound Route 9 traffic as alleged by the claimant. Mr. Desautels did, however, testify to a condition which may have affected his view of oncoming northbound traffic when he stated that he could not see vehicles which were downhill or below the hill line of the northbound lanes of Route 9. The witness was unable to estimate the distance between his vehicle while stopped at the intersection of Lansing Lane and Route 9 and the location of the condition, there was little or no further description of the condition and there was no expert testimony regarding the manner in which the condition might have rendered the intersection unsafe and thereby caused or contributed to the accident.

Thus, while there is expert proof the accident occurred as a direct result of an inadequate sight distance caused by the existence of the grassy knoll, claimant failed to establish an essential underlying factual predicate to liability: that the grassy knoll played a role in limiting or impeding Kenneth Desautels view south on Route 9 from Lansing Lane. Conversely, while there is some evidence that a condition "downhill" on Route 9 may have affected his ability to view northbound traffic, there is no expert or other proof establishing that the condition on Route 9 described by Mr. Desautels rendered the intersection of Route 9 and Lansing Lane unreasonably dangerous to those

lawfully using either roadway and/or that it was a substantial factor in causing the accident which injured the claimant. As a result, the Court finds the claimant has failed to prove that the negligence ascribed to the defendant in any way caused or contributed to the happening of the accident (*Murray v State of New York*, 38 NY2d 782 [1975]). Dismissal is, therefore, appropriate on this ground as well.

Let judgment be entered accordingly.

Saratoga Springs, New York
August 31, 2016

A handwritten signature in black ink, appearing to read "Francis T. Collins", is written over a horizontal line. The signature is fluid and cursive.

FRANCIS T. COLLINS
Judge of the Court of Claims