STATE OF NEW YORK COURT OF CLAIMS

JEFF ROZELL AS ADMINISTRATOR OF THE ESTATE OF MICHELINA ROZELL, AND JEFF ROZELL, INDIVIDUALLY,

Claimant, DECISION

-v-

THE STATE OF NEW YORK, Claim No. 117839

Defendant.

BEFORE: HON. THOMAS H. SCUCCIMARRA
Judge of the Court of Claims

APPEARANCES:

For Claimant:
FELDMAN, KLEIDMAN & COFFEY, L.L.P.
BY: RICHARD J. COFFEY, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE OF NEW YORK
BY: VINCENT M. CASCIO
ASSISTANT ATTORNEY GENERAL

This claim arises from a fatal one-car accident occurring on Saturday, February 14, 2009 at approximately 12:30 a.m. on State Route 115 also known as the Salt Point Turnpike in the Town of Clinton. Claimant's decedent, Michelina Rozell, was a rear seat passenger in a GMC Envoy driven by Cheryl Milby, who lost control of the car on an ice-covered, curved portion of the roadway covering both lanes of travel for more than 113 feet. A five day trial on the issue of liability was held from March 19 through 23, 2012. This decision relates only to liability.

In addition to his own testimony, claimant presented the testimony of New York State Department of Transportation [NYSDOT] Resident Engineer Michael Temple, New York State Police Investigator Shannon Alpert, New York State Troopers Nicole Walther and Michael Hettinger, Bradford Silver, an accident reconstruction expert, Dutchess County Deputy Sheriff Christopher Myers, former NYSDOT employee and Chief of the Clinton Fire Department James Ruffell, Lawrence M. Levine, claimant's expert engineer, Cheryl Milby, the driver, local residents Mark Lawlor, a tow truck operator, and Christopher Burns, another member of the Clinton Fire Department, neighbors Louis DeCesare, and Eitan Dor, and Catherine Winslow, the driver of a car involved in an earlier accident that night. Mr. Temple, Investigator Alpert, and New York State Troopers Nicole Walther and Michael Hettinger were mutual witnesses. The State also presented the testimony of Nicholas Pucino, its expert engineer.

Additionally, deposition transcripts of NYSDOT employees Harry Scarth, Michael Tinnie, Lawrence Blondin, Kevin Cotton, Ken Keutmann, and Eric Greiner were also introduced into evidence, as was the deposition transcript of Mr. Temple. The Court also reviewed over 200 documents, diagrams and photographs also submitted in evidence.

After carefully considering all the evidence presented, including hearing the witnesses testify and observing their demeanor as they did so, the Court finds that the claimant has established by a preponderance of the credible evidence a sufficient basis for the State's partial liability for the accident that resulted in the death of Michelina Rozell.

FINDINGS OF FACT

The Salt Point Turnpike is a road that runs generally in a north to south direction. Almost immediately to the northeast of the accident location, the Taconic State Parkway exits onto the

Salt Point Turnpike. Hollow Road intersects with the turnpike to the southwest of the accident site. The subject accident took place in front of the house of Eitan Dor, a longtime resident of the area.

Witnesses explained that the Fairview yard of Region 8 of the NYSDOT was the yard responsible for the maintenance of the Salt Point Turnpike in the area of the accident. The accident location was described by at least one NYSDOT witness as one of the "lesser traveled roads" at the "far end" of the area serviced by the Fairview yard. [Exhibit II, p. 22]. Getting from the Fairview yard to the scene of the accident takes approximately 10 to 15 minutes.

Earlier in the afternoon and evening of February 13, 2009, Michelina Rozell and Cheryl Milby had spent time together with family and friends celebrating Ms. Rozell's 33rd birthday. Initially, Ms. Rozell was driving the GMC Envoy owned by her parents, when they began their afternoon with a shopping trip. They had lunch. They shared a marijuana joint, and went to decedent's mother-in-law's house for dinner at 5:30 p.m. After dinner, they met Ms. Rozell's family at McKeever's restaurant in Pawling where they stayed for a few hours. Ms. Milby said she drank 1½ apple martinis at McKeevers, and then she and Ms. Rozell were driven to the Pawling Tavern by Ms. Rozell's brother, Jerry, in the GMC Envoy. At the Pawling Tavern Ms. Milby got a glass of water, and waited outside in the car with Ms. Rozell. Thereafter, Jerry drove Ms. Milby and Ms. Rozell to decedent's mother-in-law's house, where they again remained for awhile. When they left Ms. Rozell's mother-in-law's house sometime after midnight Ms. Milby drove, saying she "was fine" regarding her ability to drive. [T-335].

Ms. Milby took Route 55 to the Taconic State Parkway, and exited onto the Salt Point Turnpike, traveling southwest, and intending to turn for home at Hollow Road. As she came out

of "the second part" of an "S bend in the road" near the "new church" "on the left" the car slid, and she lost control of the vehicle. [T-337]. She recalled traveling at approximately 30 to 35 miles per hour as she drove - saying "you can't go very fast around that turn regardless" - and did not see ice. [T-338]. She recalled slamming on the brakes as the back right end of the car slid out, ultimately coming to rest in a stand of trees.

Although Ms. Milby had never driven the GMC Envoy before that evening, she was familiar with the Salt Point Turnpike, having traveled that area for many years prior to the accident. She had commuted to work on the road daily in the late 1990s and mid 2000s, and from 2006 to 2009 would travel the Salt Point Turnpike when visiting her parents. She had never noticed any water or ice condition previously, but was aware of the generally winding and sloping nature of the route, and that it was unlit at night.

After the accident Ms. Milby plead guilty to driving while intoxicated [DWI] as a misdemeanor and to possession of marijuana in full satisfaction of the charges filed. [Exhibit FF]. She had been charged initially with DWI, failure to use designated lane, driving left of no passing zone and imprudent speed. [*Id.*].

Eitan Dor had resided in his home on the Salt Point Turnpike since June 2006, and had previously resided "about a mile down" the Salt Point Turnpike on the other side of the Taconic State Parkway since 1987. [T-310]. He was not at home on the evening of February 13, 2009 until "around 11:00 p.m.", was awakened by his son when the subject accident occurred, called 911, but did not go to the scene. When he had gone out earlier in the evening to drive his son he did not have to negotiate the curved area where the accident occurred because he was traveling

northeast out of his driveway, and came back home on the east side as well. He did observe that it was "a very icy night." [T-320].

Mr. Dor testified that he installed a "french drain" [T-314] approximately four inches in diameter [Exhibit 48] that emptied into a culvert or ditch on State property, that was itself serviced by a 12-inch diameter plastic pipe replaced by the NYSDOT in 2008, extending underneath the entire front of Mr. Dor's property, and which saw daylight at the far side of his driveway. The drain he installed, he said, drains "just from around the house . . . just the left portion of the house . . . maybe 24 feet." [T-324-325]. At the far end of Mr. Dor's driveway to the northeast side of his property, the State pipe empties into a stream, that flows underneath the Salt Point Turnpike across to Mr. DeCesare's property. Shown a photograph of the area in front of his property that includes the pipe he installed, Mr. Dor pointed out his pipe in the lower left-hand corner, and the NYSDOT raised delineators for the beginning and end of the State pipe, as one faces southbound traffic. [Exhibit 48].

Mr. Dor's house is set back from the road on a hill. [Exhibits 45 and 46]. Directly in front of his house is a lawn, sloping down to the road, with several large trees. Large metal sculptures are on the lawn on either side of the driveway. [Exhibits 53 and 54]. At the end of the front lawn is a small stone wall. Several large barrel type planters are placed in front of the wall, on the ground area above the State's underground pipe. This ground area in front of Mr. Dor's house below the wall, and immediately above where the State pipe runs, is at grade with the road or slightly sloped toward the road and, while it contains some low grass and weeds, appears to be mostly comprised of rutted dirt or mud in its winter aspect. [Exhibits 49 and 50].

Mr. Dor said that when the State replaced the pipe "a year or two before the accident" the State "pipe was completely clogged from what the guy told [him]. That's the reason they come in to replace it." [T-320-321]. He recalled that they seeded the disturbed area above the pipe in front of his wall. Other photographs of the ditch or culvert into which Mr. Dor's pipe empties show that the ditch is relatively deep as it approaches the State pipe adjacent to the Salt Point Turnpike, and runs along a field to the west side of Mr. Dor's property. [Exhibits 46, 47 and 49]. As noted, where the ditch ends and the State pipe begins the ground is sloped toward the road. Moving out towards the road from the wall, where the approximately 6 feet area of grass and dirt ends, there is a 3 to 3½ feet paved area to the white fog line, and then the two lanes of travel in either direction.

Mr. Dor testified that he had never had any conversation with NYSDOT personnel concerning his pipe, or been told to remove it. He also stated that he had "never" observed water emptying from his pipe into the ditch accumulate to such an extent that it spilled over onto the road. However, he had observed water run off onto the roadway of the Salt Point Turnpike in the vicinity of the front lawn of his house and the stone wall in the spring, fall and winter seasons, and had seen ice build up on the roadway as a result, from 1988 until the time of this accident. [T-317-318]. He had never complained to anyone about any water run off or icing condition.

Louis DeCesare, who had resided on the opposite side of the Salt Point Turnpike from Mr. Dor for more than 30 years, and marked with a red circle the location of his house [*see* Exhibit 50], observed water running over both lanes of the road from Mr. Dor's property earlier in the day on February 13, 2009, and had observed such water flow previously, as well as icing there, for years. He did not drive over that area of the road that day, as he was headed for the

Taconic State Parkway entrance north of the site, but observed "like water or slushy stuff . . . on the road." [T-288]. He had never complained about the observed conditions.

As afternoon moved into evening on February 13, 2009, the weather became colder, dropping from a high of 40 degrees to well below freezing. [Exhibits 34 and V]. The temperature dropped from 30 degrees to 20 degrees between 6:00 p.m. and midnight. [Exhibit W]. Two days earlier, on February 11, 2009, there had been a high of 59 degrees, and a low of 31 degrees, and there had been some rain. [*Id.*]. On February 12, 2009 there had been a mid-morning high of 50 degrees, and a midnight low of 40 degrees. [*Id.*].

On the evening of February 13, 2009, at approximately 7:30 p.m., Mark Lawlor, who worked as a tow truck operator at Matt's Auto Body located approximately 1½ miles away from the site of the accident, was proceeding in a tow truck at approximately 40 mph on the Salt Point Turnpike with his children in the vehicle, and noted an icy condition across the road. He said he found himself extending his arm out to restrain his children because of the slick condition, although they already wore seatbelts. He did not report the condition to anyone, and had not reported his earlier observations on other occasions of ice in that area of the roadway, during the 30 years he had lived and worked in the area.

James Ruffell testified that he was in his fire department car responding to a call in his capacity as the Fire Chief of the Clinton Fire Department at approximately 9:30 p.m. on February 13, 2009 when he "noticed ice building up on the sides of the road" on the Salt Point Turnpike "between the Taconic State Parkway and Hollow Road" in front of Mr. Dor's residence. [T-361]. In addition to his fire department duties, Mr. Ruffell was an almost ten year employee of NYSDOT employed as a Highway Maintenance Supervisor on February 13, 2009 operating out

of the Clinton Corners yard. He also resided on the Salt Point Turnpike approximately 1½ miles north of Mr. Dor's home.

Using one of the two cell phones he had in his possession - a cell phone issued by the NYSDOT[1], or one from the fire department, he did not know which - Mr. Ruffell called "the Fairview yard", which he knew was the NYSDOT yard responsible for the maintenance of the subject area, either while he was still in his chief's truck, or when he returned to the firehouse after being turned back from the call. [T-363]. When he called the Fairview yard he said: "the phone rang, and someone picked it up. I'm not sure who picked it up, but an answering service or TMC [Traffic Management Center] picked it up, and I told them what the problem was." [T-363]. Identifying himself as "Jim Ruffell" and as "work[ing] out of the Clinton Corners yard" [T-365], he "told them they were starting to get ice built up on the road between Hollow Road and the Taconic State Parkway on Salt Point, and they needed to get a salt truck out." [T-363].

The area of ice on the road surface at the time he made his call at around 9:30 p.m. was approximately two feet off the fog line into the roadway. From his past observations of this part of the Salt Point Turnpike in front of Mr. Dor's house he knew that water could often flow across, and if it were cold enough it would freeze and build up. When asked "why", Mr. Ruffell said he called NYSDOT that night "because I kind of knew what the water was going to do from working on the Highway Department. I knew if the ice was already starting to build up, means it

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[1] Telephone records from the NYSDOT-issued cell phone confirm that while Mr. Ruffell called his mother from that phone, he did not use the NYSDOT phone to call in the icing condition he observed. [Exhibit Q]. Additionally, the portion of the records from Hudson Valley Traveler Service supplied, entitled Incident Detail Report does not record his call [*see* Exhibits O and P]. It is also noted that during the month of February 2009 the NYSDOT yards in the area were being serviced after hours by two different answering services, and were transitioning to just one service, Traffic Management Center [TMC] a NYSDOT entity.

was getting colder. The more water came out, the more it would come out into the road . . . [and] my family drives on that road." [T-408].

Mr. Ruffell had also called the NYSDOT about an icing condition in exactly the same location in January 2005, which is noted on the answering service records provided from that time period. [Exhibit DD].

Chris Burns, another member of the Clinton Fire Department, responded to the same call James Ruffell responded to on February 13, 2009 at approximately 9:30 p.m. and was driving a standard fire engine. He said that as he proceeded south on the Salt Point Turnpike in the heavy fire engine approaching the turn by Mr. Dor's house he observed (and felt) an icy condition "heading from the west side to the east side." [T-280]. He said "the front wheels lost traction . . . kind of swerved a little bit" but he "maintained control through the turn." [T-280]. In the over 30 years he had lived in the area he had noticed a "slight water runoff from the same side . . . running from the west side to the east side downhill," that is, from Mr. Dor's house to the other side, although he could not recall experiencing icing conditions himself at that location. [T-281]. When he returned to the firehouse after the call was cancelled he saw James Ruffell, and "mentioned to him about calling in the icy road condition . . . to the DOT." [T-281-282].

Later that evening Mr. Lawlor was called to what will be referred to herein as the first accident, or the Winslow accident, which occurred at approximately 10:30 p.m., at the same location as the accident that is the subject of this claim. When he arrived with his tow truck at the scene, he saw that the road was icy, and said "it was like a spill across there . . . in that area." [T-252]. The driver appeared to have come around the corner, lost control, and hit a couple of trees.

Catherine Winslow was driving a Jeep Cherokee, traveling at approximately 35 to 40 mph southbound on the Salt Point Turnpike toward Pleasant Valley heading home from a friend's house. She noted that she had not consumed any alcohol and, indeed, that a medical condition forbids her consumption of alcohol. As she passed the "brass statues" in the front yard of Eitan Dor's house and "entered a corner" she recalled her tires "had gone out towards the right, so [she] pulled [the] wheel to the right to try to compensate, and . . . ended up going up an embankment and hitting a tree." [T-545]. After her car came to rest, she got out of the car to wait for the tow truck and looked around at the scene. She noticed that "there was ice covering the entire road," and remarked to her boyfriend at the time that it "looked like an ice skating rink." [T-546].

Dutchess County Deputy Sheriff Christopher Myers responded to the 10:30 p.m. Winslow accident, recalling that he had been alerted that "it was a property damage auto accident" that he was responding to. [T-296]. Deputy Myers came from the Poughkeepsie side of the Salt Point Turnpike and, alone among the trial witnesses, recalled that "it had rained earlier" and that "it was wet everywhere." [T-297]. When he arrived at the scene, in terms of the operation of his vehicle, he "lost traction with [his] rear tires" which he ascribed to "the wet and icy road conditions." [T-297-298]. He said that the ice "covered both lanes of the roadway . . . in patches." [T-298]. He and another deputy immediately "set out the flares to let oncoming motorists know that there was an accident so we wouldn't be hit and then also that . . . there was a slippery condition." [T-301]. [Exhibit 50]. Essentially guessing as to what the life span of a flare was, Deputy Myers thought they would last 30 minutes or less. He also could not recall

how many flares they set up, agreeing that it could have been more than five or "more or less" than ten. [T-307].

Deputy Myers completed an accident report, showing ice across two lanes of travel. [Exhibit 66]. By the time Deputy Myers left the scene sometime after 11:00 p.m. - he could not "recall exactly" when he left - Ms. Winslow's car had been towed, and Ms. Winslow had left the scene. He, personally, did not call the NYSDOT rather he notified his dispatcher of the road condition and that NYSDOT "should come out and throw some sand on the . . . roadway." [T-303]. He said it was not part of normal routine to remain at an accident scene involving ice until the DOT trucks arrived and, when asked by counsel for the defendant if the road was "passable at that time", responded, not very convincingly, "yes." [T-307]. That it was passable is belied by his own efforts to warn the traveling public of the condition by putting up flares.

Deputy Myers also testified that during the 6 or more years he had patrolled that area in the wintertime on a "sporadic" basis, he had seen a similar ice condition "just about" every winter. [T-303].

The telephone call to the NYSDOT, or to its answering service, referred to by Deputy Myers is reflected as occurring at "11:06:04 PM" and ending at "11:20:08 PM" on Incident Detail Reports from Hudson Valley Traveler, one of the two entities taking messages for the NYSDOT in off-hours during the month of February 2009, prior to a conversion to one answering service operated by the NYSDOT, the Traffic Management Center [TMC]. [Exhibits O and P]. Both records from Hudson Valley Traveler are uncertified as to completeness, nor was any testimony offered to show how such records were generated. [Exhibits O and P].

The operator recording the information for Hudson Valley Traveler first notes the location broadly as "NY State Hwy 115 in Clinton Corners in Dutchess County. Area of Taconic State Parkway," and that the "severity" is "minor." [Exhibit P]. The "type" is listed as "DOT Snow Ice", no blocked lanes are indicated and no vehicles are listed as involved. [*Id.*]. The "status" is "over and done." [*Id.*]. In the "response action" section it is recorded that at 11:05:54 P.M. "Dispatcher Van Cleef of Dutchess Co. 911 (845-452-0400) reports ice on State Hwy 115 btwn Hollow Rd and the TSP." [*Id.*]. It is then recorded that at 11:06:34 P.M. "Ken Kuetman (*sic*) (845-496-1226) (845-234-0106) called. No Answer at either number, left messages at both." [*Id.*]. Finally, it is recorded that at 11:17:12 P.M. "advised Kevin Cotton (845-471-2102)." [*Id.*]. Kevin Cotton recorded receipt of the phone call as 11:25 p.m. [Exhibit S].

Ken Keutmann, a Highway Maintenance Supervisor 2 in February 2009, did not testify at trial but did provide information during his deposition. [Exhibit 157]. He testified there that the answering service utilized in off-hours - he was not sure what service was in place in February 2009 - would call the first supervisor on the list and "wait a certain amount, say fifteen minutes, and then move onto the next supervisor on our list." [Exhibit 157, p.10]. He was unaware whether any protocol concerning this calling system was reduced to writing. When he received a call, he would utilize the call-out roster "posted on our bulletin board" at the Fairview yard, and also kept in his home, and call his workers in. [Exhibit 157, p.13]. He said that "depending on the nature of the call, the urgency of the call" he would call the workers on his way in to the yard in order to get a "quicker response time" or wait until he got to the yard to call. [Exhibit 157, p. 14].

Kevin Cotton, a Highway Maintenance Supervisor 1 at the time of the accident working out of the Fairview yard, did not recall much about the night of February 13, 2009 during his deposition, and also did not testify at trial. [Exhibit 160]. He did not recall when he received the phone call at his home about an ice condition but, when shown a copy of a document entitled "Fairview Overtime Callout Log" containing a notation under a column called "1st call" of "11:25" in handwriting he identified as his own, stated that the time indicated would be when he got the call from whatever answering service called. [*See* Exhibit S]. He said that the "11:45" noted under a column entitled "in" would be the time when he got to the yard and opened it up. He said it takes "five minutes, maybe, give or take" [Exhibit 160, p.12] to get to the yard from his house.

Once he got the call from the answering service at 11:25 p.m. he stated that he would utilize the call-out roster to call his people in order of seniority. The first person he called, which he recorded as having been called at 11:30 p.m., could not come in. [Exhibit S]. The second person he called (no notation is made on Exhibit S) and the third, could not come in. He noted on the callout log that the third person he called was called at 11:45 p.m., as was the fourth person he called, Larry Blondin, who was able to respond. [Exhibit S]. Mr. Cotton stated that these calls at 11:45 p.m. were made from the yard. The callout log records Mr. Blondin as arriving at "0015" [12:15 a.m.] and as signing out at 2:00 a.m. [Exhibit 160, pp.13-14, and Exhibit S].

With regard to how the callout roster is supposed to function, Mr. Cotton said that as he called people on the list in the designated order, he is "supposed to wait ten minutes and then call them back if I don't get a phone call from them." [Exhibit 160, p.25]. He also explained that

because he received a "no" response from Mr. Truncale (the third person) at 11:45 p.m., he did not wait, but made his next call immediately thereafter. [Exhibit 160, pp.26-27]. Mr. Cotton did not remember there having been any accident that evening - namely the Winslow accident - other than the fatal accident that is the subject of this claim. He did not have any recollection of the accident area as being "a problem point" prior to February 13, 2009. [Exhibit 160, p.20].

Other NYSDOT employee witnesses who did not testify, but whose depositions were submitted in evidence, were Harry Scarth, a Highway Maintenance Worker with the NYSDOT since 2006, and Larry Blondin, a Highway Maintenance Worker for the NYSDOT since 2008, both operating out of the Fairview yard. [Exhibits 158 and 159]. The depositions of Eric Greiner, Highway Maintenance Worker and Michael Tinnie, Highway Supervisor 1 were also submitted. [Exhibits HH and II].

Mr. Scarth and Mr. Blondin attested to their understanding that when they get a call for off-hours work from a supervisor, they are required to report to the yard within an hour. Neither was aware of any particular time frame during which they were required to get the truck out of the yard and to the site. In winter, trucks are generally pre-loaded with "two ton" of salt. [Exhibit II, p.21].

Mr. Scarth estimated that from 2006 to February 2009 he had seen ice build up on the Salt Point Turnpike in the area in front of Mr. Dor's house on five occasions, but had never himself been called to salt in that location.

Mr. Blondin said that there had been water run-off across both lanes of the Salt Point Turnpike from the area of the stone wall in front of Mr. Dor's property prior to the replacement of the State pipe, but did not recall seeing ice. He had not been called out to salt the accident

area before, but, notably, this appears to have been only his first winter working for the NYSDOT.

On February 13, 2009 Mr. Blondin recalled being part of an afternoon patrol in the area of the accident at around 2:00 or 3:00 p.m., and that it was a sunny day. When he received the call about ice on the road he was surprised, because there was nothing wrong with the area during the afternoon.

As noted, Mr. Blondin arrived at the Fairview yard at 12:15 a.m. on February 14, 2008. When he later arrived at the scene of the accident at approximately 12:50 a.m. he said he could see "absolutely nothing" about the condition of the road at first [Exhibit 159, p.33], thought that the roadway was damp or wet, but did not remember any water running. Emergency vehicles were blocking his view of the road. He agreed that the area that he described as damp or wet was the same area he had seen become wet from water coming from Mr. Dor's property in the past, and that it seemed to cover the two lanes of traffic.

In terms of what regular patrols there were of the area covered by the Fairview yard, the last patrol would have been the patrol described by Mr. Blondin as occurring at 2:00 or 3:00 p.m. on February 13, 2009.

James Ruffell was at the scene of the Rozell accident and stopped Mr. Blondin from proceeding further when Mr. Blondin arrived at approximately 12:50 a.m., ultimately directing where Mr. Blondin should put salt. Mr. Blondin blasted the area with salt commencing at 1:15 a.m., drove to the other side of the Taconic State Parkway, turned around in the Stewart's ice cream shop, and blasted the area again on his way back to the Fairview yard. He finished at 1:25 a.m.

Mr. Blondin learned that there had been a prior accident at 10:30 p.m. from Mr. Ruffell, but understood the accident to have landed the Winslow vehicle in the Dor's driveway. Two photographs taken after the accident and identified by Mr. Blondin as fair and accurate representations of the scene show ice covering the two lanes of travel of a substantial length - later measured to be 113 feet to the north and south - in front of Mr. Dor's house. [Exhibits 22 and 23].

New York State Troopers Michael Hettinger and Nicole Walther heard a Dutchess County 911 alert concerning the Rozell accident on February 14, 2009 and arrived at the scene within 5 minutes. They saw a large section of ice on the roadway, emergency vehicles, and the damaged vehicle crashed into a tree. They saw New York State Police Sergeant Malorgio attending to the injured passenger in the back seat.

Trooper Hettinger had a brief conversation with Cheryl Milby and began conducting field sobriety tests, before she was taken to the hospital. She told Trooper Hettinger that she had drank two appletinis at 9:00 p.m., which he noted on the accident report he prepared. [Exhibits 1 and A]. Trooper Hettinger thought water might have come onto the roadway from the "west shoulder area" [T-89-90] or "the ditch in the area of the stone wall" [T-99], but did not determine specifically where any water that caused the ice might have come from. He also thought the water might have come off from the field to the left of the Dor house. He did not, however, see any water flowing from Mr. Dor's pipe. He said that he traveled the Salt Point Turnpike once per shift generally, but was unaware of any prior accidents at this location other than the Winslow accident which he had heard a call for, but did not respond to. He had not seen ice build up in this area previously.

Prior to arriving at the scene, Trooper Walther received a transmission from Sergeant Malorgio advising that the roadway was slippery on the approach to the scene, and that they should use caution.

At trial, Trooper Walther testified that only three-quarters of the road was covered with ice and near a curve, but was corrected by her deposition testimony taken some years earlier that her impression of the ice then had been that "as you entered the curve, it was across the entire roadway, and then there was a portion of ice, a large portion of ice covering both sides of the road, and the vehicle that was in the accident was past the ice." [T-111-112]. Shown a photograph of the ice covered lanes from the shoulder of the roadway looking northbound on the Salt Point Turnpike in front of the planters by Mr. Dor's house she agreed that it accurately depicted the ice she saw that evening. [*See* Exhibit 8]. She thought the ice came from melting snow, saying "it was very warm that day, and the temperature dropped suddenly throughout the evening." [T-115].

Trooper Walther testified that she was "very familiar" with the area where the accident occurred because it was part of her regular patrol area, and also because she lived on the Salt Point Turnpike from 2004 until "last year", and currently lives "a couple miles from there." [T-121]. The spot by a church where she would park for traffic enforcement was to the northeast of the accident site, and she would often pull speeders over "just past" the accident site, just before Hollow Road. [T-121]. She said she had "never before" noticed ice on the area of the roadway where the accident took place, and had "never experienced" water on that part of the roadway before. [T-122].

When Trooper Walther spoke to Cheryl Milby, Ms. Milby was very upset and concerned about her friend. As she questioned Ms. Milby about her consumption of alcohol, Ms. Milby said she had "an appletini" at "around nine o'clock." [T-113]. A toxicology report found a blood alcohol content of 0.07 % in Ms. Milby's system. [Exhibit 1]. Although Trooper Walther recalled talking to James Ruffell that night, she did not "recall what the conversation was" and believed she would have recalled a conversation about his having called in an icing condition earlier that night. [T-139].

When Investigator Chris Mulkins interviewed Ms. Milby at the hospital she told him that Ms. Rozell had bought two apple martinis for both of them to drink, that Ms. Milby finished one, and drank most of another apple martini purchased by another friend, and that Ms. Rozell gave her a shot of Grey Goose. She told Investigator Mulkins that after that she stopped drinking for the night. With respect to the Winslow accident noted as occurring at 10:29 p.m., Investigator Mulkins contacted the Dutchess County Sheriff's Office and was "advised that State DOT was contacted at 10:58 p.m. to come and sand the roadway due to the icy conditions." [Exhibit 1].

Although a statement signed by Ms. Milby after the interview with Investigator Mulkins indicated that she drank the shot of Grey Goose, at trial Ms. Milby said she did not write the handwritten statement, and did not read it before she signed it. She said "I was just told my best friend died. I was given heavy medication, and knocked out. Everything that went on around me, I have no recollection of." [T-342].

New York State Police Investigator Shannon Alpert completed an accident investigation and reconstruction report of the accident, which he discussed at trial. [Exhibits 1 and B]. He arrived at the scene at 2:15 a.m. on February 14, 2009 and took measurements of the ice across

the Salt Point Turnpike, finding it to extend 113 feet north and south, and across both lanes of travel, and took photographs of the scene. [Exhibits 2-28]. He was unable to determine the source of the ice or water that created the ice. He determined that the car traveled over the ice and ended up in some trees past the eastern shoulder area of southbound Salt Point Turnpike, "approximately 163 feet" from the edge of the ice. [T-55]. He saw "damage to the driver's side lift gate, the rear of the vehicle and the quarter panel, the rear of the driver's door, as well as into the roof. There was induced damage on the passenger side of the vehicle, and that was just from the vehicle being wrapped around a tree." [T-56-57].

Investigator Alpert never spoke with Cheryl Milby, but he read her statement. He recalled it as saying that she came across the ice, lost control of the vehicle and then remembered ending up under the steering wheel. He used a crash data retrieval report (or black box) generated by the vehicle to draw some conclusions concerning the speed, braking, and movements of the vehicle before it collided with the tree. There was a period prior to the impact where there was "no reading for vehicle speed, engine speed, or percent throttle, but there is a reading for the brake switch circuit status" showing that the brake light which the circuit reports was off, meaning that the driver had not braked. [T-61]. The period was from eight seconds before impact. The device recorded again at five seconds before impact, and showed that the vehicle's speed at impact was "between 23 and 30 miles per hour." [T-62]. He also noted that the vehicle was recorded as traveling as fast as 47 to 51 miles per hour on the ice, but readily acknowledged that the readings would not necessarily be reflective of the actual speed of the vehicle, since what is being measured with regard to the tire movement could be skewed by the fact that the vehicle is simultaneously rotating. The higher speed, too, could be registering when

the car was sliding on the ice. He determined that the southbound car "lost control on the ice covered roadway and started to rotate counterclockwise", and "continued rotating when it entered the east shoulder and struck two trees . . ." [Exhibits 1 and B].

Although Mr. Alpert concluded that the collision was the fault of the driver for failing to stay within the lane of travel, and that "two possible contributing factors could be alcohol and or drug impairment and an ice covered roadway" [Exhibits 1 and B], there is no mention of the speed of the driver as a factor. Additionally, the failure to stay within the lane of travel conclusion took into consideration that ice might be the reason the operator did not stay in lane, as was ice and the rotation of the car a reason why the speed of 47 to 51 mph might have registered. Investigator Alpert did not perform a crush analysis to assist in calculating the speed loss when the vehicle came to rest, saying that because the car was tipped, and

> "wasn't sliding directly on all four wheels into the tree, . . . a crush analysis with the multiple areas of impact, it was not as significant to be able to complete a crush analysis based upon the damage into the roof compared to into the doors." [T-64].

Brad Silver, claimant's accident reconstruction expert, had much more extensive and varied experience in accident reconstruction than did Investigator Alpert, but largely agreed with Investigator Alpert's conclusions concerning the path and speed of the vehicle as it encountered the ice. Mr. Silver confirmed, however, that a black box recording of speeds while a vehicle is on ice is not reliable for determining an accurate speed. By way of example, he said a car stuck on ice with the driver pressing the gas pedal and others trying to push the car could register a speed of 60 mph, yet the car is not going anywhere.

Mr. Silver found the critical curve speed was 60 mph for the bend, meaning this would be the maximum speed at which under non-ice conditions a vehicle could take the curve. The cautionary speed, which would be the speed for even bad weather conditions, was 35 mph, and the posted speed limit is 40 mph. He opined that while at some point "when the friction value drops below the normal", speed "becomes a factor", with regard to this accident it was one factor of several. Without ice on the roadway, Ms. Milby's speed was reasonable.

In this case, he determined that the speed that the vehicle was likely traveling before it encountered the ice was a maximum of 40 to 45 mph - which he thought was an estimate "on the high end" [T-491] - having just come down an incline with the slight increase in speed such topography suggests, and having then started back up a hill, losing a few miles per hour in the process. He said that as she entered the curve on dry pavement in the first part of the S turn she was traveling the posted speed of 40 mph, "suddenly comes upon the ice, and at that point, her speed is too fast for that condition, but it's an unexpected condition that she comes upon." [T-516-517]. He found that there was no braking, and opined that had she braked during the turn the wheels would have locked up and it "would have made it worse." [T-474]. The fact that the black box registered an increase in speed suggests that Ms. Milby may have depressed the gas pedal rather than the brakes.

With regard to this action, and the possible effect of alcohol, Mr. Silver said "she was already starting to spin out" when she hit the gas, and

> "hitting the gas, causing the tires to spin reduces some of the traction for her, but evidently she was able to countersteer the first time to get it [to] come back, and . . . when she hit the dry pavement that . . . caused the overcorrection . . . [She made things better] with her countersteering . . . [S]he was attempting to recover from a loss of control where the rear slid out . . . [Ms. Milby] was able to input

> two countersteers into this thing, which means she did it in a relatively quick succession." [T-488-489].

He said:

> "even if we want to argue that she was impaired, she did a countersteer correct to the right to stop the rotation to the right. What I think did her in was that as she exited the ice with the wheels turned, she hit dry pavement with the extreme steer, which she had to have to counter the first swing, and when she hits the dry pavement, that just snaps her right around. I doubt that anybody, sober or impaired, could have handled that one." [T-490].

After the vehicle left the ice and encountered some dry pavement it lost another 5 to 10 mph in speed before the collision with the tree at approximately 25 mph, which speed was also corroborated with crush analysis.

Mr. Silver ultimately opined that based upon his entire analysis of the topography, the curve speed, the unlit road, the movement and direction of the car and, most significantly, the ice, Ms. Milby's operation of the vehicle through the ice area until the point of impact was not reflective of someone being significantly impaired. He said he could not entirely rule in, or rule out, alcohol impairment as a factor given the prior Winslow accident by a sober driver operating at a similar speed, or the near accident experienced by Sergeant Malorgio.

Michael Temple, a professional engineer and the Resident Engineer for Dutchess County North (Region 8) of the NYSDOT since 2005, testified about the agency's snow and ice procedures, and general maintenance procedures. He said that as the Resident Engineer he supervises about 75 workers and oversees operations of the State highways in his region, including paving, salting, plowing, mowing and cutting brush, saying that the number one priority is the safety of the public on the State's roadways. [T-147].

Highway maintenance guidelines for the position of Resident Engineer provide in part that he is

> "responsible for the year-round maintenance of roads, bridges and all related facilities in his Residency . . . [and] must plan and direct all maintenance projects exercising judgment that resources are expended efficiently, wisely and legally. He must keep himself constantly informed as to the condition of all the roads under his jurisdiction, and take prompt action to eliminate any unsafe condition that might develop." [Exhibit 104].

The position requires that he be on-call 24 hours per day. He

> "plans, directs and inspects snow and ice control operations. Whether by contract with other agencies, by his own forces or by rented equipment, the responsibility is his. This duty calls for intelligent planning, good supervision and strong control . . ." [Exhibit 104].

On Friday, February 13, 2009 the last worker would have left the Fairview yard by 8:00 p.m. for the weekend. As was noted by the various NYSDOT witnesses, the after-hours snow and ice call-out procedures in February 2009 were handled by two different answering services, since NYSDOT was in transition from using the private service, Hudson Valley Message Service, to handling the calls through its own facility the Traffic Management Center [TMC]. [T-155]. TMC took over completely in March 2009. At five rings, as Mr. Temple understood it, the Hudson Valley company would answer but "after five rings" the TMC would answer. [T-156]. The service would call the supervisor for a particular yard, "wait five minutes" to give the supervisor a chance to respond, then call the next supervisor on the list in the event of no response. [T-157]. When the witness was asked whether the waiting period was ten minutes

rather than five, he said "I do not recall, but whatever is on that document[2] probably would be correct." [T-157]. Once a supervisor was contacted, the supervisor would then call the employees on the call-out roster. Mr. Temple thought that the supervisor would make his own sequence of calls allowing the employee five minutes to return the call. Once the worker was reached, he had one hour to arrive at the yard. The supervisor would need to unlock the garage for the worker.

The "one hour rule" was identified as being stated in a document entitled "Fall 2009 Residency Labor-Management Meeting", dated October 26, 2009, which Mr. Temple indicated was nonetheless applicable in February 2009. [Exhibit U]. This not unreasonable allowance was in consideration of the worker's circumstances when being called out after hours, where frequently the weather was bad and the roads might be dangerous.

It is noted that this same document sets out additional descriptions of protocols for dealing with "busy signals, no answers, or telephone answering devices" that suggests yet another version of how such call-outs are handled, that was not testified to. [*Ibid.*]. It states:

> "If, when calling out an employee, the telephone rings and no one answers or if the line is busy, a second call will be made. This second call will be at least ten minutes after the first one. If the line is still busy or there is still no answer, then a non-response to call-out will be noted. If a telephone answering device is encountered while attempting to contact an employee, leave the standard statement, the time of your call, and the statement 'I will call back in 10 minutes.' After 10 minutes, a second call will be made. If the answering device is again encountered, a non-response to call-out will be noted." [*Ibid.*].

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[2] The witness apparently assumed it was a written policy that counsel for claimant was referring to.

It was also Mr. Temple's testimony that this system of waiting between phone calls was utilized after hours regardless of the nature of the situation. Thus when asked whether the agency would use "the same exact procedure in a case where there's 114 feet of ice left unattended by anybody for an hour and a half or so" Mr. Temple said "for any call-out, we use the same procedure." [T-242]. He indicated that it is a statewide procedure, and is part of a winter operation package distributed to all Resident Engineers.

Additionally, Mr. Temple said that the way of knowing what type of condition is being called in is "only the information we receive from the answering service." [T-773]. After saying "the answering service is supposed to gather information as far as the location, what the problem is. They don't necessarily have to ask if there's an accident or not" [T-781], he agreed that he "supposed" he could require or had the power to require that the answering service inquire what the extent of an ice condition was, or whether there was an accident, agreeing that it would "be helpful" and "important" to know if ice covered both lanes, or if an accident was involved, or if the police had left the scene. [T-782-783].

Mr. Temple was read his deposition testimony, taken in October 2010, wherein he indicated his understanding that "typically" when there was an ice or snow hazard on the road the police agency would wait for the NYSDOT trucks to arrive. [Exhibit 162, p.50]. At trial, Mr. Temple testified instead that it "depends on what the situation is," ultimately saying that "there are occasions" when police agencies do stay, but that regardless their presence or absence did "not at all" influence the decision as to when to get the trucks out. [T-164-166].

Mr. Temple first said he was not familiar with so-called standing orders set forth in Highway Maintenance Guidelines, but when read the provisions [Exhibit 104, §7.600] he

indicated that he was "familiar" with them. [T-152-153]. He agreed that he was empowered by such standing orders to direct that work be done within a certain time frame if it was important for the safety of "the traveling public." [T-154]. Later, when questioned by defendant's counsel, Mr. Temple agreed that standing orders applied "at all times" [T-779], but only after the agency received notification, saying "after, yeah. Once we are aware of a problem, we are supposed to address it." [T-779].

These standing orders provide that

> "[t]here are several conditions or events that occur frequently but unexpectedly on the highway system. These events cannot be anticipated as they result from acts of nature or acts of the public, yet they may endanger the motorist, the highway or the community itself. Highway Maintenance employees, regardless of title or function, should be alert for these situations and *regardless of previous assignment* they should take steps to: 1. Alert the motorist of any hazardous road condition that exists so that accidents are prevented. 2. Correct the condition if within their capability, if not then 3. Notify the closest resident foreman or Resident Engineer so that someone else can take the proper steps to correct the situation." (*emphasis in original*). [Exhibit 104].

The list of "conditions or situations that are classified as standing orders in the order of importance" lists as number three in a list of six eventualities "hazardous road condition due to a hole, bump, water, snow, ice or erosion." [*Ibid.*]. Listed as number five are "conditions that are not hazardous at present but are progressing rapidly so that either traffic or the facility itself would be damaged." [*Ibid.*].

Mr. Temple first heard of the subject accident by reading a local newspaper or hearing about it on the radio, he was not sure which, as he was not contacted by anyone from the State. When he visited the site a few days after the accident, or where he thought the site was since it appears he was mistaken as to the precise location, he was unable to discern a reason for any

water flow or icing condition. In June 2009 when he visited the site he continued to be unaware of where the icing location had been in February 2009.

Mr. Temple was also mistaken in his belief that the road shoulder in front of Mr. Dor's house sloped from the road toward Mr Dor's wall (rather than the reverse), and thought therefore that this would prevent water from flowing on to the shoulder and the road. When the State pipe was installed under his watch, there was no thought of creating any swale in the ground area above the state pipe, although he agreed that a swale on the shoulder would keep water from running on to the road.

After the installation, Mr. Temple said he inspected the pipe, but nothing was recorded of his inspection. He said that he "normally look[ed] at the projects when our crews do them to see what kind of job they did." [T-184]. Ken Keutmann was the originator of the project, he said, and his own involvement was "very little." [T-184]. Mr. Temple "confirmed" the size of the pipe that would be utilized with Mr. Keutmann. [T-185]. Perforated pipe was not used at that particular location, because "you usually use that when there's a lot of ground water, and . . . it's a very wet area, and that's not a very wet area right in front of the stone wall." [T-185]. No drainage studies were done at the site before the new pipe was put in however.

Although familiar with the existence of Mr. Dor's pipe, he could not "recall exactly" when he became aware of it. Mr. Temple confirmed that the Dor pipe releases into a ditch that is on State property, and that the area between the road and the wall where the new State pipe was installed is also State property. The State did not authorize or approve Mr Dor's pipe, and he himself had never talked to Mr. Dor about the pipe. He had no concerns about any flooding or safety issues with regard to Mr. Dor's pipe, and was unfamiliar with the expert opinion of the

State's expert in this case, Nicholas Pucino, to the effect that water from Mr. Dor's pipe was responsible for filling the State ditch and thus flooding out the roadway on February 13 and 14, 2009, nor did he himself have any concern as to such an eventuality. He said "the pipe is so small compared to the exiting pipe that we put in. The capacity of the pipe we put in is more than adequate for it." [T-188].

Mr. Temple searched the maintenance records and found that other than the May 2008 installation of the pipe there was no record of any maintenance activity at the location.

Lawrence Levine, claimant's expert engineer, and Nicholas Pucino the State's expert engineer, had differing opinions as to how the conditions of February 13 and 14, 2009 arose, and as to the potential for a recurring condition, among other differences of opinion. Both are highly qualified engineers whose testimony has been accepted in this and other Courts both on the claimant's side and on the defense side on numerous occasions.

Mr. Levine found that all of Mr. Dor's property drained downhill toward the Salt Point Turnpike, and toward the shoulder of the road, with the shoulder then "tipping" toward the road rather than away from it. [T-564-565]. It was Mr. Levine's view that the State erred when it replaced the existing pipe in front of Mr. Dor's stone wall and failed to create a ditch or swale between the wall and the road, given that the property drains downhill toward the road, and the banked curve that the road itself presents. All the surface water - including melting snow, water from Mr. Dor's grassy front yard, from around his house, and the hill behind his house - is not kept away from the road by ditch or a swale of some type, which, were one installed, would also steer the water toward the lower driveway and the creek below. As a result, water was caused to

sheet across the road and then freeze. Saying "there's always problems with banked curves" [T-574], Mr. Levine said that:

> "on the high side of a banked curve, especially in an east/west road like this . . . during the day, [the sun] hits the high part of . . . [the] curve . . . where you find snow on the grass, the snow on the shoulder, . . . and it melts it, and unless the water melts and goes away from the road, it's going to go back onto the road, and the road is in the shadows as the day continues, and is colder. So if you have temperatures that are near freezing, the water will go onto the road and refreeze, . . . when you salt the roads and you plow off the snow with the salt in it, that snow will continue to melt possibly even down to 20 degrees at times . . ." [T-574-575].

Trying to recapture conditions as they might have been at the time of the accident, Mr. Levine visited the site and observed that with a thaw, "the ground just starts going, that's when you get a lot of water there." [T-576]. He saw snow melt from the shoulder itself, and some from the wall draining onto the road at night. In his view, the 4-inch Dor pipe could not alone be responsible for the water freeze that occurred that night, although it certainly could have played a part if the ditch was clogged or the entry to the State's 12-inch pipe was clogged, and backed up completely. He had observed that the ditch area and the State pipe did contain debris on his visits.

Mr. Pucino said although he visited the site several times, he was unable to ever see a condition similar to the one described as occurring on the night of the Rozell accident. When he visited the site after a significant heavy rain to see whether ground water seeped into the ditch or over the wall or through the shoulder area he found no significant seepage, and also saw that Mr. Dor's pipe did not have any water coming out of it. He also tried to duplicate a snow/melt situation, visiting the site after a heavy snow condition and a temperature increase to 50 degrees,

but found very little melting of snow. After more observations, he excluded snow melt as the source of the water, and opined that the water started in the general area of Mr. Dor's pipe, and the ditch to the State's pipe. He opined that when water came out of Mr. Dor's pipe and hit the air, it started to ice, and the ditch started to ice over. As water continued to emerge from Mr. Dor's pipe it eventually "jump[ed] over the ditch" [T-830] out on to the roadway, running down the highway, down the grade and across the banking pavement. This view that snow melt was not a factor was also informed by a lack of significant accident history at the location, since in his view if it were a recurring snow melt problem there would have been more accidents.

Mr. Pucino said that although a swale or ditch could help on a shoulder area, "it's not going to help at all when you have a ground water situation . . ." [T-840]. He thought that in this case "there was no water coming over the shoulder. There was no water coming over the wall . . ." [T-841]. He also thought that any ditch or swale would have iced over in any event. Finally, he concluded that the situation would not be a recurring one, saying that

> "there could be a number of times where water drained out of the pipe. Obviously, it had a purpose in there, but I wouldn't expect this combination of conditions to - - you know, you always need a perfect storm here, a sudden heavy - - deep thaw, and then a change - a drop in temperature just enough to ice over the ditch. It probably doesn't happen - or it didn't happen very often." [T-834-835].

Later, Mr. Pucino conceded he was unaware of any testimony by Mr. DeCesare about water coming off Mr. Dor's property earlier in the day, and was unaware of Mr. Ruffell's statement talking about water coming out of the stone wall on the night of the accident.

A written policy concerning after hours telephone calls provides that where "immediate notification is required" - and "all reports of snow or icing conditions should be reported

immediately" - the call out information "depending on the season" is accessed and utilized. [Exhibit R]. The policy states:

> "if you get a voicemail, leave a message. If there is no call back within 15 minutes or so, call the Back Up 1 number on the list. If no response/call back is received proceed to contact Back Up 2, Back Up 3, etc. until someone is contacted and notified." [*Ibid.*].

If the system to obtain the call out information "fails", then a "Winter Snow & Ice Directory" is consulted. [*Ibid.*]. The operator is instructed to:

> "contact the appropriate Highway Maintenance Supervisor II . . . by pager first. If no response, try cell phone then home number. If you are still unable to make contact, proceed to contact the next person (HMS I) by pager, cell phone then home number." [*Ibid.*].

This "call-out response plan was designed to provide an incentive to employees to respond to call-outs for snow and ice control when almost all of the work force is needed." [*Ibid.*].

Additional Highway Maintenance Guidelines concerning overtime and callout procedures provide that when an "emergency" occurs, defined as:

> "any condition, occurrence, or situation which endangers the public and/or private or public property, or any such condition, occurrence or situation which, if not corrected until the next succeeding regular work period, could progress to a point endangering public safety or public or private property", . . . [there are] "three circumstances by which maintenance forces are summoned to emergency duty outside regular working hours." [Exhibit 104, §7.700].

Among the three circumstances is one where an emergency is observed by:

> "a foreman, equipment operator, or other responsible employee . . . which, in his judgment, requires his and/or his crew's services, he goes on duty, and calls out the numbers of people and equipment necessary to cope with the situation." [*Ibid.*].

Another circumstance is when such responsible employee receives a call from a private citizen or a police officer calling his attention to an emergency, and:

> "he goes on duty, investigates the condition, and, if the condition is confirmed to be an emergency, he then calls out the numbers of people and equipment necessary." [*Ibid.*].

DISCUSSION AND CONCLUSION

Claimant advances several bases for finding State liability in this case. It is first argued that the State created the condition, or exacerbated its recurring nature, by failing to address the ongoing water flow issue from State property adjacent to Mr. Dor's property, and from Mr. Dor's property as well, when it reinstalled its culvert pipe - albeit one of a much wider diameter than the one servicing the State's ditch previously - without adequate study of the drainage, and without creating a swale or ditch above the installed pipe based on the troubling topography including a shoulder sloping toward the road. If this was not a condition the State created, claimant then argues that it had actual notice of the condition based upon the testimony of at least two possibly less senior NYSDOT workers - Mr. Scarth and Mr. Blondin - who stated that they had observed water flow from the area across the Salt Point Turnpike and, in Mr. Scarth's case, icing, and that of Mr. Ruffell, also a NYSDOT employee, who called in an icing condition in 2005. Since there was no change to the defects in the area accomplished by the installation in 2008, such direct notice of an icing condition in 2005 does not vitiate any concern that should have arisen based upon such notice. Claimant also argues the State had constructive notice of this recurring condition based upon the testimony of these same NYSDOT workers, Deputy

Myers, and the testimony of uninterested neighbors and other users of the road without any stake in this litigation.

If the State did not create the dangerous condition or it was not a recurring dangerous condition about which the State had actual or constructive notice, it is argued that the State had actual or constructive notice of the dangerous condition that evening in sufficient time within which to correct the condition, and negligently failed to do so.

The State argues that driver error and negligence were the sole causes of the subject accident, and that the claimant failed to establish that the State had actual or constructive notice of a dangerous or recurring condition.

The State is charged with the nondelegable duty to the traveling public of maintaining its roads and highways in a reasonably safe condition to prevent foreseeable injury, but is not an insurer of the safety of its roads. *See* Friedman v State of New York, 67 NY2d 271 (1986).[3]

The State's negligence is not established by the mere presence of ice, snow or water on a highway. Timcoe v State of New York, 267 AD2d 375 (2d Dept 1999); Slaughter v State of New York, 238 AD2d 770 (3d Dept 1997); Fiege v State of New York, 189 AD2d 748 (2d Dept 1993); Freund v State of New York, 137 AD2d 908 (3d Dept 1988), *appeal denied*, 72 NY2d 802 (1988); Valentino v State of New York, 62 AD2d 1086 (3d Dept 1978) *appeal dismissed,* 46 NY2d 1072 (1979). The presence of ice does give rise to the question, however, of whether the condition was the result of a lack of reasonable diligence in maintaining the highway under all the circumstances. Slaughter v State of New York, *supra*; Johnson v State of New York, 265

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[3] These four cases decided concurrently all involved so-called 'cross-over' accidents occurring on State constructed and maintained highways in which the alleged negligence is the State's failure to install median barriers.

AD2d 652 (3d Dept 1999). What constitutes reasonable diligence in reacting to a particular condition on a particular highway obviously depends on the circumstances of each case.

If the State created the condition, proof of actual or constructive notice is not needed.

Where the State has actual or constructive notice of a hazardous condition in a particular area, liability may result from the failure to timely address or correct the problem [*see* Rooney v State of New York, 111 AD2d 159 (2d Dept 1985); Slaughter v State of New York, *supra*; Citta v State of New York, 35 AD2d 288 (4th Dept 1970), *on appeal after remand* 30 AD2d 636 (4th Dept 1968); *see also* Wydysh v State of New York, UID # 2003-009-121 (Ct Cl, Midey, J., September 29, 2003); Zouaoui v State of New York, UID # 2011-029-010 (Ct Cl, Mignano, J., April 13, 2011); *cf.* Casey v State of New York, UID # 2008-029-031 (Ct Cl, Mignano, J., August 14, 2008)], or to post warnings of the condition. Sellitto v State of New York, 250 AD2d 754 (2d Dept 1998); Freund v State of New York, 137 AD2d 908 (3d Dept 1988); Farrell v State of New York, 46 AD2d 697 (3d Dept 1974).

Finally, in fulfilling its obligation to the traveling public the State may assume that those using the roads will use reasonable care and obey the law governing the operation of motor vehicles. *See* Tomassi v Town of Union, 46 NY2d 91, 97 (1978).

As an initial matter, the Court finds that the evidence establishes that the State created a dangerous condition by reinstalling its pipe nine months before this accident in May 2008 without - according to the testimony of Resident Engineer Michael Temple - having conducted any drainage study or otherwise assessing the viability of its ditch and culvert, or analyzing the topography of the hillside and the adjacent roadway, and with only "very little" involvement on the responsible person's part, and credits the testimony of Lawrence Levine in this regard.

Even if the State did not actually perpetuate the danger by this particular installation, the Court is satisfied that it should have known that a recurrent dangerous condition could occur in the area of the Salt Point Turnpike in front of Mr. Dor's house whereby water would sheet across the surface of the road, and ice up in bad weather. Eitan Dor and Louis DeCesare, 20 and 30 year residents, respectively, attested to the occurrence, as did NYSDOT employees James Ruffell, and Harry Scarth. Indeed, Mr. Ruffell complained of an icing condition in the exact same location in January 2005. Dutchess County Deputy Sheriff Christopher Myers, and tow truck operator Mark Lawlor, another 30 year veteran of the area, also confirmed the recurring hazard of this particular location. Lawrence Blondin and Chris Burns observed water run off.[4]

Of course, other witnesses possessing familiarity with the area as well - all State employees - testified that this had not been their experience. Unlike the witnesses called in Casey v State of New York, *supra*, however, the witnesses attesting to the recurrence of the condition of water run off and of icing had no personal relationship with claimant, while those who testified that they lacked awareness of any recurring condition had significant ties to the defendant. Additionally, the Court credits Mr. Levine's analysis of the cumulative effect on groundwater drainage and snow melt of the slope of both Mr. Dor's property and the adjacent property, the joint findings by Mr. Pucino and Mr. Levine that shoulders were improperly sloped toward the roadway, and the presence of a banked curve, would create the foreseeable likelihood that with a thaw water could "spill" across the road and ice up with a change in temperature (as described by Mr. Lawlor at the scene of the Winslow accident).

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[4] It is noted that even Mr. Pucino stated that while the "perfect storm" of conditions to support his running pipe, iced-over ditch theory would not "happen very often" he did not go so far as to say it would not at all occur.

Even more directly, on the evening of February 13, 2009 the State was provided with actual notice of an icing condition at 9:30 p.m., called in after hours by one of its own employees James Ruffell, but, because of some failure on the part of the entity or entities to whom the NYSDOT region had delegated the responsibility of obtaining and recording information during the month of February 2009, such advice given by an employee - who also functioned as an emergency responder in his capacity as Chief of the Clinton Fire Department - was not conveyed to proper channels. The Court absolutely credits that Mr. Ruffell made a telephone call at approximately 9:30 p.m. about the increasingly dangerous condition he observed, and does not find determinative the documents provided to show whether the call was received. What the records suggest instead is that Mr. Ruffell made the call from other than the NYSDOT cell phone, just as he stated, and that the call was not properly recorded by the answering service or by TMC. Absolutely no credible reason has been advanced as to why Mr. Ruffell would fabricate this event. According to Mr. Ruffell, at the time he reported the condition there was ice extending two feet into the southbound travel lane from the white fog line. Christopher Burns also experienced the icing condition, but did not himself call it in since his boss, James Ruffell, had done so. Measured from this initial notice of the dangerous condition the State response of arriving at the scene only after the second accident that evening, at approximately 12:50 a.m., was not reasonable and was negligent.

Additionally, at 10:30 p.m. the entirely sober Catherine Winslow, traveling at approximately the same speed as Ms. Milby, came upon ice across two lanes of travel in front of Mr. Dor's house, and went off the road and struck a tree and, fortunately, was not herself injured. Mr. Lawlor, too, saw that the ice condition he had experienced hours earlier, at 7:30 p.m. or so,

was now across two lanes of travel, and Deputy Myers drew a diagram of the ice condition showing the presence of ice across the two travel lanes as well.

When the fact of an icing condition was relayed to the answering service just after 11:00 p.m. by the Dutchess County Sheriff's dispatcher - which in itself is advice of an exigent circumstance in this Court's view meriting further inquiry - no additional information was obtained as to the extent of the ice, the fact of an accident caused by the ice, or that police personnel would remain until the NYSDOT personnel arrived. Indeed, the wrong information was noted, in that the recorders made no note of an involvement of a vehicle (although there is a spot on the computer printout to note such information) and noted the severity as "minor." [Exhibit P].[5] This was negligence for which the State is responsible. Indeed, it was not the practice for police personnel to stay, although the Regional Engineer responsible for implementing safety plans in his region was under the mistaken impression that police personnel typically stayed until NYDOT personnel arrived.

Additionally, by its terms, the call-out policy referred to by Mr. Temple as the one followed in all situations for after hours contacts, was clearly created to provide incentives for workers to respond to an all-hands-on-deck type of snow situation, not to define the State response to an acute, isolated condition. [*See* Exhibit R]. Indeed, there are guidelines whereby the proper response may have required that Mr. Ruffell call in his own crew, or that Mr. Cotton investigate the situation first to assess the level of danger. [*See* Exhibit 104].

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[5] Even with the call-in noted for the Rozell accident the recorder describes the location incorrectly and calls the severity "minor." [Exhibit P].

While the Court can see that a policy allowing a worker to arrive at the yard within an hour under storm conditions to avoid danger to the worker makes sense, as does the need to check the vehicle before going to the site, the call-out practice commencing with the first calls to a supervisor by the answering service, and the subsequent calls by the supervisor to gather in workers for the job, is inherently unreasonable. The built in delays at every step of the process - delays which varied in the consciousness of those who were required to implement the policy from 5 minutes to 15 minutes between phone calls - defy reason. In this sense, the only reason advanced was some reference to contractual obligations, with no evidence provided of same. There was no barrage of emergency calls to deal with that night. This was just the type of situation that warranted the existence of proper intake procedures to assure that the information taken in by the first line of inquiry - the answering service or the TMC - was good information, the attention of a supervisor to determine the extent of the danger and/or the immediate response contemplated by the so-called standing orders.

Based on the foregoing, the Court finds that claimant has established by a preponderance of the evidence that the State of New York is in part responsible for the happening of this tragic accident. The State failed to address a recurrent icing condition about which it had notice from its own employee, and continued such recurrent condition by its negligent failure to properly assess the replacement of its pipe, should have known of the existence of this recurring water/ice condition based upon the testimony of disinterested witnesses and its own employees, and had actual and constructive notice of the icing condition that arose on the evening of February 13, 2009, and deteriorated throughout the evening and into the early morning hours of February 14, 2009, which was a proximate cause of the wrongful death of Michelina Rozell.

Of course the evidence supports some high level of culpability on the part of the driver of the car in which Ms. Rozell was a passenger, Cheryl Milby. The Court credits the findings of both accident reconstruction experts with regard to the general path of the vehicle, and the additional conclusions drawn by Mr. Silver, which showed that despite some level of intoxication higher than the .07% blood alcohol level registered some unspecified hour after the accident, Ms. Milby was able to negotiate her car through the icy area with some ability. Even the completely sober driver, Ms. Winslow, was unable to avoid an eventual collision with trees two hours earlier, although presumably other drivers who experienced the progressive icing were able to travel through without incident. For her part, Ms. Milby had driven from decedent's mother-in-law's house along Route 55 and the Taconic State Parkway without any problem, until she came upon a sudden swath of ice around a curve on an unlit State highway traveling at or near the speed limit, if not slightly slower, knowing that such curve contained two bends.

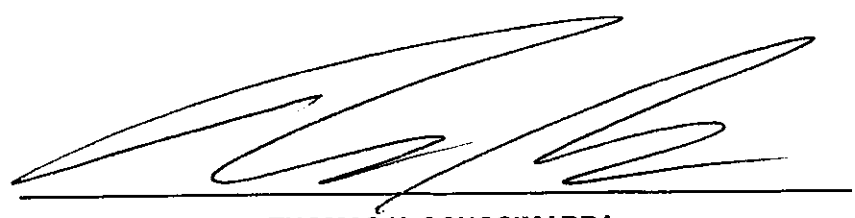
Based on the foregoing, on balance, the Court finds that the Defendant State of New York is 50% responsible for the happening of this accident.

The Chief Clerk is directed to enter judgment on the issue of liability as set forth herein.

A trial on the issue of damages will be scheduled as soon as practicable.

Let interlocutory judgment be entered accordingly.

White Plains, New York
October 12, 2012



THOMAS H. SCUCCIMARRA
Judge of the Court of Claims