IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 4, 2009 Session

ALLISON HOCKER v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 20200885 William O. Shults, Commissioner

No. E2008-02638-COA-R3-CV - FILED OCTOBER 30, 2009

Allison Hocker ("the Claimant") suffered life-threatening injuries in a violent head-on collision in Loudon County at the intersection of U.S. Highway 70 (referred to herein as "Highway 70" or "70") and U.S. Highway 11 (referred to as "Highway 11" or "11"). She was traveling east on Highway 70 when she missed a sharp right turn in the road at 70's intersection with 11, allegedly because of the poor design of and markings on the roadway, and drove directly into oncoming traffic. In a trial before the Tennessee Claims Commission ("the Commission"), the Claimant proved to the satisfaction of the Claims Commissioner ("the Commissioner") that the intersection was negligently designed, constructed and maintained by the State, but the Claimant was denied recovery because her fault was found to be equal to that of the State. The Claimant's damages, without regard to fault, were found to be $2,877,602.41. The Claimant appeals. We reverse and remand for the entry of a judgment for the Claimant in the amount of $300,000.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims Commission Reversed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

J. Randolph Humble and Tracy Jackson Smith, Knoxville, Tennessee, for the appellant, Allison Hocker.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and George H. Coffin, Jr., Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

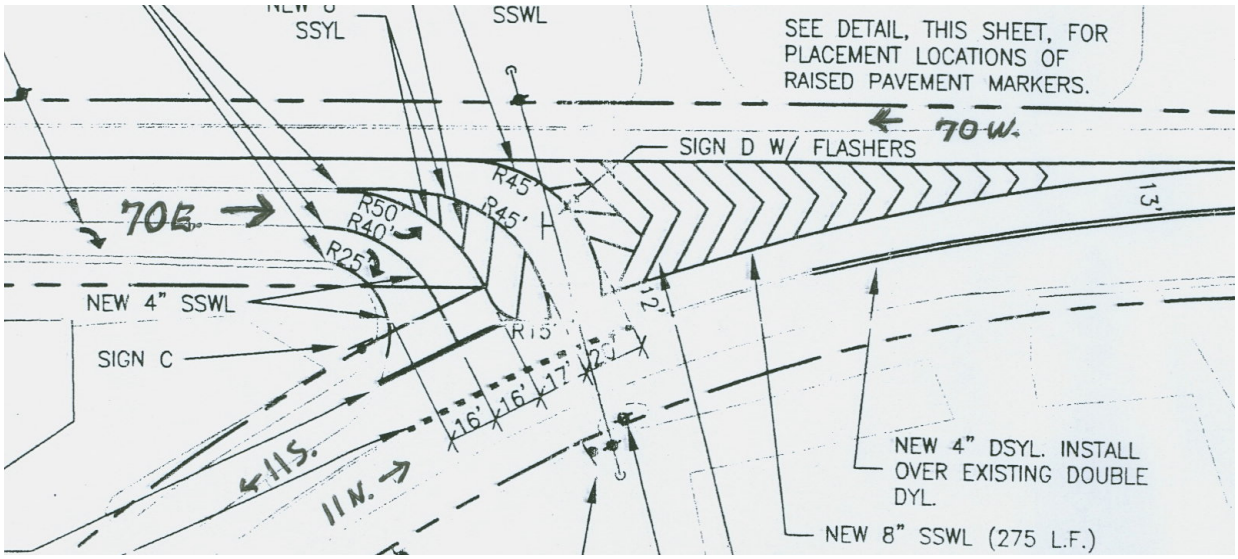
I.

A.

The intersection where the Claimant was tragically injured is commonly known as Dixie Lee Junction. In the days before interstate highways, Highway 70 was a major east-west artery and Highway 11 was a major north-south roadway. According to the proof, the roads were still heavily traveled at the time of the Claimant's accident, partly because of their proximity to the heavily-populated west side of Knoxville. However, even though the Claimant worked at a nursing home close to and east of Dixie Lee Junction, it is undisputed that until the day of the accident, December 5, 2000, the Claimant had never driven through the intersection.

Highway 70 (generally running east-west) and Highway 11 (generally running north-south) come together north of Knoxville. As combined, they are known, for a long distance, as Kingston Pike. To the west of Knoxville, they split off at the Dixie Lee Junction near the boundary between Knox County and Loudon County. The combined 70 and 11 and their subsequent split roughly parallel the joining together, and splitting, of Interstates 40 and 75 through Knox County into Loudon County.

It is impossible to understand the accident and assess the relative fault of the Claimant and the State without first understanding the intersection. The intersection is generally configured like a lower case "y" that has been rotated counterclockwise about 90 degrees. At the point of the subject intersection (as pertinent to the dynamics of this accident), Highway 11 travels northeast, along the long base of the "y," and south along a long curve that sweeps toward the south, corresponding to the diverging left branch of the "y." Highway 70 runs along the same lanes as Highway 11 to the north and east of the intersection. Thus, the common lanes form the base of the "y." Highway 70 forms the other branch of the "y" where its westbound lane diverges from Highway 11 and continues toward the west. Because our verbal description, however accurate, will be more difficult as we advance into the details of the intersection, we have graphically depicted the intersection by reproducing a portion of trial exhibit 30, with some editorial alterations for clarity.



The departure from our general description of the intersection as a "y" comes in the form of a hard right turn in Highway 70 for all *eastbound* traffic (the direction in which the Claimant was traveling) – a turn that tends to connect the two branches of the "y" by means of a short connecting spur. Immediately before the hard right turn, the single eastbound lane of 70 becomes two lanes, one for traffic turning right onto Highway 11 south ("the 70 east-south lane") and one for traffic turning left onto combined Highway 11 north and 70 east ("the 70 east-north lane"). Thus, eastbound Highway 70 traffic desiring to go south on Highway 11 must take the 70 east-south lane, which is the right lane, and negotiate the hard right turn, stop at the intersection, and turn right (south) on Highway 11. Eastbound traffic on Highway 70 planning to go east on the combined Highway 70/Highway 11, must take the 70 east-north lane, which is the left lane of the hard turn, negotiate the hard right, stop at the intersection, and then turn left to proceed on combined Highways 70 and 11. Another lane in the connecting spur exists for northbound traffic on 11 to go west on 70 ("the 11 north-west lane") by turning left off of 11 into the 11 north-west lane and then merging with 70 west. The 11 north-west lane forms two medians. One is a small narrow median between the 11 north-west lane and the 70 east-north lane. The other is a large triangular shaped median formed by the 11 north-west lane, the 11 south lane, and the 70 west lane.

With this background we can briefly describe the topography of the intersection and the signage provided to traffic proceeding eastbound on 70 on the day of the collision. Eastbound Highway 70 traffic climbs a slight incline on the approach to the intersection. The incline obscures an eastbound driver's view of the intersection, and particularly the hard right turn, until the driver is about 80 to 130 feet away. A yellow and black sign on the right shoulder of the road approximately 750 feet to the west of the intersection informs eastbound drivers that the road takes a sharp right turn. A yellow traffic sign bearing the outline of a stop sign and an upward pointing arrow is situated about 500 feet west of the intersection. A green sign situated also on the right shoulder of Highway 70 to the west of the intersection indicates that traffic intending to go south on

11 makes a hard right turn but the 11 north and 70 east traffic continues straight. A stop sign with flashing beacons is aerially suspended directly in front of eastbound traffic so as to indicate a stop straight ahead. The overhead sign is visible about 700 to 800 feet west of the intersection, however, in fact, the stop is not directly ahead. Instead, the stop is to the right. At the time of the accident, there were no reflectorized barrier markers to keep drivers from entering the medians, although there are now. There were, however, traffic bumps coated with white reflectorized coating to indicate to drivers that the medians are not for traffic. The 70 east-south lane near the intersection contained a white painted arrow indicating a right turn, and the 70 east-north lane contained a white painted arrow indicating a left turn. The actual stop sign that drivers must obey is immediately to the right of the overhead sign and on the right shoulder of 11 south near the 70 east-south lane.

On the day of the collision, the Claimant was doing a favor for two coworkers who lived in Kingston and Harriman. They were without transportation, and she agreed to come to the nursing home and give them a ride home, even though she was off work that day. Since they lived to the west, she traveled 70 west, through Dixie Lee Junction to take them home. She returned along 70 east, but by the time she made it back to the intersection it was about 7:30 p.m. and dark. From passing through westbound earlier in the afternoon, the Claimant recalled that the roads intersected, but not much more. She testified that the intersection was poorly lit, although there is some lighting in the area of the intersection. The Claimant is not a drinker and was not impaired on the evening of the accident.

As she approached the intersection on her way back to Knoxville, she saw the symbolic "stop ahead" sign but later could not recall seeing the sign indicating a hard right turn ahead. She saw the flashing beacons and the overhead stop sign from a considerable distance away. Next she saw the painted arrow in the right lane but did not see an arrow in her lane. She later remembered thinking that she should stop but being confused as to where to stop. Her impression was that she should stop somewhere underneath the overhead stop sign. She topped the crest of the hill at about 40 to 45 miles per hour, slowing as she attempted to go under the overhead stop sign, and, realizing too late that she was in an area prohibited to traffic, skidded through the medians into oncoming traffic. She collided violently with another vehicle. At trial, other than as stated, she did not recall seeing other traffic signs and markings.

Rescuers had to cut the Claimant out of her automobile. She was flown to the University of Tennessee Trauma Center where she remained for approximately two months. Her extensive orthopaedic injuries included a broken hip, broken femurs, broken knees, broken pelvis and broken ribs. She had numerous torn tendons and ligaments, plus a closed head injury, lacerated kidneys and spleen, and a severed aorta. After her discharge from the hospital to a nursing home, she had to be re-hospitalized because of an antibiotic resistant staph infection. She had to learn to walk again, this time with a limp because one leg was left shorter than the other, and she spent many months in rehabilitation. She was able to return to work part time about two and a half years after the accident.

As related by the Claimant's expert, Dan Moore, the condition of the intersection as of December 5, 2000, dated back to an overhaul of the intersection recommended by an Advanced Planning Report ("APR") dated March 23, 1999. APRs are state-level investigations of roadway problems, usually instigated by local government officeholders. The APR for Dixie Lee Junction

found both "geometric" and "operational" deficiencies with the intersection and recommended improvements. The 1999 APR reported a "slightly higher accident rate" for the intersection. According to Mr, Moore, the reflectorized stripes and raised bumps (also called RPMs) in the median were added after the APR and, before the accident, the right turn ahead sign was installed, and the overhead sign with flashing beacons was installed. Mr. Moore acknowledged that the white painted lane markings in Highway 70 were painted after the APR and before the accident.

In his re-creation of the accident, Mr. Moore placed the blame for the accident on the State. The investigating officer found skid marks beginning inside the median area after the painted RPMs. According to Mr. Moore, this corresponded to poor and confusing signage, a misleading overhead sign, and the Claimant's feeling of the pavement bumps and reacting. In Mr. Moore's opinion, eastbound motorists on Highway 70 cannot see the median island until they are approximately 86 to 100 feet away, and cannot get a full view until they are about 50 feet away. Also, the hard right turn that a driver must negotiate cannot be seen until the driver is actually in the curve. Mr. Moore testified that road designers use a perception/reaction time of 2.5 seconds but the Claimant, according to his calculations, only had one to one and a half seconds to react. Mr. Moore believed the Claimant acted appropriately, as any prudent person would, by applying her brakes about 50 to 80 feet from the intersection. Mr. Moore placed her speed as reduced to 40 m.p.h., give or take a little, as she entered the median, leaving only 3/4 second from the time she applied the brakes to impact during which her car skidded 70 feet.

Mr. Moore testified that there are missing pieces of information that a driver needs to safely travel Highway 70 east through the intersection. Drivers need to be informed to slow significantly well in advance of the intersection and need to be informed that they must make an immediate hard right turn rather than continue on directly through the median. Mr. Moore recommended placing yellow traffic signs with black "chevrons"[1] that would be visible to drivers prior to cresting the hill. Also, Mr Moore recommended something to reduce the speed of motorists approaching the intersection. According to Moore, there were no signs lowering the speed within one-half mile of the intersection. There should be something advising drivers that the hard right curve should be negotiated at 10 to 15 m.p.h. Moore suggested slowing the speed by reducing the speed limit or by rumble strips , or, preferably, both. The bottom line in Mr. Moore's analysis is that a driver is simply unable to appreciate the situation in time to react.

Mark Best, who was the regional traffic engineer for the Tennessee Department of Transportation ("TDOT") for the area including Dixie Lee Junction, testified that changes were made as a result of the 1999 APR; they were completed in December of 1999. At that time, Best was the person with supervisory responsibility over signage, traffic markings and traffic studies. The improvements were actually done by Loudon County under contract with the State, but the State has jurisdiction over Dixie Lee Junction. Best admitted receiving a certified letter from Loudon County informing TDOT that the improvements were completed in accordance with the plan and contract. Best was unaware of anyone from TDOT ever visiting the site after the 1999 alterations either to inspect the work, to inspect the intersection at night or to see if the improvements were working.

[1] Chevrons are road markings in the shape of an inverted "V."

In fact, Best admitted no one from TDOT is usually assigned the duty of checking alterations to see if they are working. Best took issue with Mr. Moore's suggested solutions. Rumble strips, according to Best, would generate noise complaints and chevrons would pose maintenance concerns. Further, according to Best, none of Moore's suggestions would have worked because the Claimant went past a right turn sign, a stop ahead sign, and an overhead stop sign. In Mr. Best's analysis, knowing that one must stop also tells one that he or she must slow.

Mr. Paul Beebe, a TDOT traffic engineer, testified about the 1999 APR and the studies that produced it. According to Beebe, the 1999 APR was preceded by a 1997 preliminary APR which placed the accident rate at Dixie Lee Junction at twice the state average. The APRs were requested by the Loudon County Executive. APRs are not mandatory, but rather suggestions for improvement. The 1999 APR identified the angle of Highway 70's approach to the intersection as undesirable. One preliminary APR suggested a flyover for Highway 70 that would take the eastbound lane over Highway 11 allowing traffic to merge. This alternative was described by Mr. Best as very expensive, whereas the 1999 improvements were accomplished for $50,000.

John Marius, who has lived on a family farm just west of the intersection all his life, testified that the intersection has been the site of many accidents, including fatalities. Mr. Marius testified that there has been less "blood and gore" after the 1999 changes, which he characterized as "marginal." Mr. Marius was present at meetings with state and county officials and was asked to donate some land to improve the intersection. According to Mr. Marius, the speed limit on 70 is 45 m.p.h., the intersection is "congested," and it is "confusing."

Mr. Miller Day, who has lived 1/4 mile west of the intersection since 1975 testified of problems at the intersection since the early 1980s. He attended several community meetings back to 1996. Mr. Day's position is and has been that the intersection is dangerous and the cause of numerous accidents. One problem that Mr. Day has identified is a "stop ahead" sign with a *straight* arrow on it and another is the placement of an overhead stop sign without a corresponding place to stop. Mr. Day confirmed that there is no reduction of the speed limit on Highway 70 in the vicinity of the intersection and described TDOT as "asleep at the wheel" in this regard.

Mr. Harold Duff, who lives near the intersection and travels though it often, and has also been a Loudon County Commissioner since 1994, has been a vocal advocate of improvements to the intersection. In his mind, Duff was elected to "fix" the problem of Dixie Lee Junction. His preference is the flyover, but he acknowledges that is an expensive alternative. Mr. Duff identified at least three alternative plans that were put forth in the late 1990s. It was Loudon County that actually hired an engineering firm in 1999 to develop improvements with TDOT's concurrence. The 1999 changes involved twisting Highway 70 to the right, creating the median and marking the median. Mr. Duff was not satisfied that the 1999 alterations had solved the problems. Mr. Duff blames himself, partly, as a commissioner for failing to get the problem "fixed."

B.

As indicated above, the Commissioner first found that the State was at fault for the dangerous intersection, but found that the Claimant was equally at fault. Upon the finding of 50% fault on the

part of the Claimant, the Commission dismissed the claim against the State. Nevertheless, the Commission made an alternative finding – "in the event the opinion of the Commission is reversed on the comparative negligence issue . . . that Ms. Hocker's damages are far in excess of the Three Hundred Thousand Dollar ($300,000.00) damages cap provided for in Tennessee Code Annotated § 9-8-307(e) [2009]." Shortly thereafter, the Claimant moved the Commission to make additional specific findings regarding the Claimant's damages. The State responded that the findings were seemingly unnecessary but not inappropriate. In light of what the Commission characterized as no serious dispute as to the nature and effect of the Claimant's injuries and stipulated medical expenses, the Commission granted the motion and entered an amended judgment incorporating the additional findings with total damages, without regard to fault, of $2,877,602.41, leaving the original judgment otherwise in "full force and effect."

II.

The Claimant has appealed raising the following issue for our consideration: "[W]hether the evidence preponderates against the Commissioner's allocation of fault to the Claimant, Allison Hocker."

III.

A.

Apportionment of fault in a non-jury matter before the Claims Commission is reviewed, *de novo*, with a presumption of correctness unless the evidence preponderates against the bench findings. ***Lewis v. State***, 73 S.W.3d 88, 94-95 (Tenn. Ct. App. 2001); Tenn. R. App. P. 13 (d).

B.

We approach our analysis of the Commission's decision by borrowing liberally from it and stating our agreement and disagreement as the case may be. We agree with the Commission's finding that, under the law, the State had a duty "to exercise reasonable care under all the circumstances in planning, designing, constructing[,] and maintaining the State system of highways." Further, "[i]n gauging whether the State has breached its duty in such a circumstance, the Commissioner may consider factors, including '(1) the physical aspects of the road; (2) the frequency of accidents at the site; (3) expert testimony in arriving at this factual determination,' " according to ***Atkins v. State***, No. E2003-01255-COA-R3-CV, 2004 WL 787166 at *5 (Tenn. Ct. App. E.S., filed April 14, 2004). The Commissioner's discussion of the parties' comparative negligence is comprehensive and informative and we repeat a lengthy portion verbatim as follows:

> The Commission FINDS this case should be decided under Tennessee Code Annotated §§ 9-8-307(a)(1)(I) and (J) and that § 9-8-307

(a)(1)(C) does not apply here.[2] Further, the Commission believes that if the State is negligent under subsection (I), its negligence would be in the areas of "inspection of," "approval of plans for," and "construction of" the renovation of the Dixie Lee Junction intersection. . . . Additionally, in the case of subsection (J), dangerous conditions on state maintained highways, Ms. Hocker must establish not only the usual foreseeability of risk required in any negligence case but also "notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures."

First, with regard to the foreseeability that the Claimant must show under either subsection (I) or (J), this Commission has no difficulty finding that it was foreseeable to the State that there was a dangerous traffic issue at the Dixie Lee Junction intersection. In fact, witness Duff testified that he was elected to the Loudon County Commission in 1994 with a principal assignment from the voters of correcting the situation that existed at the Junction. In attempting to remedy the

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[2] The pertinent part of the statute states as follows:

> (a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:
>
> * * *
>
> (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;
>
> * * *
>
> (I) Negligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways;
>
> (J) Dangerous conditions on state maintained highways. The claimant under this subdivision (a)(1)(J) must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures[.]

Tenn. Code Ann. § 9-8-307 (Supp. 2009).

situation, Mr. Duff held public meetings where TDOT officials were present and met with TDOT officials in their Regional Office in Knox County and at headquarters in Nashville. It is also clear that this situation was brought to the attention of the State in light of the Advanced Planning Reports and preliminary studies prepared by TDOT. . . . State studies found that, prior to the supposed remedies carried out in 1999, Highway 70 entered Highway 11E at a severe thirty degree (30°) angle. And, although the repair efforts changed the nature of the accidents from fatalities to hard impacts, it is clear from the Claimant's proof that the Dixie Lee Junction intersection was still a problem area at the time of Ms. Hocker's accident because of its configuration and the large degree of development and . . . due to the heavy growth in this area of Knox and Loudon Counties. . . .

Foreseeability is not only a requirement of recovery under Tennessee Code Annotated § 9-8-307(a)(J), it is an underlying requirement of any negligence lawsuit. In ***Eaton[v. McClain***, 891 S.W.2d 587 (Tenn. 1994)], Justice Drowota said:

> [A] risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. **Foreseeability is the test of negligence**. . . .
>
> The pertinent question is whether there was any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries.

Id. at 594 (*citing* ***Doe***, 845 S.W.2d at 178).

* * *

Here, the Commission FINDS that the State was negligent, as will be discussed in greater detail, particularly in its inspection and monitoring of the Dixie Lee Junction intersection following the 1999 renovations.

The Commission makes this finding in light of several factors. First, although there was signage in place at the time of the accident, it was confusing. The first sign that Ms. Hocker encountered was a hard-right turn sign, but it was located far back from the intersection. Shortly thereafter, she passed a "stop ahead" sign that also contained

a vertical or straight ahead arrow. Then, as she approached the intersection itself, she was confronted with a stop sign bearing flashing lights, but there was no indication as to where her stop should take place. In fact, the actual stop was at a stop bar to the right of the intersection on the margin of Highway 11E. Additionally, as can be seen in Exhibits 6-B and C, the channelized traffic island cannot be fully appreciated until the . . . driver is virtually on top of it. Finally, although the . . . driver is approaching an intersection, the speed limit is never lowered from forty-five (45) miles an hour as motorists approach the hard-right turn, and they are . . . required to negotiate that turn in order to turn east toward Knoxville on 11E.

However, the negligence in this case is not that of the State alone. It is clear that Ms. Hocker's unfortunate fate was caused by some of her own actions or inactions on December 5, 2000.

This being the case, a comparison of the two parties' negligence must be undertaken, and those factors from **Eaton** must be used as a guide. As discussed previously, Justice Drowota made it clear in ***Eaton*** that these are non-exclusive factors. Surely, each of the six parameters discussed by Justice Drowota will not apply in every case. However, they do provide a useful framework within which to analyze this and other cases.

[The factors are stated as follows:

In summary, the percentage of fault assigned to each party should be dependent upon all the circumstances of the case, including such factors as: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Eaton v. McLain, 891 S.W.2d 587, 592 (Tenn.1994)(footnotes omitted).]

Factor one (1) relates to the relative closeness of the causal relationship between the conduct of the State and the injury to Ms. Hocker. The proof here showed that road designers typically factor a two and one-half (2 1/2) second reaction time into the design process. However, the Claimant's witness, Moore, testified that Ms. Hocker had, at most, one and one-half (1 1/2) seconds to appreciate the channelized median and react once she topped the hill at forty-five (45) miles an hour. According to his calculations, three-quarters (3/4) of a second after applying her brakes, she hit the first of two vehicles that she collided with on Highway 11E. If this is the case, the design for the Dixie Lee Junction intersection renovation project was deficient with regard to the amount of reaction time which had been engineered into the intersection reconfiguration.

* * *

With regard to factor one (1), the proof from the Claimant is unrebutted that the geometrics (or the horizontal and vertical configuration) of the intersection are not good. Mr. Moore testified that Ms. Hocker would be able to appreciate what she was driving into at the intersection from a distance of eighty-six (86) to one hundred (100) feet. Mr. Best, on behalf of the State, testified that she should have been able to appreciate the configuration of the intersection at one hundred twenty (120) to one hundred thirty (130) feet from it during the day and at night. Regardless of whether Ms. Hocker was able to understand the intersection at . . . 86 feet . . . or . . . 130 feet . . . (depending on which expert the fact finder believes), it is clear that . . . Ms. Hocker entered a very convoluted junction at night with little time to react. Further, the Trooper, who investigated this accident and traveled the area frequently, characterized Dixie Lee Junction as "odd" following its renovation. Additionally, the stop sign at the intersection and the adjacent red lights are not located where the motorist is required to stop but, rather, over the intersection itself, compounding the confusion that any unfamiliar driver would experience. Therefore, with regard to ***Eaton*** element number one (1), the Commission FINDS there was a causal relationship between the confusing nature of the intersection and Ms. Hocker's accident. However, this confusion factor is ameliorated by Ms. Hocker's failure to slow her vehicle in an effort to unravel her professed confusion.

In that same connection, ***Eaton*** factor number six (6) requires the Commisson to evaluate Ms. Hocker's particular "capacities." . . . [T]his Commission has no difficulty finding that this Claimant was thoroughly capable of intelligently operating her automobile in an unimpaired state on the evening of her accident.

Factor number two (2) from the ***Eaton*** calculus evaluates Ms. Hocker's reasonableness in confronting the risk she encountered. Although Ms. Hocker may characterize the signage as confusing, she passed a sign indicating that the road would take a hard-right and that she would encounter a stop ahead. In fact, the proof shows that the flashing lights located on either side of the overhead stop sign at the intersection were visible from a distance of seven hundred (700) feet and that the sign itself should have been visible, even at night, from a distance of four hundred (400) feet. Ms. Hocker must have appreciated these warnings since she admitted that she slowed her vehicle. Additionally, Ms. Hocker's expert witness, Don Moore, testified that the signs in place were properly reflectorized, meeting the requirements of the Manual on Uniform Traffic Control Devices . . . as adopted in Tennessee. This being the case, Ms. Hocker must be faulted for failing to thoroughly appreciate what the signage was trying to tell her. In fact, her expert witness admitted that these signs were very restrictive and that they are the "most" restrictive, except for traffic signals. Mr. Moore went on to testify that, regardless of her speed, a "stop ahead" sign, a sharp turn ahead sign, and a stop sign above the intersection with flashing beacons should have placed Ms. Hocker on notice that she needed to slow down since there was a stop coming up, even without a sign lowering the speed limit . . . . Additionally, Engineer Best, a witness for the State, accurately observed that every motorist must begin a slowing process before actually arriving at a stop sign. Trooper Ruskey added that the signage in place prepared drivers for the intersection and that a driver should have been able to see the reflective paint on the signs and in the intersection once the driver's headlights strike it. Ms. Hocker testified that this paint was "fainted." The Commission does not find this testimony credible in light of the fact that this accident happened within a year of the painting of the median. Moreover, the testimony of Trooper Ruskey made clear that the paint had been in place only since the completion of the project, which was slightly less than a year before the accident. . . .

Eaton finally directs that the Commission evaluate the extent to which the State failed to reasonably utilize an existing opportunity to avoid the injury to Ms. Hocker. For some unfathomable reason, the

evidence shows that TDOT never inspected the renovation project after it was completed, nor did it follow-up after 1999 to see if the reconfiguration of the intersection was working. Additionally, Engineer Best testified that TDOT, as far as he knew, never checked this intersection at night. This failure verges on the unbelievable. Why TDOT did not follow up and inspect work done at a known dangerous intersection of two heavily traveled roads is difficult to understand. For years, responsible Loudon County officials had virtually begged TDOT to do something about the intersection of the two heavily used highways in an expanding neighborhood. Their efforts extended all the way to Nashville. However, after the State assisted Loudon County in obtaining a small Fifty Thousand Dollar ($50,000.00) grant, the State apparently walked away from this project and left its completion up to Loudon County. Although the engineering firm and contractor are well-known in their respective fields in Tennessee, the Claimant's expert, Moore (a former state employee), testified that TDOT maintains roads even after completion of independent contractors' work.

The failure to inspect this dangerous intersection after the work was completed is a serious consideration in this case. Additionally, the Claimant's position that the speed limits should have been lowered for motorists approaching the intersection from the west is well-taken. Both Tennessee Code Annotated §§ 55-8-152 (f)(1)(A) and 55-8-153 authorize TDOT to lower the speed limits "due to concerns regarding the roadway, traffic, or other conditions" and "at any congested area, dangerous intersection . . . that the public safety requires." If the speed limit had been lowered as Ms. Hocker approached the intersection, she might have heeded such signage and entered Dixie Lee Junction at a speed which might have offered her an opportunity to appreciate what she was driving into. However, no such reduction took place.

Additionally, Mr. Moore suggested that the placement of chevrons on the boundary of the channelized median area of the intersection might have diverted Ms. Hocker to the right, thus avoiding the path through the median which led her directly into Highway 11E. This is an extremely good suggestion, given the visibility problems created for Highway 70 drivers who top the crest of the hill just before the intersection.

However, it should also be remembered that, in fact, Ms. Hocker had gone through Dixie Lee Junction earlier when she traveled west on Highway 70 toward Kingston and Harriman. Surely, she must have

understood and appreciated something about an area that she had driven through shortly before the accident.

After a consideration of all the ***Eaton*** factors and the facts in this case, it is undeniably clear that the comparative negligence issue is extremely close. As discussed earlier, the fact that the State never evaluated, during the daylight or at night, whether the 1999 reconfiguration of Dixie Lee Junction was accomplishing its goals is very disturbing. Surely, the State at the very least should have had in place a component of TDOT that evaluates post-construction repairs to determine whether or not they are functional and safe.

On the other hand, the State's argument that Ms. Hocker did not take sufficient precautions for her own safety as she approached the intersection is well-taken. Although some issues regarding the signage were raised during the course of the trial of this matter, it is clear that Ms. Hocker was put on notice that she was approaching an intersection. In fact, she had been through this same intersection earlier in the evening. Although the markings and signage may not have been absolutely perfect, they provided her with notice that she was approaching an intersection through the use of reflectorized signs and road markings and flashing red lights visible seven hundred (700) feet from the intersection. The Claimant's expert Moore testified that regardless of Ms. Hocker's speed as she approached the intersection, the "stop ahead" sign, the sharp turn sign, and the stop sign with the flashing beacons should have placed her on notice, even in the absence of signs lowering the speed limit, that she was approaching a location where she would have to bring her vehicle to a stop. Additionally, Ms. Hocker herself testified that she had slowed somewhat as she approached Dixie Lee Junction.

In light of all of these factors, the Commission cannot find that either party was more negligent than the other in causing this tragic accident. In other words, the Commission FINDS that the Claimant and the State were equally negligent. Accordingly, the Claimant is ineligible to recover damages because she has been deemed fifty percent (50%) negligent, and ***McIntyre[v. Ballentine***, 833 S.W.2d 52 (Tenn. 1992)] clearly establishes that a claimant is entitled to recover under the "49% rule" only if the claimant's negligence is less than that of the defendant.

(Bold emphasis in original, footnote 2 added.)

We agree with the Commission's finding of negligence against the State. The only statement in the State's brief that addresses its negligence is "The Defendant, while not agreeing with the Commissioner's finding that it was negligent, does agree that the Claimant's acts or omissions were responsible for her injuries and damages." The State's arguments for upholding the Commissioner's apportionment of fault are all along the line that a stop sign is the most restrictive of traffic signs, that the Claimant knew she was approaching a stop, that she had to slow in order to stop, therefore, the Claimant had all the information she needed. Further, the State argues that in light of her duty for her own safety and to keep her automobile under control, her professed confusion should have produced more caution and more slowing. The Claimant simply reargues the first, second and third factors listed in ***Eaton*** and argues that she had too little warning to react to the danger to be assigned an equal share of the fault. We agree with the Claimant.

We believe that the first and third ***Eaton*** factors weigh heavily in favor of assigning fault to the State. The "relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff" is strong. *See* ***Eaton***, 891 S.W.2d at 592. The Commissioner recognized as much, stating, because of the deficiencies in design and signage and speed, "it is clear that . . . Ms. Hocker entered a very convoluted junction at night with little time to react." The Commissioner found the Claimant's argument for lowering the speed limit to be "well-taken" and found her expert's suggestion of chevrons to be "extremely good." Further, in discussing the third ***Eaton*** factor, the Commissioner stated: "If the speed limit had been lowered as Ms. Hocker approached the intersection, she might have heeded such signage and entered Dixie Lee Junction at a speed which might have offered her an opportunity to appreciate what she was driving into." We concur with these findings based on our review of the record except we believe that more probably than not, had the state made some or all of these corrective measures, the Claimant would have "appreciate[d] what she was driving into," and the result would have been different. We hold that the evidence preponderates strongly in favor of a direct causal connection between the State's breach of its duty and the accident.

The strength of the third ***Eaton*** factor in this case stems from the fact that the State was in a position to prevent the accident but, in the words of one of the lay witnesses, was "asleep at the wheel." If, "[f]oreseeability is the test [for] negligence" as quoted by the Commission from ***Eaton,*** then the State failed that test. The State has known that the intersection was dangerous since at least 1997, but has done precious little about it. As characterized by the Commissioner, "Loudon County officials had virtually begged TDOT [for years] to do something about the intersection of the two heavily used highways in an expanding neighborhood." Worse, after helping Loudon County acquire $50,000 to apply to corrections in 1999, TDOT "walked away" from the project and never came back. Moreover, the Commissioner found TDOT's failure to inspect the project to see if improvements were made according to plan, and how they worked once made, to be a "serious consideration in this case" to the point of being "disturbing." We agree, and hold that the evidence preponderates in favor of finding that the State was in the best position to prevent this accident.

We agree with the Commission that some fault can be logically assigned to the Claimant, but we do not agree that the second ***Eaton*** factor weighs heavily enough to equal the State's fault. We note that the Commissioner specifically found that the Claimant was not impaired in any manner. He did not find she was exceeding any posted speed limits. Other than the fact that the accident happened, there is little in this record to tell us the Claimant was not exercising due care for her own safety. The Commissioner found that in light of the existing signs, "Ms. Hocker must be faulted for failing to thoroughly appreciate what the signage was trying to tell her." Further, the Commissioner made negative inferences from the Claimant's admitted attempt to slow: "Ms. Hocker must have appreciated these warnings since she admitted that she slowed her vehicle." Also, the Commissioner imputed knowledge of the condition of the intersection to the Claimant from the fact that earlier in the day she had driven toward Kingston and Harriman along 70 west. Having concluded that the signage and layout of the intersection were confusing, and that the State was in a position to eliminate or at least reduce the confusion, we are unwilling to assign significant fault to the Claimant for being confused. Likewise, we are unwilling to conclude that she was not confused by the fact that she attempted and accomplished some slowing of her vehicle. By all accounts she had probably slowed from about 45 m.p.h. to about 40 m.p.h. between the time she topped the hill and began her skid in the median area. We believe it more likely than not that she slowed in light of the stop ahead and resultant confusion about where and when to stop. We are unwilling to impute knowledge of the dangers facing eastbound drivers at the intersection after dark to the Claimant based on her one pass through the intersection in the straight, westbound lane of 70 in the daylight. We hold that the evidence preponderates against a finding that the Claimant was equally at fault with the state. We hold that the State was 51% or more at fault.

Although we are empowered to reallocate fault after a bench trial, that will not be necessary in this case. *See* ***Cross v. City of Memphis***, 20 S.W.3d 642, 645 (Tenn. 2000). With damages found to total over $2.8 million, it makes no difference whether we or the Commissioner apportion 1% fault to the Claimant or 49%; her recovery will always be at least $300,000, but capped at $300,000. Tenn. Code Ann. § 9-8-307(e). Therefore, we simply direct entry of a judgment awarding the Claimant $300,000.

IV.

The judgment of the Commission is reversed. Costs on appeal are taxed to the appellee, the State of Tennessee. This case is remanded to the Commission, pursuant to applicable law, with directions to enter a judgment in favor of the Claimant in the amount of $300,000, and such further proceedings as are necessary and consistent with this opinion.

CHARLES D. SUSANO, JR., JUDGE