

COURT OF APPEALS
STATE OF NEW YORK

-----X
JOHN SMITH,

Plaintiff-Appellant,

-against-

Acme County Clerk's
Index No. 3284/96

THE TOWN OF ANYTOWN,

Defendants-Respondents.

-----X

**PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL TO
THE COURT OF APPEALS**

LAW FIRM NAME
Attorneys for Plaintiff-Appellant

On the Brief:
Jane Doe, Esq.

TABLE OF CONTENTS

1. Notice of Motion. 22 N.Y.C.R.R. § 500.11(d)(1)(i) 1

2. Statement of Questions Presented Pursuant to 22 N.Y.C.R.R. § 500.11(d)(1)(ii).
..... 3

3. This Motion is Timely Made. 22 N.Y.C.R.R. § 500.11(d)(1)(iii). 4

4. This Court possesses jurisdiction pursuant to NY CPLR. § 5602(a)(1)(i) to review the decision and order of the Appellate Division which affirmed the lower court’s order granting the Town’s Motion for Summary Judgment and dismissing Smith’s Complaint. 22 N.Y.C.R.R. § 500.11(d)(1)(iv). 4

5. Reasons for Granting Leave to Appeal (22 N.Y.C.R.R. 500.11(d)(1)(v)). 5

Summary of the Facts: 5

Argument 8

I. LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE APPELLATE DIVISION, EIGHTH DEPARTMENT HAS IMMUNIZED MUNICIPALITIES FROM THEIR DUTY TO PROVIDE SAFE STREETS AND HIGHWAYS TO LOCAL RESIDENTS AND HAS INTERPRETED NEW YORK LAW ON THE QUESTION OF PROXIMATE CAUSE IN THE SUMMARY JUDGMENT CONTEXT AT ODDS WITH COURT OF APPEALS PRECEDENT. 8

A. Leave to Appeal Should be Granted Because the Eighth Department’s Decision Absolves Towns from Any Liability Toward Residents for Hidden Dangers of Roadway Design that Traffic Engineers Can Warn Against and Reduce. 9

B. Leave to Appeal Should be Granted because the Eighth Department’s Decision Affirming the Dismissal of Smith’s Complaint on Summary Judgment Elevates the Standard for Establishing a Prima Facie Showing of Causation, Deprives Litigants of their Day in Court, and is Inconsistent with Court of Appeal Precedent. 11

C. Leave to Appeal Should be Granted Because the Eighth Department’s Decision Affirming the Granting of Summary Judgment in the Town’s Favor Conflicts with Decisions of other Courts Holding, under Similar Facts, that Fact Issues Precluded Summary Judgment 18

Conclusion 21

TABLE OF AUTHORITIES iii

TABLE OF AUTHORITIES

STATE CASES

<i>Alber v. State</i> 252 A.D.2d 856, 675 N.Y.S.2d 689 (3d Dep't 1998)	17, 18
<i>Andre v. Pomeroy</i> 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974)	12, 18
<i>Applebee v. State</i> 308 N.Y.502, 127 N.E.2d 289 (1955)	17
<i>Atkinson v. Oneida</i> 59 N.Y.2d 840, 451 N.E.2d 494, 464 N.Y.S.2d 747 (1983)	17
<i>Boyd v. Trent</i> 262 A.D.2d 260, 690 N.Y.S.2d 732 (2d Dept. 1999)	15, 19
<i>Friedman v. State</i> 67 N.Y.2d 271, 493 N.E.2d 893, 502 N.Y.S.2d 669 (1986)	9
<i>Gleich v. Volpe</i> 32 N.Y.2d 517, 300 N.E.2d 148, 346 N.Y.S.2d 806 (1973)	17
<i>Koester v. State of N.Y.</i> 90 A.D.2d 357, 457 N.Y.S.2d 655 (4th Dep't 1982)	15, 16, 17
<i>Little v. City of Syracuse</i> 258 A.D.2d 899, 685 N.Y.S.2d 365 (4th Dep't 1999)	18
<i>Miller v. Fenton</i> 247 A.D.2d 740, 669 N.Y.S.2d 391 (3d Dep't 1998)	19, 20
<i>Nallan v. Helmsley-Spear, Inc.</i> 50 N.Y.2d 507, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980)	11, 18
<i>Scheemaker v. State</i> 125 A.D.2d 964, 510 N.Y.S.2d 359 (4th Dep't 1986), <i>affirmed</i> , 70 N.Y.2d 985, 521 N.E.2d 427, 526 N.Y.S.2d 420 (1988)	14
<i>Vasquez v. Consolidated Rail Corp.</i> 180 A.D.2d 247, 584 N.Y.S.2d 345 (3d Dep't), <i>leave to appeal denied</i> , 80 N.Y.2d 762, 607 N.E.2d 818, 592 N.Y.S.2d 671 (1992)	15

STATUTES AND RULES

17 NYCRR § 230.1 9
17 NYCRR § 200.2 9
17 NYCRR § 230.2 10, 12
22 NYCRR. § 500.11 1, 3, 4, 5
NY CPLR. § 5602 1, 4

TREATISES

Restatement, Torts 2d, § 431 11

1. Notice of Motion. 22 N.Y.C.R.R. § 500.11(d)(1)(i)

COURT OF APPEALS
STATE OF NEW YORK

-----X
JOHN SMITH,

Plaintiff-Appellant,

-against-

Acme County Clerk's
Index No. 3284/96

THE TOWN OF ANYTOWN,

Defendants-Respondents.

-----X

SIRS:

PLEASE TAKE NOTICE that upon the annexed Statement in Support of Motion for Leave to Appeal of Jane Doe, attorney for plaintiff-appellant, upon the briefs and record filed in the Appellate Division, Eighth Department on the prior appeal in this action, and upon all papers and prior proceedings in this action, plaintiff-appellant will move this Court at the Courthouse of the Court of Appeals, 1234 56th Street, Albany, New York, on March 19, 20xx at 9:30 a.m., for an order granting plaintiff-appellant leave to appeal to the Court of Appeals from the order of the Supreme Court, Appellate Division, Eighth Department, entered in the Office of the Clerk of the Appellate Division, Eighth Department on January 18, 20xx, and served with notice of entry by regular mail on January 25, 20xx, together with such other and further relief as this Court deems just and proper. The order granted

Defendant the Town of Anytown’s (“the Town”) motion for summary judgment dismissing Plaintiff John Smith’s (“Smith”) complaint.

Dated: New York, New York
February 28, 20xx

Respectfully Submitted,

Law Firm of Jane Doe and Associates

By: _____
Jane Doe, of counsel
Attorneys for Plaintiff-Appellant

To:
Appellate Counsel for Defendant-Respondent
Clerk of the Court of Appeals

2. Statement of Questions Presented Pursuant to 22 N.Y.C.R.R. § 500.11(d)(1)(ii).

1. The plaintiff offered undisputed evidence that the Town of Anytown owed a duty to safely maintain and design its roads, that advisory signs were necessary on Jones turnpike to warn that stopping distances were inadequate if the motorist was driving in excess of 20 mph, and that plaintiff suffered severe injuries when he crested a hill lacking any advisory signs driving 25 mph and was unable to safely stop his motorcycle to avoid a car 119 feet away. The Appellate Division dismissed Smith's complaint, concluding that Smith could not prove proximate cause as a matter of law, having driven the road several times in the past. Should leave to appeal be granted because the Eighth Department's decision contravenes legislative intent by creating a local motorist exception to a municipality's duty to maintain its roads?
2. Proximate cause issues are implicated in every variety of tort case. Moreover, granting summary judgment is a "drastic remedy" that deprives a litigant of his or her day in court. Should leave to appeal be granted because the Eighth Department elevated the standard for establishing proximate cause for purposes of opposing summary judgment in violation of this Court's precedents?
3. The Appellate Division also decided that Smith would not have acted differently, and subsequently avoided the accident, even if the advisory signs had been posted. Should leave to appeal be granted because the Eighth Department's decision conflicts with other Appellate Division opinions concluding that the reasonableness of the party's conduct and whether the plaintiff could have avoided the accident if warnings signs had been posted are issues of fact precluding summary judgment?

The above questions should be answered in the affirmative.

3. **This Motion is Timely Made. 22 N.Y.C.R.R. § 500.11(d)(1)(iii).**

The order of the Supreme Court, Appellate Division, Eighth Department was entered on January 18, 20xx and was served with notice of entry by regular mail on January 25, 20xx. A copy of the order with notice of entry is annexed hereto as Exhibit “A”. This motion is timely as it is made within thirty-five days of the service of the judgment with notice of entry. *See* NY CPLR § 2103(b)(2). A copy of the order of the Supreme Court, Acme County, which granted summary judgment to the Town on February 18, 2000, is annexed hereto as Exhibit “B”. The notice of appeal, annexed hereto as Exhibit “C”, was filed within thirty days of entry of the Appellate Division’s order on March 10, 2000.

4. **This Court possesses jurisdiction pursuant to NY CPLR. § 5602(a)(1)(i) to review the decision and order of the Appellate Division which affirmed the lower court’s order granting the Town’s Motion for Summary Judgment and dismissing Smith’s Complaint. 22 N.Y.C.R.R. § 500.11(d)(1)(iv).**

Plaintiff seeks review of the final Decision and Order of the Supreme Court, Appellate Division, Eighth Department dated January 18, 20xx and served with notice of entry by regular mail on January 25, 2001. The Appellate Division’s Order and Decision affirmed the final order of the Supreme Court, Acme County (Jack Jackson, J.) entered February 18, 20xx granting the Town’s Motion for Summary Judgment and dismissing Smith’s Complaint. This Appellate Division decision and order affirming the lower court’s decision is within this Court’s jurisdiction to review under New York CPLR § 5602(a)(1)(i)

and the New York State Constitution Art. IV, § 3 because it an order of the Appellate Division which finally determines the action and which is not appealable as of right.

5. Reasons for Granting Leave to Appeal (22 N.Y.C.R.R. 500.11(d)(1)(v)).

Summary of the Facts:

Smith filed a negligence claim alleging that the Town of Anytown owned, operated, managed, controlled, supervised, designed, and maintained a road located at Jones Turnpike, a public roadway, 1.1 miles east of the intersection with Johnson Road. (R. 29-30). On August 14, 19xx, John Smith was lawfully operating his motorcycle on the road when he lost control attempting to avoid a car that had pulled out onto the road. (R. 30-31, 64, 121-22). Smith had just crested a hill at the speed of 25 mph when he saw a car back out of a driveway onto the turnpike at the bottom of the hill. (R. 80-81). Evading the car was impossible as he was driving to the far right of the lane due to concerns of oncoming traffic straying off the center of the unmarked road. He was unable to stop in time and, instead, veered to the left and lost control. (R. 101-02). He suffered fractures to his leg requiring six surgeries, internal fixation devices, and extensive physical therapy. (R. 209).

Smith claimed that the Town was negligent in failing to conduct a traffic study or post advisory signs required by state law warning motorists that the stopping distance from the crest of the hill to the driveway at the bottom of the hill was inadequate if the motorist exceeded speeds of 20 mph. (R. 62). The posted speed limit was 35 mph, and Smith was traveling 25 mph at the time of the accident. (R. 64, 87, 88). If the Town had posted the

necessary advisory signs, Smith would have decreased his speed to 20 mph and avoided the accident. (R. 208-09).

Smith offered the affidavit of Robert James, a professional transportation and forensic engineer who was also a member of the National Committee on Uniform Traffic Control Devices responsible for updating the MUTCD. (R. 199, 200). James concluded that “[i]t is my professional opinion based upon a reasonable degree of engineering certainty that the Town of Anytown was negligent in its ownership, operation, control and design of the roadway on Jones Turnpike in the location of the plaintiff’s accident” and that this negligence proximately caused plaintiff’s accident. (R. 200). James concluded that the Town had a duty to maintain the safety of its roads in accordance with the Department of Transportation’s Manual of Uniform Traffic Control Devices 1983 (“MUTCD”). (R. 200). The Town violated several provisions of the MUTCD. First, the Town failed to retain an engineer and, instead, allowed a high school graduate with no engineering background to conduct road evaluations (R. 200-02). Second, the Town failed to conduct sight distance studies, place a double yellow line on the center of the road, or install an advisory speed sign warning that the distance between the crest of the hill and the driveway was inadequate for stopping if the motorist exceeded 20 mph (R. 202, 205). If Smith had been traveling 20 mph rather than 25 mph at the time of the accident and traveling closer to the center of a protected, double-yellow lined road, he would have had time to safely stop and avoid the car. (R. 205). The Town failed to offer any controverting expert evidence. (R. 212-18).

Deposition testimony by the Town's supervisor of highways, George Clinton, revealed that the supervisor lacked any engineering background and had obtained only a high school diploma. (R. 147-48). Clinton alone was responsible for ongoing road evaluations and any subsequent referrals for further testing or studies. (R. 133, 150). Clinton conceded that the Town followed state guidelines included in the Manual of Uniform Traffic Control Devices, which required signs warning of advisory speeds and road conditions requiring possible evasive action. (R. 137-38, 141, 154-55). Clinton never suggested that studies be conducted on the segment of Jones Turnpike where the accident occurred. (R. 161, 163, 169, 174).

The Supreme Court, Acme County granted the Town's motion for summary judgment and dismissed Smith's Complaint on the basis that he failed to prove proximate cause as a matter of law. According to the trial court, Smith was a local resident who was familiar with the road and, therefore, could not recover for the Town's negligent in failing to post advisory signs in accordance with the MUTCD. Smith appealed and the Appellate Division, Eighth Department affirmed the dismissal of his Complaint, also stating that Smith's familiarity with the road precluded recovery:

Given plaintiff's intimate knowledge of the road conditions and physical features that he claims gave rise to his accident, additional warnings or road marking surely would have made no difference. (pp. 2-3). Plaintiff's wholly conclusory allegations that, had there been an advisory speed sign limiting the speed to 20 miles per hour, he would have reduced his speed to that rate or less, and if there had been double yellow lines in the middle of the roadway he "would have been able to travel closer to the center of the roadway without concern for oncoming traffic", fail to raise a genuine question of fact. Under

the circumstances, the opinion of plaintiff's expert concerning defendant's negligence in failing to install advisory speed signs and highway markings and in failing to perform traffic and engineering studies is irrelevant.

(Exhibit A, pp. 2-3). The Eighth Department did not address engineering expert James's conclusion that a motorist, such as Smith, would not be cognizant of the necessary stopping distance required while traveling a particular rate of speed. (R. 202).

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE APPELLATE DIVISION, EIGHTH DEPARTMENT HAS IMMUNIZED MUNICIPALITIES FROM THEIR DUTY TO PROVIDE SAFE STREETS AND HIGHWAYS TO LOCAL RESIDENTS AND HAS INTERPRETED NEW YORK LAW ON THE QUESTION OF PROXIMATE CAUSE IN THE SUMMARY JUDGMENT CONTEXT AT ODDS WITH COURT OF APPEALS PRECEDENT.

Smith respectfully urges this Court to grant leave to appeal for three reasons. First, the Eighth Department's conclusion that Smith cannot establish proximate causation as a matter of law due to his familiarity with the road carves out an unrecognized exception to a town's duty of care toward motorists, including local residents. Towns should not be able to shirk their responsibility of warning of hidden dangers, such as the ratio between speed and adequate stopping distance. The proper inquiry is not whether Smith was familiar with the road, but whether or not the accident could have been avoided had the Town posted advisory 20 mph speed signs and Smith had been driving 20 mph rather than 25 mph at the time of the accident. Second, the Eighth Department ignored this Court's precedents by elevating the standard of proof necessary to make a prima facie showing of causation. The

Eighth Department's erroneous application of summary judgment standards has statewide importance because proximate cause issues are implicated in a variety of tort cases and because summary judgment is a drastic remedy depriving litigants of their day in court. Third, the Eighth Department's decision is in conflict with other court decisions holding, under similar facts, that summary judgment was precluded by fact issues concerning whether or not a plaintiff would have acted differently if the necessary warning signs had been posted.

A. Leave to Appeal Should be Granted Because the Eighth Department's Decision Absolves Towns from Any Liability Toward Residents for Hidden Dangers of Roadway Design that Traffic Engineers Can Warn Against and Reduce.

The lower court's determination that Smith's frequent travel over the section of Jones Turnpike precluded a finding of proximate cause as a matter of law strips local residents of the protections afforded by the state legislature. It is required that each town in New York State comply with the New York State Department of Transportation's Manual of Uniform Traffic Control Devices 1983 ("MUTCD"). *See* 17 NYCRR § 230.1 ("Determination of the particular sign (or signs) to be applied in a specific situation should be made in accordance with criteria in this manual."); *see also Friedman v. State*, 67 N.Y.2d 271, 283, 493 N.E.2d 893, 898, 502 N.Y.S.2d 669, 674 (1986) (municipalities have an absolute liability to maintain safety of their streets and roads). "Safety, and the ability of a highway to accommodate an adequate number of vehicle with minimum delay and inconvenience" were guiding principles in the legislature's enactment of traffic control guidelines. 17 NYCRR

§ 200.2 (a). Yet, according to the Eighth Department in this case, Smith cannot recover for the Town's undisputed failure to comply with the MUTCD because he had traveled the road before. Under the lower court's reasoning, towns would be able to shirk their responsibilities toward their residents to provide and maintain safe roads. According to the Eighth Department, as soon as a resident travels a defective road, he or she assumes all dangers and risks, even those that are hidden or beyond the knowledge of a lay person. This blanket immunity contravenes the intent of the state guidelines governing traffic control devices – to maintain safe roads.

As a result of the Eighth Department's decision, Smith, and other local residents, are deprived of statutory protection from hidden roadway defects that traffic engineers can warn against and reduce. (Exhibit A, pp. 2-3). Smith presented the uncontroverted affidavit of engineering expert Robert James that, although the posted speed limit was 35 mph, because of the blindspot presented by the hill, a driver would be unable to safely stop and avoid a car exiting the driveway 119 feet below the crest of the hill if the motorist was exceeding a speed of 20 mph. (R. 202). Accordingly, pursuant to the MUTCD, the Town should have posted an advisory sign warning of the maximum safe speed of 20 mph necessary to safely navigate the hill and blindspot. (R.200-01). "Advance posting distance is determined by the prevailing approach speed and the action required to respond to the condition. These factors govern the travel distance needed for the driver to comprehend and react to the sign message, and perform any necessary action." 17 NYCRR § 230.2 (b)(1). This case does not

involve an open and apparent danger, such as a pothole, curve, or bridge. Instead, this case involves scientific calculations regarding the ratio between stopping distances and speed. Smith, like other residents, knew there was a blindspot and slowed his vehicle accordingly. (R. 80). He did not know that a speed of 35 mph required a stopping distance of 225 to 250 feet and that the actual distance between the crest of the hill and the driveway was 119 feet – approximately half the necessary distance. (R. 202, 208-09). This holding is incongruent, because regardless of whether danger was hidden or not, a tourist or traveler would be able to bring suit while a local resident could not under the same facts. Barring his negligence action on the basis of his status as a local resident deprives him, and other motorists, of statutory protections afforded to all motorists.

B. Leave to Appeal Should be Granted because the Eighth Department's Decision Affirming the Dismissal of Smith's Complaint on Summary Judgment Elevates the Standard for Establishing a Prima Facie Showing of Causation, Deprives Litigants of their Day in Court, and is Inconsistent with Court of Appeal Precedent.

This Court should grant leave to appeal because the lower court has misconstrued the proper standard for making a prima facie showing that a plaintiff's injuries were proximately caused by a municipality's failure to safely design or maintain its roads. This is an important issue of statewide importance because proximate cause issues are implicated in a variety of tort cases and because granting the drastic remedy of summary judgment deprives injured parties of their day in court. To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events

which produced the injury. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980), *citing* Restatement, Torts 2d, § 431. Although it is the claimant's burden to show that defendant's conduct was a substantial causative factor in the sequence of events that led to his injury," the showing need not be made with "absolute certitude nor exclude every other possible cause of injury." *See Nallon*, 50 N.Y.2d at 520; *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 N.Y.2d 203, 205, 225 N.E.2d 527, 278 N.Y.S.2d 826 (1967). "The existence of remote possibilities that factors other than the negligence of the defendant may have caused the accident, does not require a holding that plaintiff has failed to make out a prima facie case. It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." *Cornbrooks v. Terminal Barber Shops*, 282 N.Y. 217, 223, 26 N.E.2d 25 (1940). Thus, under well-settled standards, Smith established a prima facie case of causation if he presented facts from which causation may be reasonably inferred.

The lower court improperly violated Court of Appeals precedent in concluding, at the summary judgment stage, that Smith failed to prove his negligence claim as a matter of law. (Exhibit A, p. 2). Summary judgment "...deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). Section 230.2 of the Manual of Uniform Traffic Control Devices

1983 (MUTCD) requires the posting of warning signs, including advisory speed signs, to warn of dangerous conditions requiring motorist response. (R. 203). *See* 17 NYCRR § 230.2 (a) & (b). The only reasonable inference from the evidence is that the Town's negligence in failing to post warning signs and strike the center of the road proximately caused Smith's accident. It is uncontroverted that Smith was cautious, alert, and driving 25 mph and that after cresting a hill he was unable to stop and had to veer to avoid colliding with a car pulling onto Jones Turnpike. (R. 80, 88 - 89, 208-09). Smith lost control of his motorcycle and crashed, suffering fractures to his leg, which resulted in internal fixation, six separate surgeries, and extensive physical therapy. (R. 209). Engineering expert Robert James concluded in his affidavit that an advisory speed limit of 20 mph should have been posted because of the short stopping distance from the top of the hill to the driveway below. Due to the blindspot, a motorist driving 35 mph as posted by the Town, or even the slower speed of 25 mph as in this case, would not have adequate stopping distance. (R. 202). The Town does not dispute that it has a duty to maintain its roads or that it failed to post the proper advisory signs. (R. 15-23). The Town's supervisor of highways, who had only a highschool education and lacked any engineering background, would perform ongoing evaluations of the town's roads and then make referrals to an engineer for further studies. No referral was made in this case, and an engineer never conducted any evaluations of the turnpike where the accident occurred. (R. 141-42, 147, 148-49). Based upon this undisputed evidence, Smith sustained his burden of presenting some evidence supporting his

claim that the Town violated its duty to safely maintain the turnpike by failing to warn motorists, including local residents, that the short stopping distance between the crest of the hill and the driveway dictated a maximum speed of 20 mph. Thus, by affirming the trial court's granting of summary judgment in the Town's favor, the Appellate Division erroneously elevated the plaintiff's burden in defeating summary judgment.

Notwithstanding the undisputed evidence establishing the negligence elements of duty, breach, causation, and damages, the Supreme Court, Ulster County improperly dismissed Smith's complaint on the basis that he had traveled the road before and was aware of the blindspot. (R. 8-10). But whether or not Smith was familiar with the road is immaterial because the accident resulted from the short distance between the crest of the hill and the driveway at the bottom of the hill, which made it impossible to avoid striking vehicles exiting the driveway after cresting the hill at a speed greater than 20 mph. (R. 208-09). *See Scheemaker v. State*, 125 A.D.2d 964, 510 N.Y.S.2d 359 (4th Dep't 1986), *affirmed*, 70 N.Y.2d 985, 521 N.E.2d 427, 526 N.Y.S.2d 420 (1988). In *Scheemaker*, a plaintiff, injured in an automobile accident at an intersection lacking mandatory speed limit signs, sued the state for failing to control the speed of motorists through the intersection and for conducting an incomplete safety investigation of the intersection. Despite the fact that both motorists in the case were familiar with the intersection where the accident occurred, the Court of Appeals affirmed the lower court's entry of judgment in the plaintiff's favor concluding that each driver's familiarity did not preclude the plaintiff's recovery where both

drivers were acting lawfully at the time of the accident. *Scheemaker*, 70 N.Y.2d at 985. As aptly stated by the Second Department in *Scheemaker*:

Each driver's familiarity with the accident site does not preclude liability as a matter of law. Whether claimant's injuries were proximately caused in part by the State's negligence presented questions of fact....

Scheemaker, 125 A.D.2d at 965. Similarly, at the time of the accident, Smith was traveling well within the posted speed limit of 35 mph. It is undisputed that the distance between the crest of the hill and the driveway at the bottom of the hill was inadequate to allow a motorist to stop if driving more than 20 mph. Smith, and other local motorists, despite their knowledge of the blindspot, were unaware that they could not drive in excess of 20 mph and safely take evasive action should a vehicle exit the driveway onto the turnpike. (R. 202).

Moreover, the courts below ignored undisputed evidence showing that the accident would not have occurred if the maximum safe speed of 20 mph for navigating the road and blindspot had been posted. "Generally, the absence of a warning sign cannot be excluded as a cause of an ensuing accident unless it is found that the accident would nevertheless have happened." *Koester v. State of N.Y.*, 90 A.D.2d 357, 362, 457 N.Y.S.2d 655 (4th Dep't 1982); *accord Boyd v. Trent*, 262 A.D.2d 260, 260, 690 N.Y.S.2d 732, 733 (2d Dept. 1999); *Vasquez v. Consolidated Rail Corp.*, 180 A.D.2d 247, 584 N.Y.S.2d 345 (3d Dep't), *leave to appeal denied*, 80 N.Y.2d 762, 607 N.E.2d 818, 592 N.Y.S.2d 671 (1992). Thus, the absence of a warning sign is not a proximate cause of an accident where the driver's awareness of the physical conditions prescribed the same course of action as the warning

sign would have, if the driver “actually had the danger in mind” as he approached due to prior familiarity with the road, or if other signs gave adequate warning of the danger. *Koester*, 90 A.D.2d at 362. There was no evidence that Smith would have insisted on driving 25 mph over the crest of the hill if the Town had properly installed an advisory speed limit sign of 20 mph. In fact, the court’s assumption that “[g]iven plaintiff’s intimate knowledge of the road conditions and physical features that he claims gave rise to the accident, additional warnings or road marking surely would have made no difference” is unreasonable. (Exhibit A, p. 2). To the contrary, if a sign posting the maximum safe speed limit of 20 mph had been installed, the only reasonable inference is that Smith would have complied and, as a result, had adequate stopping distance to avoid the car entering the road at the bottom of the hill. All the evidence indicates that Smith was a cautious driver, who alert and driving below the speed limit at the time of the accident.

In *Koester*, cited with approval by the court below, the Eighth Department concluded on appeal that the lack of a sign warning of a curve was the proximate cause of a motorcycle accident. Although the motorcyclist knew there was a curve and even that two lanes merged together, “neither the precise location of the merger nor the configuration of the curve was uppermost in his mind.” *Koester*, 90 A.D.2d at 362. As in this case, “there is no evidence in this record of any negligence or culpability on the part of claimant; he was operating his motorcycle at less than the maximum speed limit; he was alert and observant; and the vehicle was in proper mechanical working order.” It is undisputed in this case that Smith was

traveling under the speed limit when he crested the hill and that he lost control of his motorcycle because of the inadequate stop distance between the top of the hill and the driveway below. There is a reason why cities must employ engineers to safely design highway safety plans; an average motorist, even a frequent traveler over a particular road, does not have the capacity of determining the ratio between speed and adequate stopping distance. Smith did not know that he had to travel 20 mph or less in order to have adequate stopping distance should a vehicle pull out from the driveway at the bottom of the hill. Smith also did not know that staying to the far right of the road to avoid oncoming traffic straying over the center of the unmarked road would delay his reaction time should a car pull onto the road from the driveway. (R. 205).

All of those cases cited by the Appellate Division are distinguishable upon the facts because the installation of traffic signs in those cases would not have tempered the driver's actions or prevented an accident. (Exhibit A, p. 2, *citing Atkinson v. Oneida*, 59 N.Y.2d 840, 451 N.E.2d 494, 464 N.Y.S.2d 747 (1983); *Gleich v. Volpe*, 32 N.Y.2d 517, 300 N.E.2d 148, 346 N.Y.S.2d 806 (1973); *Applebee v. State*, 308 N.Y.502, 127 N.E.2d 289 (1955); *Alber v. State*, 252 A.D.2d 856, 675 N.Y.S.2d 689 (3d Dep't 1998); *Koester v. State*, 90 A.D.2d 357, 457 N.Y.S.2d 655 (4th Dep't 1982)). In *Atkinson*, the Court of Appeals concluded that the county's negligence in failing to install the proper flashing lights at an intersection was not the proximate cause of the plaintiffs' accident because both parties were familiar with intersection and the existing stop and stop ahead signs. *Atkinson*, 59 N.Y.2d

at 841. Here, unlike the presence of alternative warning signs in *Atkinson*, there were no warning signs at all. The Court also concluded in *Applebee* that the state's failure to install a stop sign in compliance with statute did not proximately cause a fatal accident because the plaintiff slowed and stopped at the intersection despite the missing stop sign. *Applebee*, 308 N.Y. at 508 ("It's absence did not cause her to do anything other than she would have done had it been present."). The Court's decision in *Gleich* turned on the absence of proof of the school's negligence in the placement of a bus stop where a driver struck a small child crossing the street, not on whether the school's negligence was a proximate cause of the accident. *Gleich*, 32 N.Y.2d at 522-23. In *Alber*, the court concluded that the state's negligence in failing to place a clearance line fifteen feet from the nearest rail at an railroad intersection was not the proximate cause of the fatality accident because the decedent was familiar with the intersection, the other warning signs, and even the clearance line that existed at the intersection that was removed during re-paving several years prior to the accident. *Alber*, 252 A.D.2d at 857. Accordingly, no evidence exists that the accident would have occurred had the Town properly posted advisory 20 mph speed signs. The Eighth Department's elevated standard of proof, which will bar other tort litigant from adjudicating complex proximate cause issues, should be reversed.

C. Leave to Appeal Should be Granted Because the Eighth Department's Decision Affirming the Granting of Summary Judgment in the Town's Favor Conflicts with Decisions of other Courts Holding, under Similar Facts, that Fact Issues Precluded Summary Judgment

Leave to appeal should also be granted as the Appellate Division's decision conflicts with decisions of other courts barring summary judgment on similar facts. "Given the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established." *Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507, 520-21, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980). "[I]ssues of proximate cause are generally matters that are for the jury to resolve." *Little v. City of Syracuse*, 258 A.D.2d 899, 899, 685 N.Y.S.2d 365 (4th Dep't 1999) (affirming denial of city's motion for summary judgment where material issues of fact existed regarding whether or not absence of a center line on road proximately caused accident). In particular, whether or not the defendant or the plaintiff acted reasonably under the circumstances can "rarely be decided as a matter of law," even in those cases where the facts are conceded. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). Thus, the lower court erred in granting summary judgment where issues of fact existed regarding whether or not Smith would have acted differently, and avoided the accident, if the warning signs had been present.

The Appellate Division concluded, as a matter of law, that Smith's actions would not have differed and that the accident would have still occurred, even if the Town had properly

posted signs warning of limited sight distance and a maximum safe speed of 20 mph and added a double-yellow line to the center of the road. (Exhibit A, p. 2). But the court's decision disposed of fact issues, which preclude summary judgment. *See Boyd v. Trent*, 262 A.D.2d 260, 690 N.Y.S.2d 732 (2d Dep't 1999); *Miller v. Fenton*, 247 A.D.2d 740, 669 N.Y.S.2d 391 (3d Dep't 1998). In *Boyd*, after sustaining injuries in an automobile accident, the plaintiff brought an action against a town for failing to post advisory and reduced speed signs at the approach to a curve. The Appellate Division, Eighth Department affirmed the lower court's denial of the defendant town's motion for summary judgment, concluding that summary judgment was inappropriate where issues of fact existed, regarding whether or not the parties' conduct would have differed in the presence of warning signs. *Boyd*, 262 A.D.2d at 261.

In *Miller*, the plaintiff was injured when her van was struck by a train. Plaintiff, familiar with the crossing, slowed her van to 10 mph while approaching the tracks but did not hear a train bell, whistle, or horn. When still 25 feet from the tracks, she suddenly saw the approaching train, stomped on the brake, and slid over ice and onto the tracks. *Id.* at 392-93. The Eighth Department reversed the Supreme Court's finding that because the plaintiff was familiar with the crossing that the lack of an active warning device could not have been the proximate cause of the accident. Instead, the court concluded that issues of fact concerning proximate cause existed, barring summary judgment.

Although an individual's knowledge of the terrain can preclude a recovery for the negligent failure to post a warning sign, "the absence of a warning sign

cannot be excluded as a cause unless the plaintiff's awareness of the condition would have led to the same course of conduct as if the sign had been present." In this instance, it cannot be said, as a matter of law, that plaintiff's actions would not have been the same if there was a flashing light or automatic gate, triggered by an oncoming train, in operation when she approached the crossing.

Miller, 247 A.D.2d at 742.

Likewise, fact issues exist regarding whether or not Smith would have driven slower and closer to the middle line, and therefore avoided the accident, if the Town had posted a 20 mph advisory speed limit sign or striped the road with a double-yellow line. The Eighth Department's surmise that "additional warnings or road markings surely would have made no difference" is pure speculation. (Exhibit A, p. 2). Smith presented uncontroverted evidence that he was cautiously navigating the hill at the time of the accident. (R. 80, 81, 84). And he also stated in a sworn affidavit that he would have heeded any advisory signs warning of a maximum safe speed of 20 mph. (R. 208). The court's inference that Smith would have ignored any advisory signs, raced to the top of the hill, and risked death on his motorcycle is not only impermissible but also is unreasonable based upon the record.

Conclusion

For the reasons set forth herein, it is respectfully submitted that this Court grant the Plaintiff John Smith's Motion for Leave to Appeal to this Court, along with such other and further relief as this Court deems just and proper.

Dated: New York, New York
 February 28, 20xx

Respectfully submitted,
Law Offices of Jane Doe and Associates

By: _____
Jane Doe, of counsel
Attorneys for Plaintiff-Appellant