HUNTON & WILLIAMS

1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

RICHARD L. AGUGLIA
DIRECT DIAL: 202 • 955 • 1634
EMAIL: raguglia@hunton.com

FILE NO: 57136.2

August 10, 2000

BY HAND

Ms. Sheila Cross Reid, Chairperson
c/o Sherri Pruitt
Board of Zoning Adjustment
441 - 4th Street, N.W.
Room 210
Washington, D.C. 20001

'00 AUG 10 P1:19

Re: BZA Application No. 16559
(Cafritz Estate/Field School)

Dear Chairperson Reid and Board Members:

On July 25, 2000, the BZA concluded its hearing in this case. However, on rebuttal, the applicant introduced, for the first time, two new experts. A new traffic expert, a Mr. Long, of Delon Hampton & Associates, testified allegedly in support of the traffic study of Gorove Slade in this case. A new land planning expert, Steve Sher, testified on Junior and Senior High Schools West of Rock Creek Park ("Sher School Report"). Since the experts should have been, but were not, introduced as part of the applicant's initial presentation, my clients, Neighbors Against Foxhall Gridlock ("NAFG"), should not be denied the opportunity to submit the attached sur-rebuttals relating to each new expert's report.

A brief background history will set the case in perspective and underscore the need for sur-rebuttal. The applicant's presentation was made on May 10, 2000. The applicant chose not to have Mr. Sher testify. Mr. Sher's School Report does not relate to the comparable schools cited by NAFG, as part of its party opposition, but describes different schools, with one exception, which is not a true rebuttal. In addition, the applicant's THIRD traffic report was presented at the Board hearing on May 10, 2000. That report switched the school's proposed entrance on Foxhall Road from the north entrance to a revised south entrance with a 10 car-250 stacking lane. As a result of the DPW report submitted later that month, which was adopted by OP, Gorove Slade submitted on June 2, 2000 a FOURTH report which closed the northern entrance except for emergency vehicles and reduced the stacking lane from 10 cars and 250 feet in length to 3 cars and 66 feet in length, and indicated 474 feet of combined deceleration, taper and stacking lane. The changes from the THIRD to the FOURTH report were not presented to the Board as part of applicant's initial presentation on May 10, 2000.

BZA Case No. 16559 Exhibit No. 473

Board of Zoning Adjustment
District of Columbia
CASE NO.16559
EXHIBIT NO.473

HUNTON & WILLIAMS

NAFG presented its testimony in opposition on July 25, 2000, which indicated potential traffic hazards from the probable overflow created by only a 3 car stacking lane, and sight distance problems associated with the stacking, taper and deceleration lengths proposed by Gorove Slade under MUTCD and AASHTO standards. NAFG's traffic concerns related to Gorove Slade's FOURTH traffic report which, by its own terms, superseded all of its prior reports.

The Delon Hampton road layout plan submitted by Mr. Long on rebuttal is, in essence, a FIFTH traffic report, as it indicates a 5 car stacking lane with 512 feet of declaration, taper and stacking lanes.

We submit that it is patently unfair for the applicant to present such testimony, given the peculiar facts of this case, without the opportunity for sur-rebuttal. For these reasons, we ask the Board to accept the attached sur-rebuttals or, in the alternative, to strike Mr. Sher's and Mr. Long's testimony, as they do not constitute true rebuttal, but new testimony which should have been part of applicant's initial presentation on May 10, 2000, or, for traffic purposes, part of its response on June 2, 2000 to the DPW report.

Sincerely,

Richard L. Aguglia

Richard L. Aguglia

cc: Phil Feola, Esq. (by hand)
Ken Woodcock (by fax)
Jeff Bolotin, Esq. (by fax)
Alan Swendiman, Esq. (by fax)
ANC 3D c/o Eleanor Lewis (by U.S. mail)

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SUR-REBUTTAL OF NAFG REGARDING
ROAD LAYOUT PLAN SUBMITTED BY DELON
HAMPTON & ASSOCIATES FOR THE FIELD SCHOOL

On July 25, 2000, applicant submitted for the first time, a new traffic analysis/road layout plan, on rebuttal, prepared by Delon Hampton & Associates. NAFG did not have the opportunity to review and comment on the document prior to the hearing.

STANDARD OF REVIEW

We submit that the District of Columbia is required to follow AASHTO standards to avoid civil liability for the following reasons:

1. The District of Columbia generally follows AASHTO standards because the federal government follows AASHTO standards in constructing federal highways. A significant portion of the District's budget to construct roads comes from federal funds. See attached budget for D.C. for capital outlays for road construction.

2. According to AASHTO records, the District is an AASHTO supporting organization. As of June 23, 2000, the DC representative to AASHTO was former Director of DPW Vanessa Dale Burns.

3. AASHTO requirements relate to new construction, and the proposed auxiliary/stacking lane and road widening constitutes new construction. See attached AASHTO citation and court case.

4. We can find no AASHTO citation or court case which allows a deviation from AASHTO standards for new construction because the original street as constructed does not currently comply with AASHTO standards. Generally, changes in AASHTO standards are not applied retroactively to prior constructed streets absent unusual circumstances. The same is true

for changes in the building code in the District of Columbia, that is, a change in the building code will not require a building already constructed to conform to the new standards. However, by analogy, new construction in a building (e.g. an alteration) must comply with the most current building code requirements. Put another way, the District may be held liable for new construction that results in a traffic hazard leading to injury and/or property damage for failure to follow AASHTO standards.

THE DELON HAMPTON ROAD ANALYSIS
DOES NOT MEET AASHTO STANDARDS

We note at the outset that the road analysis diagram submitted by Delon Hampton does not list any sight distance, much less the sight distance required by AASHTO. DPW found that 364 feet was needed for south bound cars travelling down Foxhall Road towards the new southern entrance for the proposed school, because the slope in the road (downgrade) was 7.5%. See DPW report dated May 22, 2000 at 1.

Second, the AASHTO acceptable design practice to meet sight distance requirements is a combination of the following, assuming a 5 car storage bay is correct:

Deceleration lane	-	364 feet
Enter Taper	-	88 feet
Storage Bay	-	104 feet[1]
Total Required	=	556 feet

See page 828 of AASHTO.

[1] This represents the length of a 5-car stacking lane versus the 66 foot 3-car stacking lane proposed by Gorove Slade's FOURTH traffic report.

However, the Delon Hampton roadway layout plan indicates a total of only 512 feet as follows:

Deceleration lane	-	320 feet
Enter Taper	-	88 feet
Storage Bay	-	104 feet
Total Required	=	512 feet

Accordingly, the Delon Hampton design fails the AASHTO test. The reason that both of the school's experts desire to decrease or "pinch" the AASHTO standards is that the southbound sight line requirements for the storage bay cannot be accomplished within the frontage of the school's property.

Third, the Delon Hampton road analysis or, for that matter, Gorove Slade's FOURTH traffic report, does not provide sufficient technical support for either the 5-car or 3-car stacking lane. A test, called the Webster formula, would indicate whether the stacking lanes/storage bays are sufficient to meet the needs of southbound traffic entering the school. However, the Delon Hampton road layout design was not accompanied by such a formula.

CONCLUSION

The Delon Hampton road analysis actually rebuts, rather than supports, the Gorove Slade report in that it calls for a larger stacking lane/storage bay and a combined length of 512 feet instead of 474 feet called for by Gorove Slade.

Nevertheless, neither report meets AASHTO standards and have no support for the length of the storage bay. As such, the flawed designs will lead to traffic hazards, injury, and civil liability for the District of Columbia, should this Board accept one of those reports.

Applicant has failed to meet its burden of proof that approval of the application will not lead to objectionable traffic conditions. As such, the application for special exception for a private school should be rejected.

Respectfully submitted

HUNTON & WILLIAMS

By: Richard L. Aguglia

Richard L. Aguglia

August 10, 2000

Date

SUR-REBUTTAL TO THE TESTIMONY OF STEVE SHER REGARDING JUNIOR/SENIOR HIGH SCHOOLS WEST OF ROCK CREEK PARK

In an effort to discredit the study performed by Ken Woodcock, on behalf of NAFG, indicating that approximately 38 acres was the correct lot size for the Field School or 8.4 students per acre, the applicant introduced a school study prepared by Steve Sher, an expert land planner. (See attached). The report fails to indicate a single school, like the proposed Field School, that has:

- a single entrance/exit
- no on street parking
- no nearby Metrobus/Metrorail transportation
- almost 50% of the school's student population served by shuttle buses

Indeed, Mr. Doggett, our expert planner, has been unable to find such a school.

The Sher study allegedly denotes 12 junior and senior high schools (including the Field School's present and proposed locations), west of Rock Creek Park or 13 listings. At the outset, we note that while the Cafritz site has 10.5 acres, applicant had conceded that only 8.5 acres are useable because of the steep slope of the lots. Accordingly, the new site should indicate 38 students per acre, and not 30 students (320 students ÷ 8.5 acres).

Thus, of the 13 listings (12 schools), 4 have students per acre less than the proposed Field School site as follows:

	Acres/Students Per Acre
Georgetown Visitation	22.8/19

NCS	20.0/27.3 v. 19[1]
St. Albans	28.0/28.0 v. 19[1]
St. John's College	24.4/32
Proposed Field School	8.5/38

Two items are to be noted with respect to these 4 schools. First, all of these schools have 2 ½ to 3 times the acreage of the proposed Field School site. Second, St. John's College has 9.5 acres vacant for sporting events/school purposes, more than the entire useable space for the proposed Field School site.[2]

With respect to the remaining 8 schools, including the current Field School site, the following is worth noting:

- The Maret school, with 7.9 acres, the closest to the Field School's proposed useable site of 8.5 acres of the 12 schools listed, has been seeking additional sports fields as testified to by Ken Doggett, NAFG's expert land planner. The school has leased other space for school purposes. Hence, our point that the Cafritz site is too small for the Field School's needs is well taken.
- The current Field School site and Edmund Burke site are urban schools having no playing fields. It has been reported that the Edmund Burke school is seeking an additional site across the street. Obviously, the high concentration of students per acre is distorted for lack of a playing field and these schools are urban schools not the

[1] A review of the D.C. 2000 assessment directory indicates 2,483,410 square feet for the entire National Cathedral site or 57 acres/19 students per acre when the arbitrary 20 acres per school attributed by Mr. Sher to each school is discounted. In his high school study, based upon the Bunting and Lyon Blue Book for Private Independent Schools 2000, Mr .Woodcock also found 19 students per acre.

[2] Square 2308, Lots 804, 806-807 and 22.

type of "island" schools referred to in the Woodcock testimony, that is, well buffered from residential neigborhoods. They should be struck from the study.

- The Sheridan School is not a high school, but an elementary school, grades K-8, according to D.C. records, and has no playing fields. It should be struck from the study.
- Wilson High School and Sidwell Friends are serviced by both Metrorail and Metrobus which are in close proximity to the school grounds.
- Georgetown Day - The BZA's grant of a special exception to this school was premised upon the availability of mass transit, as found by the school's own traffic expert, as follows:

. . . excellent public transportation access with ten bus routes adjacent to the site and the Red Line Metrorail station approximately three blocks to the southeast. (Decision at 4, para 14).

- The Washington International School, Tregaron campus at Macomb Street, has approximately 410 students, not 770 as reported in the Sher report, which incorrectly includes students in the lower school at Reservoir and 37th Streets. Thus, the correct student population per acre is 67 and not 127. Further, according to the school's Director of Finance, the school has a long term lease on 13 acres for school functions excluding the placement of a building on the leases premises.
- A majority of the schools listed by Mr. Sher are 3 stores in height, allowing for more student density per acre without decreasing the playing fields available to their students, whereas the proposed Field School incorporates the existing 2-story Cafritz

house into its complex, which further decreases the size of playing fields available to it.

Accordingly, the Sher study should include only 10 schools, as Sheridan (a grammar school), Edmund Burke and the existing Field School are urban not island schools and have no playing fields. Most of the schools with a greater density of students per acre are serviced by Metrorail and Metrobus (Wilson, Sidwell and Georgetown Day) and the closest school in acreage to the proposed Field School is seeking additional land for sports facilities. All things considered, the Sher report supports NAFG's analysis that the proposed Field School site is too small and presents objectional traffic conditions for lack of public transportation. See attached Sher report as revised by NAFG.

Respectfully submitted

HUNTON & WILLIAMS

By: Richard L. Aguglia

Richard L. Aguglia

August 10, 2000

Date

Revised Sher School Report

	School	Acres	Students Per Acre
1	Georgetown Visitation Note: Good access to public transportation - bus service at property line	22.8	19
2	NCS St. Albans Note: Excellent access to public transportation	57	19
3	St. John's College Note: Good access to public transportation - bus service at property line	24.4	32
4	Proposed Field School Note: No public transportation	8.5	38
5	Washington Int'l. Note: Has 13 acres at its disposal for sporting events	6.1	67
6	Maret Note: Seeking to buy/lease land for sporting activities	7.9	76
7	Georgetown Day Note: Excellent access to public transportation	4.6	90
8	Sidwell Friends Note: Excellent access to public transportation	15.4	99
9	Wilson H.S. Note: Excellent access to public transportation	4.5	336

Junior/Senior High Schools West of Rock Creek Park

Name of School	Land Area Sq. Ft./Acre(s)	Student Enrollment (Students per Acre)
Georgetown Visitation	996,498/22.8	430 (19)
National Cathedral (NCS)	871,200/20.0*	546 (27.3)*
St. Albans	871,200/20*	560 (28.0)*
Field School (new site)	457,380/10.5	320 (30)
St. John's College	1,066,447/24.4	768 (32)
Maret	344,399/7.9	600 (76)
Georgetown Day	198,636/4.6	410 (90)
Sidwell Friends	670,783/15.4	1,530 (99)
Washington International (Tregaron Campus)	264,845/6.1	770 (127)
Sheridan	70,647/1.6	215 (133)
Wilson H.S.	195,253/4.5	1,500 (336)
Edmund Burke	22,050/0.5	275 (550)
Field (existing)	16,500/0.4	219 (575)

* NCS and St. Albans are sited on the 60 acre National Cathedral site. Neither school has a defined, separate measurable lot area. For the purposes of this table, each school was allocated 20 acres.

The above information was obtained from a variety of sources, including: BZA Orders, D.C. Assessment Directory, Internet, and telephone inquiries with school officials.

List of Exhibits

Exhibit A ..... FHA Highway Safety Program Manual

Exhibit B .....AASHTO - Auxiliary Lanes

Exhibit C ..... Capital Outlay Budget

Exhibit D .....Wagshal v. D.C.

Exhibit E..... Rogers v. Daigle

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

HIGHWAY SAFETY PROGRAM MANUAL

VOLUME 12 - HIGHWAY DESIGN, CONSTRUCTION, AND MAINTENANCE	TRANSMITTAL 42
CHAPTER I. PURPOSE	February 1974

Par. I. Introduction
II. Purpose
III. Specific Objectives

I. INTRODUCTION

A. Proper design, construction, and maintenance of streets and highways are important aspects of an effective highway safety program. Poorly designed roads, improper handling of traffic in construction zones, and inadequate maintenance can contribute directly to crashes and resulting serious injuries.

B. There are a great many things that can be done in the design, construction, and maintenance of highways to improve their contribution to safety. In the legislative deliberations which preceded enactment of the Highway Safety Act of 1966 it was stated that

> "We can require that all new construction and reconstruction, regardless of where it is, be built to no less than Federal-aid primary design standards, even if this does mean building fewer miles, and we can require that those primary geometric design standards be substantially raised. . . .
>
> "We can require that median barriers and guardrails be constructed of impact absorption materials that return cars with the least possible damage to positions parallel to traffic, and we can require that this be done immediately. We can also start replacing the present impact-dangerous barriers and guardrails with the improved types. . . .

"We can require that maintenance standards and practices be high enough to keep highways up to original construction standards."*

II. PURPOSE

The purpose of the Program is to assure that principles of safe design and operation are considered in the planning, construction, and maintenance of all streets and highways, thus resulting in the safest practicable physical environment for the road user.

III. SPECIFIC OBJECTIVES

The specific objectives of the Program are to ensure that

A. Existing streets and highways are maintained in a condition that promotes safety.

B. Major improvements either to modernize existing roads or to provide new facilities are designed with proper application of approved safety standards.

C. Appropriate precautions are taken to protect passing motorists and pedestrians as well as highway workers from accident involvement at highway construction and maintenance sites.

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*H. Rept. 1700, 89th Congress, 2d Session p. 15.

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

HIGHWAY SAFETY PROGRAM MANUAL

VOLUME 12 - HIGHWAY DESIGN, CONSTRUCTION, AND MAINTENANCE	TRANSMITTAL 42
CHAPTER IV. PROGRAM DEVELOPMENT AND OPERATIONS	February 1974

Par.
I. Introduction
II. Geometric Design
III. Pavement Design and Construction
IV. Pavement Treatment for Skid Resistance
V. Roadway Lighting
VI. Crash Survivability
VII. Emergency Response
VIII. Maintenance
IX. Work Site Safety
X. Rail-Highway Grade Crossings
XI. Pedestrian Safety
XII. Land Development
XIII. Training

I. INTRODUCTION

Safety must be a fundamental consideration in all planning, design, construction, reconstruction, and maintenance of highways and other features of the highway environment within the public right-of-way. In carrying out their responsibilities, all agencies responsible for work within the public right-of-way should consider the provision of a hazard-free driving environment as a primary objective, along with other considerations such as cost and efficiency of vehicular or pedestrian movement.

A. Scope of the program.

The program should center on the ultimate purpose of reducing deaths, injuries, and property damage. This means there should be conscious and systematic efforts to adopt provisions that will result in reductions in deaths and injuries by

II. GEOMETRIC DESIGN

The program should provide that standards relating to safety features such as sight distance, horizontal and vertical curvature, spacing of decision points, width of lanes, etc. must be followed for all new construction, reconstruction, and maintenance on all streets and highways in all jurisdictions. In all new construction and reconstruction, the highest practical standards for the type of highway concerned should be used.

A. Design standards should be based upon proven principles and accepted practice by the highway engineering profession.*

B. All standards and related working instructions adopted by State, county, and local agencies should be periodically reviewed and updated to reflect new technology and changes in operating conditions so as to reflect at least current minimums necessary for safe traffic operations. Existing policies, standards, and guides of AASHO should be used for all roadways to which these policies could apply.

C. Design standards should cover all aspects relating to safety including, but not limited to, such safety features as sight distance, horizontal alinement, cross-section, access control, design consistency, and spacing of decision points. A Policy on Geometric Design of Rural Highways offers the most complete text in this area and should be used as a basic source in setting design standards. Some of the general criteria to be considered are

1. In the design of streets and highways, the driver's view of the highway under both day and night conditions should be considered. A detailed review by specialists in the various highway engineering disciplines will often reveal unsafe features which can be corrected prior to the construction phase.

    a. Safe and effective placement of roadside and overhead signs and signals needed by the driver should be carefully planned.

*See Appendix C for a list of references containing design policies, standards, guides, and practices. Where alternatives exist in the references, those producing the safest practical results should be used.

b. Design policies should include sight distance at railroad grade crossings. Speed zoning and distribution of speeds of both highway vehicles and trains at the site should be considered.*

c. Desirably, the calculation of safe stopping sight distance should be computed using wet coefficients of friction and the roadway design speed for braking distance. A reduction from the design speed, because of assumed reductions in vehicle speed when traveling on wet roads, could provide inadequate stopping distances for present traffic. The consistent annual increase in traffic speeds on existing highways and the reluctance of the driver to reduce his speed in wet weather require the use of longer design stopping distances in the interest of safety.

d. Special attention should be given to the design of roadway drainage to prevent the accumulation of water on the pavement surface and thereby reduce the possibility of hydroplaning. This is particularly important in the transition area between tangent sections and superelevated horizontal curves.

2. Design criteria should be applied uniformly throughout the highway system. Although deviations might be necessary on some specific section, these should be kept to a minimum inasmuch as a lack of uniformity can itself introduce hazards.

3. Overall system design should ensure that the road user will not encounter any abrupt changes that would not be expected, such as the introduction of a sharp horizontal curve at the end of a long straight section of roadway. This means that design criteria should be applied within the context of the total facility as it would be used by motorists; they should not be applied on a disjointed, piecemeal basis.

*For a discussion of desirable sight distances, see National Cooperative Highway Research Program (NCHRP), Report No. 50, Factors Influencing Safety at Highway-Rail Grade Crossings, Chapter IV.

Aug-03-00 05:41P Transportation Research C P.07

AUXILIARY LANES

General Design Considerations

From the foregoing discussions it is appropriate to deal with the design elements of auxiliary lanes as they relate to median openings and left-turning movements. In general, auxiliary lanes are used preceding the openings as described in this section and are also used at at-grade intersections preceding and following right turning movements to accommodate speed changes, weaving and maneuvering of traffic. Auxiliary lanes may also be added to increase capacity through an intersection.

Auxiliary lanes should be at least 10 ft wide and desirably should equal that of the through lane. Where curbing is to be used adjacent to the auxiliary lane, an appropriate curb offset should be provided. The length of the auxiliary lanes for turning vehicles consists of three components: (1) deceleration length (2) storage length and (3) entering taper.

Desirably, the total length of the auxiliary lane should be the sum of the length for these three components. Common practice, however, is to accept a moderate amount of deceleration within the through lanes and to consider the taper as a part of the deceleration length. Where intersections occur as frequently as four per mile, it is customary to forego most of the deceleration length and to provide only the storage length plus taper. Each component of the auxiliary length is discussed in the following section.

Deceleration Length

Provision for deceleration clear of the through-traffic lanes is a desirable objective on arterial roads and streets and should be incorporated into design whenever feasible. The total length required is that needed for a safe and comfortable stop from the design speed of the highway. Minimum deceleration lengths for auxiliary lanes on grades of 2 percent or less, with an accompanying stop condition, for design speeds of 30, 40 and 50 mph are 235, 315 and 435 ft respectively.

These lengths exclude the length of taper which should be approximately 8 to 15 ft longitudinally to 1 ft transversely. Long tapers indicate the path drivers are to follow and reduce the unused portion of the pavement. However, long tapers tend to entice some through drivers into the deceleration lane. On the other hand, shorter tapers produce better "targets" for approaching drivers and give positive visibility of the added auxiliary lane.

exclusive of intra-District FTE positions, during fiscal year 1999.

Capital Outlay

(Including Rescissions)

For construction projects, a net increase of $1,711,160,737 (including a rescission of $114,430,742 of which $24,437,811 is from local funds and $89,992,931 is from highway trust funds appropriated under this heading in prior fiscal years, and an additional $1,825,591,479 of which $718,234,161 is from local funds, $24,452,538 is from the highway trust fund, and $1,082,904,780 is from Federal funds), to remain available until expended: *Provided*, That funds for use of each capital project implementing agency shall be managed and controlled in accordance with all procedures and limitations established under the Financial Management System: *Provided further*, That all funds provided by this appropriation title shall be available only for the specific projects and purposes intended: *Provided further*, That notwithstanding the foregoing, all authorizations for capital outlay projects, except those projects covered by the first sentence of section 23(a) of the Federal-Aid Highway Act of 1968, approved August 23, 1968 (82 Stat. 827; Public Law 90-495; D.C. Code, sec. 7-134, note), for which funds are provided by this appropriation title, shall expire on September 30, 2000, except authorizations for projects as to which funds have been obligated in whole or in part prior to September 30, 2000: *Provided further*, That, upon expiration of any such project authorization the funds provided herein for the project shall lapse.

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JEROME S. WAGSHAL, APPELLANT
vs.
DISTRICT OF COLUMBIA, APPELLEE

No. 3777
DISTRICT OF COLUMBIA COURT OF APPEALS
216 A.2d 172
January 19, 1966, Decided

Appeal from the District of Columbia Court of General Sessions

COUNSEL

Jerome S. Wagshal, pro se.
David P. Sutton, Assistant Corporation Counsel, with whom Chester H. Gray, Corporation Counsel, Milton D. Korman, Principal Assistant Corporation Counsel, and Hubert B. Pair, Assistant Corporation Counsel, were on the brief, for appellee.

JUDGES

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.
AUTHOR: QUINN

OPINION

QUINN, **Associate Judge:** Appellant was driving south on Thirteenth Street when a truck traveling east on Taylor Street came into the intersection of Thirteenth and Taylor Streets, N.W., and struck his automobile broadside. Appellant was thrown from his car and injured. A stop sign which normally controlled traffic proceeding east on Taylor Street was down, and it was stipulated that appellee had had notice of this condition for about six days prior to the accident.

In addition to bringing suit against the owner and the driver of the truck, appellant sued the District of Columbia on the theory that it had "negligently failed to properly maintain a stop sign." At the end of appellant's case, the trial court granted appellee's motion for a directed verdict on the ground of sovereign immunity. Trial proceeded as to the remaining parties and ended in a hung jury, after which a settlement between them was reached. This appeal is taken from the judgment entered on the directed verdict in favor of appellee.

Where the District of Columbia acts in its governmental capacity, **i.e.,** where it exercises its discretionary or judicial powers, sovereign immunity attaches. But where it merely exercises ministerial powers, there is a duty to act in a reasonably safe and skillful manner. **Elgin** v. **District of Columbia,** 119 U.S.App.D.C. 116, 337 F.2d 152 (1964). And whether it be called governmental or ministerial, it is well established that an exception to the doctrine of sovereign immunity is the District's obligation to maintain the streets in a reasonably safe condition for travel. **Urow** v. **District of Columbia,** 114 U.S.App.D.C. 350, 316 F.2d 351, **cert. denied** 375 U.S. 826, 11 L. Ed. 2d 59, 84 S. Ct. 69 (1963); **Booth** v. **District of Columbia,** 100 U.S.App.D.C. 32, 241 F.2d 437 (1956); **District of Columbia, Lumbia** v. **Caton,** 48 App.D.C. 96 (1918). Thus, in **Booth,** where the plaintiff was injured in a flood on city streets, the United States Court of Appeals held that although she could not recover on the theory of the inadequacy of the sewer system plan, a matter involving governmental discretion, she could prevail on the ground that the District failed to maintain the streets in a reasonably safe condition. The court

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there cited the earlier case of **District of Columbia** v. **Caton, supra,** which established that the District's duty to keep the streets safe is controlling whether the dangerous condition is the result of a general plan of improvement, or not.

The question presented to us is whether the District of Columbia is immune from liability for negligently failing to maintain an existing traffic control device. If such negligence amounted to a failure to its duty to keep the streets safe, immunity will not lie. In **Urow, supra,** the issue was whether the District could be sued for its failure to **establis** h a traffic control device at an intersection. The court there held that the District was immune, stating that the jury should not be allowed to examine the reasonableness of a discretionary, quasi-legislative determination.

The **Urow** case pointed out that the District of Columbia's decision to establish or not to establish a general plan of improvement is within the are protected by the doctrine of sovereign immunity. But if a plan that is adopted creates a hazard on the road, either because of its inherent unreasonableness or because of negligence in its administration, then the duty of the District is the same as it is with respect to any street condition that becomes unsafe. **District of Columbia** v. **Caton, supra.** Thus, whereas the **Urow** case stands for the proposition that the District cannot be held liable for a failure to exercise its discretionary, quasi-legislative powers to control traffic at an intersection, here we have a situation where after a decision had been made to regulate traffic, the intersection was allowed to become unregulated and unsafe through negligence - not pursuant to a studied, reasoned decision. The District need not have put up the sign, but once it did, it had a duty to maintain it properly in order to keep the intersection reasonably safe for motorists.

This distinction was recognized in the **URow** case and in one which followed it a week later, **Sass** v. **District of Columbia,** 114 U.S.App.D.C. 365, 316 f.2d 366 (1963). In **Urow,** the court was careful to point out that "this complaint does not present a claim that the municipality installed and then failed to **maintain** a traffic device at an intersection." In the **Sass** case, a third party complaint against the District was dismissed on the ground that it failed to state a claim upon which relief could be granted. The third party complaint alleged that the District had been negligent "in failing to operate and maintain the traffic light control signals at the intersection" where the collision took place. The United States Court of Appeals recognized that the controlling question of law was one of sovereign immunity and reversed the dismissal on the ground that it was not clear from the "vague and indefinite complaint * * *, which does not even allege specifically that the District had notice of any malfunction," that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Thus the court recognized the possibility that immunity might not attach in such a situation, even though it was careful to restrict its holding by stating:

"* * * On this complaint, we are unwilling to make a sweeping holding that the District of Columbia is or is not immune, under any state of facts which might be proved, from tort liability for negligence in maintenance of an **existing** traffic control device or system of devices. Compare Urow v. District of Columbia, 114 U.S.App.D.C. 350, 316 F.2d 351 (1963). * * * " (114 U.S.App.D.C. at 366.)

It has been argued that the street safety exception goes only to physical defects in the street and that it does not include traffic lights and signs. Aside from the fact that the stop sign here was a very real physical appurtenance of the intersection, we believe the distinction drawn is without merit. The absence of the sign in the place where it had stood for a considerable time created an unsafe condition every bit as dangerous as a hole in the roadway or an obstruction.

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In reaching our decision we recognize that cases in other jurisdictions have arrived at opposite conclusions. However, justice and logic lead us to go along with those jurisdictions which have found a city liable for its failure to properly maintain a traffic control device. **See Irvin** v. **Padelford,** 127 CAl.App.2d 135, 273 P.2d 539 (1954); **Johnston** v. **City of East Moline,** 338 Ill.App. 220, 87 N.E.2d 22 (1949)8 **aff'd** 405 Ill. 460, 91 N.E.2d 401 (1950); **O'Hare** v. **City of Detroit,** 362 Mich. 19, 106 N.W.2d 538 (1960); **Falkowski** v. **State,** 26 Misc.2d 367, 210 N.Y.S.2d 268 (1961); **Nuss** v. **State,** 301 N.Y. 768, 95 N.E.2d 822 (1950); **Lyle** v. **Fiorito,** 187 Wash. 537, 60 P.2d 709 (1936).

Appellee urges that even if it cannot avail itself of the doctrine of sovereign immunity, the trial court's judgment should be sustained on alternative grounds. It contends that, as a matter of law, the absence of the stop sign on Taylor Street was not the proximate cause of the accident and that appellant was contributorily negligent in failing to slow down and observe the truck when he approached the intersection.

Proximate cause has been defined in this jurisdiction as "'that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.'" **Howard** v. **Swagart,** 82 U.S.App.D.C. 147, 151, 161 F.2d 651, 655 (1947). The injury must be the "'natural and probable consequence of the negligent or wrongful act, and * * * ought to have been foreseen in the light of the attending circumstances.'" **Howard** v. **Swagart, supra;** see also **Johnston** v. **City of East Moline, supra.** Whether it is or not is ordinarily a question of fact for the jury. **Hanna** v. **Fletcher,** 97 U.S.App.D.C. 310, 231 F.2d 469, 58 A.L.R.2d 847, **cert. denied** 351 U.S. 989, 76 S. Ct. 1051, 100 L. Ed. 1501 (1956). A jury could reasonably find from the evidence presented in this case that a collision was the natural and probable consequence of the failure to repair the stop sign. See **Johnston** v. **City of East Moline, supra.**

Whether appellant was contributorily negligent is also a question of fact for the jury. Here he was traveling on a through street normally protected by lights and signs on the side streets. Whether he was negligent in failing to slow down and observe the truck when he approached the intersection was clearly a question for the jury to decide. See **Irvin** v. **Pardelford, supra.**

Reversed.

DISPOSITION

Reversed.

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216 A.2d 169 MCEACHNIE V. MCEACHNIE (Ct. App. 1966)

HENRY H. McEACHNIE, APPELLANT

vs.

SARAH E. McEACHNIE, APPELLEE

No. 3803
DISTRICT OF COLUMBIA COURT OF APPEALS
216 A.2d 169
January 19, 1966, Decided

Appeal from the District of Columbia Court of General Sessions

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Court of Appeal of Louisiana,
First Circuit.

Steve P. ROGERS, Sr. and Shirley E. Rogers
v.
Lane T. DAIGLE, State Farm Mutual Automobile Insurance Company, Prudential Property and Casualty Insurance Company, State Farm Fire and Casualty Company, and State of Louisiana through the Department of Transportation.

No. 93 CA 1523.

June 3, 1994.
Opinion Granting Rehearing
Oct. 27, 1994.

Parents of child who died while a passenger in vehicle that crashed into mailbox brought wrongful death action against owners of mailbox, their insurer and Department of Transportation (DOTD) alleging that mailbox owners and DOTD were negligent in not removing hazardous mailbox. The Thirty-Second Judicial District Court, Parish of Terrebonne, Timothy C. Ellender, J., entered judgment for mailbox owners, their insurer and DOTD, and parents appealed. The Court of Appeal, Fogg, J., held that mailbox owner, their insurer, DOTD and United States Postal Service were all at fault. On rehearing, the Court of Appeal further held that passenger was not at fault.

Affirmed in part and reversed in part.

West Headnotes

[1] Appeal and Error ⇐ 1008.1(5)
30k1008.1(5)

[1] Appeal and Error ⇐ 1008.1(7)
30k1008.1(7)

[1] Appeal and Error ⇐ 1010.1(5)
30k1010.1(5)

Appellate court cannot disturb trial court's finding if appellate court finds from record that there is reasonable factual basis for finding, and record establishes that finding is not clearly wrong or manifestly erroneous.

[2] Appeal and Error ⇐ 1011.1(4)
30k1011.1(4)

When conflicting evidence creates two possible views of evidence, and trier of fact's choice between views is reasonable in light of entire record, appellate court may not reverse merely because it would have chosen alternate view.

[3] Automobiles ⇐ 266
48Ak266

[3] Highways ⇐ 192
200k192

[3] Automobiles ⇐ 288.5
48Ak288.5
(Formerly 272k98)

Department of Transportation & Development (DOTD) breached duty owed to driving public to maintain reasonably safe roadway and shoulder and was 10% at fault in wrongful death action when passenger in car died when car crashed into mailbox, though driver was intoxicated and was speeding, where but for mailbox, passenger in car might not have been killed, where mailbox did not fall under guidelines issued by American Association of State Highway and Transportation Officials **(AASHTO)** and thus DOTD was aware or should have been aware that mailbox was lethal roadside hazard, and where DOTD overlaid highway that mailbox was on without having mailbox removed.

[4] Automobiles ⇐ 266
48Ak266

[4] Highways ⇐ 192
200k192

Department of Transportation (DOTD) did not enjoy immunity from liability, in wrongful death action for death of passenger when automobile hit mailbox, for its operational decision to use federal funds to overlay highway rather than remove hazardous

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mailboxes.

[5] Automobiles ⚿ 266
48Ak266

[5] Highways ⚿ 199
200k199

[5] Automobiles ⚿ 288.5
48Ak288.5
(Formerly 272k98)

Owners of mailbox and their insurer were 3% at fault in wrongful death action when passenger in car died when car crashed into mailbox, though driver was intoxicated and was speeding, where owners should have been aware mailbox was hazardous because of the many accidents on highway in front of their property involving telephone poles and trees, where one of the accidents occurred in manner similar to one in wrongful death action, destroying mailbox, and where, rather than removing mailbox after being destroyed in accident, owners rebuilt it in same style and location.

[6] Automobiles ⚿ 288.5
48Ak288.5
(Formerly 272k98)

[6] Postal Service ⚿ 3.1
306k3.1

United States Postal Service was 7% at fault in wrongful death action when passenger in car died when car crashed into mailbox, though driver was intoxicated and was speeding, where Postal Service should have been aware of hazards presented by 3,000 pound brick mailbox, three to four feet off highway on shoulder.

[7] Death ⚿ 95(1)
117k95(1)

Appropriate damages for wrongful death of 21-year-old man killed when automobile in which he was passenger hit brick mailbox were $150,000 for decedent's father, $150,000 for decedent's mother and $5,417.08 for funeral and burial expenses, where family was close and engaged in many activities together, and decedent had visited his parents daily and was working with his father.

[8] Appeal and Error ⚿ 749
30k749

Plaintiffs' decedent could not be assessed with any degree of fault by appellate court in wrongful death action for riding with driver when driver was intoxicated, absent appeal or answer to appeal filed by defendants.

[9] Automobiles ⚿ 242(8)
48Ak242(8)

Defendants in action arising from automobile accident which resulted in death of passenger had burden of proving that passenger was at fault.

[10] Automobiles ⚿ 224(5)
48Ak224(5)

Guest passenger in an automobile has no duty to supervise the driver.

[11] Automobiles ⚿ 224(8)
48Ak224(8)

If alcohol-induced impairment of the driver is a substantial cause of the driver's negligence and if the guest passenger knows or should have known of the driver's impaired condition and nevertheless voluntarily rides with him, the guest passenger may be found comparatively negligent or at fault.

[12] Automobiles ⚿ 224(8)
48Ak224(8)

Guest passenger was not at fault in automobile accident that resulted in passenger's death where it was not shown by a preponderance of the evidence that driver's condition was noticeably impaired such that the passenger knew or should have known that driver was intoxicated to such a degree that his driving ability was likely to be impaired.

****759** Michael Pellegrin, Houma, for plaintiffs-appellants Steve P. Rogers, Sr. and

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Shirley E. Rogers.

William F. Dodd, Houma, for defendant-appellee Dept. of Transp. and Development.

William Kelly, Metairie, for defendant-appellee Prudential and Cas. Ins. Co.

Lloyd T. Bourgeois, Labadieville, for defendant-appellee Don Calongne, Charles Chauvin, II and State Farm Fire and Cas.

Jerry H. Schwab, Houma, for defendant-appellee State Farm Auto. Ins. Co.

Before WATKINS, SHORTESS and FOGG, JJ.

***2** FOGG, Judge.

This appeal from a judgment dismissing the plaintiffs' suit involves the issue of whether the owners of a brick mailbox on the ****760** shoulder of a highway and the State of Louisiana, Department of Transportation & Development (DOTD), are liable to the plaintiffs in negligence for the death of their son, a passenger in a vehicle which crashed into the mailbox.

The plaintiffs, Steve and Shirley Rogers, filed a wrongful death suit seeking damages for the death of their twenty-one year old son, Scott. Rogers was killed on February 24, 1991, while a passenger in a car driven by Lane Daigle, which went out of control on a curve in Highway 316 in Terrebonne Parish and crashed into a 3,000 pound brick mailbox, which was three to four feet off the highway on the shoulder. The case went to trial against the following defendants: Charles Chauvin, II, and Don Calongne, owners of the mailbox; State Farm Fire and Casualty Company, their insurer; and DOTD. [FN1] After the trial, the court rendered judgment in favor of the defendants. The trial court found that the sole fault for the death of plaintiffs' son was with the driver of the vehicle. The plaintiffs appeal, contending that the trial court erred in failing to assign any percentage of fault to DOTD and to the owners of the mailbox and their insurer.

FN1. Lane T. Daigle and his insurer, State Farm Mutual Automobile Insurance Company, and Prudential Property and Casualty Insurance Company, the plaintiffs' uninsured motorist insurer, were initially named as defendants, but the plaintiffs dismissed their demands against them.
State Farm, Mr. Chauvin, Mr. Calongne, and DOTD filed third party demands against the United States Postal Service. The Postal Service filed a petition to remove the case to the federal court, but the federal court later granted the plaintiffs' motion to remand the case to state court, stating in its ruling that Mr. Chauvin, Mr. Calongne, and State Farm voluntarily dismissed their third party demand, and that DOTD failed to name the proper defendant in its third party demand. All third party demands were eventually dismissed.

As a basis for liability, the plaintiffs rely on guidelines issued by the American Association of State Highway and Transportation Officials **(AASHTO)** in 1985. According to the guidelines, there are 20 million mailboxes on rural roads and streets, and the limited data on accidents associated with ***3** mailboxes suggests that possibly 70 to 100 people die annually from vehicles striking mailboxes "where the design of the mailbox or, especially, its support can be shown to have contributed to the severity of the accident." The guidelines recognize that massive structures such as the mailbox in this case are a "lethal roadside obstacle that should be eliminated," and that multiple mailbox installations were serious threats.

William Hickey, the road design engineer for DOTD, testified that DOTD began developing the formal policy for adopting these **AASHTO** guidelines in 1990, which was when he first became personally aware of them. Hickey also testified that in 1986, all **new construction** projects were to meet the **AASHTO** guidelines, although there was no formal written policy; the federal government would not accept a state highway project for federal aid without compliance. On February 7, 1992, based on the **AASHTO** guidelines, DOTD adopted mailbox regulations which require DOTD to remove any mailbox support that does not meet a crashworthy standard on **new construction** projects or on overlay

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projects; the mailbox must also be placed eight to twelve inches from the shoulder, a postal service requirement.

Highway 316 was overlaid in 1990 and 1991. Hickey testified that the mailbox in this case would not be acceptable under the **AASHTO** regulations, but that there would be no reason to believe that its owners would have been aware of the guidelines; it was not shown that DOTD had any notice of the existence of this particular mailbox. Dr. Olin K. Dart, Jr., the plaintiff's expert witness in traffic engineering, highway design, traffic safety, and accident reconstruction, believed that Louisiana should have adopted these regulations before this accident, and testified that he had begun giving seminars for public officials in which the mailbox problem was addressed in 1989, 1990, and 1991. A letter addressed to the Secretary of DOTD dated June 23, 1987, from the Division Administrator for the Federal Highway Administration was introduced into evidence; the letter stated that federal-aid highway funds could be used for the removal of hazardous mailbox **761 installations *4 along existing highways. Hickey testified that the federal government was allowing DOTD to use the funds it normally received to reconstruct highways, and that funds available for one project on a statewide basis were limited, and there was a long list of ongoing projects with greater priority.

On the evening of the accident, Daigle testified that from about 10:00 p.m. until 2:00 a.m., he and Rogers were at two bars, drinking beer; he had from six to eight beers, and he was told after the accident that his blood alcohol level was .07. Upon leaving to go home, Daigle wanted to spend the night at a friend's house, although he stated that he was not too intoxicated to drive and had no trouble staying awake; Rogers and Daigle en route to their friend's house decided to turn around and go to Rogers' house. The accident happened about 3:20 a.m., on their way to Rogers' house.

The testimony was undisputed regarding how the accident happened. Daigle's vehicle, which was headed north, crossed the centerline of a moderate S-curve. After entering the southbound lane, Daigle steered to the left and then began traveling sideways 210 feet from the mailbox; the car then went onto the shoulder twenty-seven feet from the mailbox, rolled onto the passenger's side, and then slid into the mailbox. Upon the car's hitting the mailbox, the windshield broke, and the vehicle flipped, rolled over, and came to a stop. After impact with the mailbox, Rogers was ejected from the vehicle and was killed instantly. Daigle did not know why he went onto the shoulder and did not recall trying to get back on the road.

At the time of the accident, the road conditions were good. The posted speed on the highway was 50 m.p.h. and there was no curve warning sign. Although Daigle did not remember his speed when the accident happened, the speed immediately before the accident was estimated to be 68 m.p.h.

Calongne testified that the mailbox had been in its location for thirteen years at the time of the accident. According to Calongne, in the nineteen years he had lived in this location, *5 there were several accidents on both sides of the highway involving telephone poles and trees. Calongne initially testified that he witnessed seven accidents which occurred on the shoulder in front of his house, and all involved speeding and/or drinking; Calongne later testified that some of the accidents were across the highway from his house. Two accidents occurred when a vehicle in the northbound lane went across the centerline and southbound lane, and onto the shoulder. In one of these accidents (which was three to five years before the accident in this case), the vehicle struck the mailbox, destroying it. Calongne and Chauvin rebuilt it in the same style and location. Calongne testified that he never considered removing the mailbox prior to the accident in this case, and that after the accident, he and his neighbor put the mailbox back up. Calongne testified that the postal service instructed them about where to put the mailbox. Calongne testified that he was never notified by DOTD or the postal service that his mailbox presented a hazard, and that if he had

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been so notified, he would have moved it back; Calongne was unaware of the **AASHTO** guidelines prior to the accident.

Dr. Dart testified that the mailbox did not cause the accident, but that the accident would not have been as severe but for the close proximity of the mailbox to the road. Dr. Dart also testified that Daigle was speeding at the time of the accident, and that the primary cause of this accident was Daigle's condition. He testified that an advisory speed for the curve would be 45 m.p.h., but that this was based on the worst road conditions.

Dr. Joseph D. Blaschke, the defendant's expert in traffic engineering, roadside safety, and accident reconstruction, testified that the primary cause of the accident was Daigle's loss of control of the vehicle and travel at an excessive speed in an impaired condition. Dr. Blaschke stated that the curve could be negotiated safely in dry weather conditions at 50 m.p.h. Both Drs. Dart and Blaschke testified that the highway had no defects.

In his reasons for judgment, the trial judge stated that he drove the curve where the accident happened at 50 m.p.h. and at 68 ***6** m.p.h. (the estimated speed of the Daigle ****762** vehicle at the time of the accident), and there were no signs of a possible loss of control; the judge opined that the curve could easily be negotiated at 68 m.p.h. and 75 m.p.h. He noted that Daigle was very familiar with the highway, having grown up in the area. The judge found that the mailbox owners were not negligent in that there was no showing of prior knowledge of a dangerous condition. He then determined that the sole cause of this accident was the negligence of Daigle, and noted that if this were an accident on the shoulder where such an accident would logically occur, that is, on the outside edge of the curve, he might conclude differently. The judge pointed out that when Daigle lost control he was not using the shoulder to recover control, but rather, his vehicle was simply out of control. The judge stated that but for the mailbox, Rogers might not have been killed, but that he would consider that DOTD knew of the recommendations regarding mailbox placement, but had not adopted them.

[1][2] This court cannot disturb the trial court's finding if we find from the record that there is a reasonable factual basis for the finding, and the record establishes that the finding is not clearly wrong or manifestly erroneous. Stobart v. State, Department of Transportation and Development, 617 So.2d 880 (La.1993). When conflicting evidence creates two possible views of the evidence, and the trier of fact's choice between the views is reasonable in light of the entire record, an appellate court may not reverse merely because it would have chosen the alternate view. Rosell v. ESCO, 549 So.2d 840 (La.1989).

[3][4] We believe the trial court erred in failing to assess any fault to the defendants. Although the driver was impaired and was speeding, the mailbox was a substantial cause of the plaintiffs' son's death. See Simpson v. State, DOTD, 636 So.2d 608 (La.App. 1st Cir.). Because of the **AASHTO** guidelines, DOTD was aware or should have been aware as early as 1985 that mailboxes such as this one were lethal roadside hazards; in fact, in 1986, it began implementing **AASHTO** regulations ***7** regarding mailboxes in **new construction**. The letter DOTD received in 1987 shows that federal funds were available for removal of such hazardous mailboxes, and therefore, DOTD should have begun removal of them at the time. However, DOTD overlaid Highway 316 in 1990 and 1991 without having the mailbox removed. We conclude that DOTD's failure to remove the mailbox while overlaying the highway in question, armed with knowledge of the hazardous nature of the mailbox, was a breach of a duty DOTD owed to the driving public to maintain a reasonably safe roadway and shoulder. DOTD enjoys no immunity from liability for its operational decision not to remove the mailbox. See Chaney v. National Railroad Passenger Corp., 583 So.2d 926 (La.App. 1st Cir.1991). We find that DOTD should have been assessed with 10% of fault.

[5] We also find that the trial court erred in

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failing to assess any fault to the owners of the mailbox. Calongne and Chauvin should have been aware that the mailbox presented a hazard, given the many accidents on the highway in front of their property involving telephone poles and trees. In particular, two accidents occurred in a manner similar to the one in the case at bar, and in one of these accidents, a vehicle hit the mailbox, destroying it; at that point, they should have realized it was hazardous to drivers on Highway 316. Yet, Calongne and Chauvin did not consider removing the mailbox, but instead rebuilt it in the same style and location. We find that Calongne, Chauvin, and State Farm should have been assessed with 3% of the fault.

[6] Additionally, we find that the trial court erred in failing to find the United States Postal Service at fault. Postal regulations required this mailbox to be located so near to the road; the postal service should be aware of the hazards presented by a massive structure such as the mailbox in this case. Fault in the amount of 7% should have been assessed to the United States Postal Service.

[7] Because the trial court did not find the defendants liable, it did not reach the issue of damages. The record shows that the Rogers were a close family, and engaged in many activities together. Rogers visited with his parents daily and slept and ate ****763 *8** meals at their home often; at the time of the accident, Rogers maintained a residence with his brother in a small house provided by and near his parents. When the accident happened, Rogers was working with his father. Accordingly, we fix damages for the loss of their son at $150,000 for Mr. Rogers, and $150,000 for Mrs. Rogers. We also award $5,417.08 for funeral and burial expenses.

[8] Therefore, we reverse the judgment of the trial court, and assess 10% fault to DOTD, 3% fault to Calongne, Chauvin, and State Farm, and 7% fault to the United States Postal Service. [FN2] We fix damages for the loss of their son at $150,000 for Mr. Rogers and $150,000 for Mrs. Rogers; we also award $5,417.08 for funeral and burial expenses. Costs of this appeal to be assessed as follows: $964.00 to DOTD, and $964.00 to Calongne, Chauvin, and State Farm.

FN2. Some of the appellees argue in their briefs to this court their contention that Scott Rogers was at fault for riding with Daigle in his "condition." It is unnecessary for us to address this issue, as we are powerless to assess the plaintiffs' decedent with any degree of fault absent an appeal or answer to the appeal having been filed by the appellees.

REVERSED IN PART AND RENDERED; AFFIRMED IN PART.

ON REHEARING

***2** PER CURIAM.

We grant the motion for rehearing filed by the defendants-appellees, Don Calongne, Charles Chauvin, II, and State Farm Fire and Casualty Company, on the limited issue of the fault of Scott Rogers. In their application for rehearing, the defendants-appellees contend that this court must evaluate Rogers' fault under La.C.C.P. art. 2133 A. This article states that a party who does not seek modification, revision or reversal of a judgment in an appellate court may assert in support of the judgment any argument supported by the record although he has not appealed, answered the appeal or applied for supervisory writs.

In this case, the trial court cast the driver with all the fault, thereby finding that the defendants-appellees were not at fault. The contention that Rogers was at fault would support the judgment finding no fault on the part of the defendants-appellees. Therefore, we have reconsidered our statement in our original opinion that we need not address this issue, and have determined that we must consider this contention. See Succession of Doll v. Doll, 593 So.2d 1239 (La.1992); Diefenthal v. Longue Vue Management Corp., 561 So.2d 44 (La.1990).

[9][10][11][12] The defendants-appellees have the burden of proving that Rogers was at fault. Molbert v. Toepfer, 550 So.2d 183

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(La.1989). A guest passenger in an automobile has no duty to supervise the driver. Adams v. Security Insurance Co. of Hartford, 543 So.2d 480 (La.1989). If alcohol-induced impairment of the driver is a substantial cause of the driver's negligence and if the guest passenger knows or should have known of the driver's impaired condition and nevertheless voluntarily rides with him, the guest passenger may be found comparatively negligent or at fault. Molbert v. Toepfer, 550 So.2d 183 (La.1989). The evidence presented by the defendants-appellees does not establish by a preponderance of the evidence that Daigle's condition was noticeably impaired such that Rogers knew or should have known that Daigle was intoxicated to such a degree that his driving ability was likely to be impaired. ***3** Therefore, we find no support for any assessment of fault to Rogers under these principles.

For the reasons expressed in our original opinion, with the exception stated above, the decree which we rendered in our original opinion is reinstated.

ORIGINAL DECREE REINSTATED.

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