

# Special Investigations and Prosecutions Unit

## Report on the Investigation into The Death of Susan LoTempio



**Barbara D. Underwood**  
**NYS Attorney General**

## EXECUTIVE SUMMARY

On Friday, March 30, 2018, a pedestrian, Susan LoTempio, died tragically after being hit by a Buffalo Police Department (“BPD”) patrol vehicle. The collision occurred at approximately 6:30 a.m., which was approximately thirty minutes prior to sunrise. The roads were wet and visibility was poor. Wearing dark clothing, Ms. LoTempio was crossing the street at an angle and in an area where there was no crosswalk. A BPD patrol vehicle responding to a call by a civilian for police assistance collided with Ms. LoTempio. As further detailed below, the evidence makes clear that the collision was a tragic accident for which no criminal charges are warranted.<sup>1</sup>

The OAG investigation included, among other investigative steps:

- Interviews of Police Officer (“PO”) Daniel Ahearn, who was operating the BPD vehicle, and of other responding officers;
- Inspection of the vehicle driven by PO Ahearn, and review of the New York State Police (“NYS”) collision reconstruction report;
- Review of video footage of the incident, which was consistent with the accounts of PO Ahearn and the other responding officers;
- Review of the Erie County Medical Examiner’s Report, including toxicology results of blood and urine taken from PO Ahearn, which show that PO Ahearn was not under the influence of alcohol or drugs at the time of the collision;
- An analysis of PO Ahearn’s cell phone, which shows that he had not been using his phone while driving prior to or at the time of the collision;
- Review of the decision of NYS Department of Motor Vehicles (“DMV”) Administrative Law Judge Glenn E. Murray, which found that the record before Judge Murray did not present evidence that PO Ahearn was unlawfully operating his vehicle or that he operated his vehicle with gross negligence.

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<sup>1</sup> In Executive Order No. 147 (July 8, 2015), Governor Cuomo appointed the OAG as special prosecutor “to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian . . . caused by a law enforcement officer.” Governor Andrew Cuomo subsequently issued Executive Order No. 147.16, which expressly conferred jurisdiction upon the Office of the Attorney General (“OAG”) to investigate any potential unlawful acts or omissions by BPD officers relating to Ms. LoTempio’s death.

## STATEMENT OF FACTS

### A. The Civilian Call for Assistance and Dispatch of BPD Vehicles

On March 30, 2018 at 5:45 a.m., BPD received a call from an elderly caller claiming an intruder was in his North Buffalo house making noise. Several BPD officers, including PO Ahearn, were familiar with the address and the caller. PO Ahearn believed that the caller suffered from delusions and dementia.<sup>2</sup>

At 6:22 a.m., BPD dispatched two marked patrol vehicles from the D District stationhouse, located at 669 Hertel Avenue. PO Nicholas Militello, the primary officer on the call, was driving a 2014 Chevy Tahoe. A Probationary Police Officer (“PPO”), Jordan Lengel, was his passenger. PO Ahearn was driving the second vehicle, a 2016 Dodge Charger. He was alone in the Charger. Consistent with BPD policy, both police vehicles responded to the call without lights or sirens activated.<sup>3</sup>

Officer Ahearn’s vehicle, like all BPD patrol vehicles, had a mobile computer terminal (“MCT”) mounted on a fixed pedestal between the driver and passenger seats. On the MCT is a detachable computer, called a Toughbook. The MCT provides call detail, such as who called the BPD for assistance and details about previous calls from the same address. Updates appear in the call detail as they occur. PO Ahearn explained that he had never adjusted the MCT in any patrol vehicle he had been assigned to, because the mechanism for adjusting it up or down is typically loose or broken. On the day in question, PO Ahearn began logging into his MCT after he entered

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<sup>2</sup> This was the sixth call to that address in 2018, the 24th call in the preceding year, and the 111th call to that address since 2007. A review of prior calls to this location shows that virtually all of the responding officers noted the caller’s diminished capacity.

<sup>3</sup> A copy of the BPD Manual of Procedure Sections 7.2 – 7.6 defining the Types of Responses is attached hereto as Exhibit 1. This call would be classified as one requiring a rapid response.

the vehicle at the D District parking lot. This process requires an officer to type in his car number, BPD identification number, and password.

The collision occurred near the intersection of Hertel and Tennyson Avenues, which is approximately 207 feet east of the intersection of Hertel and Delaware Avenues.<sup>4</sup> PO Ahearn's vehicle and the other BPD vehicle were driving along Hertel Avenue in the direction of the Hertel-Tennyson Avenues intersection. PO Ahearn told the OAG that, as he approached the intersection of Hertel and Delaware Avenues, he completed logging in to the MCT system. He saw no other cars or pedestrians, just "open dark road." Just as PO Ahearn passed through the Hertel-Tennyson Avenues intersection, the call to which he was responding popped up on his MCT screen and made an audible chirping noise. PO Ahearn quickly glanced at the MCT. Nearly simultaneously, he heard an impact with his vehicle.

Unbeknownst to PO Ahearn, Ms. LoTempio – dressed in a gray fleece jacket and dark green sweat pants – was crossing Hertel Avenue towards Tennyson Avenue. A video surveillance camera from a nearby Burger King shows Ms. LoTempio walking eastbound in front of Burger King, briefly looking behind her towards the Hertel-Delaware intersection, and then crossing the street on a diagonal towards Tennyson into the path of PO Ahearn's oncoming vehicle.<sup>5</sup> According to her husband, Ms. LoTempio, a resident of North Buffalo, was taking her daily morning walk.

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<sup>4</sup> A map of the area is attached as Exhibit 2.

<sup>5</sup> PO Ahearn's vehicle had a non-functional headlight on the passenger side. Because the LED lights surrounding the headlight were illuminated, both headlights on the vehicle appeared to be working normally in the Burger King surveillance video. PO Ahearn told the OAG that, following his usual routine, he had inspected the vehicle for damage prior to responding to the call. The headlights were set to automatic, so they immediately illuminated when the car was turned on, without any action by the driver. PO Ahearn said that he did not observe any problem with the headlights.

The impact lifted Ms. LoTempio onto the hood and windshield of the BPD vehicle, then onto its roof and trunk.<sup>6</sup> PO Ahearn stopped, went over to Ms. LoTempio, and directed traffic away from her body. PO Militello, who had not recognized that there was a person on the roadway prior to the collision, stopped and radioed for an ambulance.

The crew of an ambulance in the area observed several police officers responding to a call and followed them in anticipation of being dispatched. Emergency Medical Technician (“EMT”) Alana Eure was one of the first responders. She said that her ambulance crew from American Medical Response (“AMR”) were already on the scene by the time they received the actual call for service.

Upon approach, it was readily apparent to EMT Eure that Ms. LoTempio was in very poor condition. Eure placed a heart monitor on her, which registered a rhythm called “P.E.A.” or Pulseless Electrical Activity. This means that there was no heartbeat or pulse but the heart still had electrical activity. This condition cannot sustain life without medical assistance; EMT Eure and her ambulance crew began life-saving efforts.

Buffalo Fire Department EMTs soon arrived on the scene and began performing chest compressions. The Fire Department EMTs also attached a bag valve mask to Ms. LoTempio and provided oxygen. AMR Paramedic Jeffrey Nielsen arrived and inserted an endotracheal tube into Ms. LoTempio and did a chest decompression. None of these procedures successfully resuscitated her. After several minutes with no improvement in Ms. LoTempio’s condition, Ms. LoTempio was declared dead at the scene.

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<sup>6</sup> PPO Lenger told the OAG that just before the collision, she observed something dark to her left moving slowly from the area of Tennyson southbound across Hertel. PPO Lenger initially believed it was a deer or a dog. As the headlights illuminated the object, she realized it was a person carrying a bag. Almost immediately thereafter, the collision occurred. PPO Lenger’s recollection of seeing a pedestrian crossing Hertel from the north side is not corroborated by the Burger King video surveillance tape or by Ms. LoTempio’s injuries described by the Medical Examiner. Those injuries occurred primarily to her left side, consistent with her walking northerly across Hertel Avenue.

## **B. New York State Police Collision Reconstruction Report**

At the request of the BPD, at approximately 9:30 a.m., Investigator Troy D. Ford of the NYSP Troop A Collision Reconstruction Unit responded to the scene. Inv. Ford inspected and photographed the scene and PO Ahearn's vehicle, including inspecting its "black box," the event data recorder. The vehicle was unoccupied and still running when Inv. Ford arrived. He was advised that it had not been moved since PO Ahearn pulled over after hitting Ms. LoTempio.

Inv. Ford conducted a full examination of the outside and inside of the vehicle later in the day. Inv. Ford found that the passenger side headlight was inoperable, and the LED running strips bordering this headlight were working properly. Inv. Ford noted that the size and placement of the vehicle's MCT left "approximately 1.5 inches of a viewable area available (from a driver's vantage point) between the top of the computer screen and the bottom right half of the mounted rearview mirror." Inv. Ford calculated the range of speed of PO Ahearn's vehicle upon impact to be between 43 miles per hour and 47 miles per hour. The posted speed limit for the area of the collision is 30 miles per hour.

OAG and BPD received the completed collision reconstruction report on September 21, 2018.<sup>7</sup> It concluded that PO Ahearn had the right of way, that his field of vision was partially obstructed by the MCT, and that he was apparently distracted by the chime of the MCT call. It also concluded that Ms. LoTempio crossed the street in the dark in dark-colored clothing where there was no crosswalk, emphasizing the latter conduct as the primary contributor to the collision.

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<sup>7</sup> A copy of the full collision reconstruction report is attached hereto as Exhibit 3.

### **C. DMV Hearing**

Pursuant to New York State Vehicle and Traffic Law (“VTL”), the Department of Motor Vehicles conducted a hearing before Administrative Law Judge Glenn E. Murray to determine whether PO Ahearn’s registration, license, and/or driving privileges should be revoked or suspended.<sup>8</sup> A copy of the decision is attached hereto as Exhibit 4.

Based on testimony by PO Ahearn, Judge Murray concluded that PO Ahearn’s “view was substantially obstructed by his computer screen and his attention was divided between his windshield, and his computer.” Judge Murray further concluded as follows:

The record does not present evidence that respondent was unlawfully operating his vehicle when the accident occurred or that he operated his vehicle with gross negligence. The occurrence of a fatal accident does not, by itself, establish that respondent operated his vehicle unlawfully, operated it with gross negligence, or caused the accident.

### **D. Medical and Forensic Evidence**

#### **1. Ms. LoTempio**

Dr. Scott LaPoint performed the autopsy on Ms. LoTempio at the Erie County Medical Examiner’s Office on March 30<sup>th</sup>, 2018, commencing at approximately 1:00 p.m. A copy of the autopsy report was provided to the OAG on October 17, 2018. The autopsy revealed that Ms. LoTempio died of multiple blunt force injuries. Most of the injuries occurred on her left leg. This is consistent with Ms. LoTempio crossing Hertel from the south heading in a northerly direction. Toxicological examination showed no evidence of drugs or alcohol in her system. Dr. LaPoint determined the manner of death to be accidental.<sup>9</sup>

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<sup>8</sup> The State Police’s accident reconstruction report was not available at the time of the hearing.

<sup>9</sup> A copy of the autopsy report is attached hereto as Exhibit 5.

## 2. PO Ahearn

PO Ahearn voluntarily submitted to testing of his blood and urine at 10:40 a.m. on March 30, 2018. No drugs or alcohol were found.

PO Ahearn also voluntarily agreed to have his cell phone activity reviewed during the half hour before and after the collision. The only activity found was a call to PO Ahearn's wife shortly after the collision, thus verifying that he was not on his personal phone immediately before or during the incident.<sup>10</sup>

### **LEGAL ANALYSIS**

The evidence makes clear that the collision and Ms. LoTempio's death were accidental. According to the accident reconstruction report, PO Ahearn was driving between 43 and 47 miles per hour in an area where the posted speed limit is 30 mile per hour. PO Ahearn was driving an emergency police vehicle responding to a call for police assistance and therefore he was entitled to exceed the speed limit. VTL Section 1104-b (exemption from speed limit for police vehicles); VTL Section 101 (defining "authorized emergency vehicle" as "Every . . . police vehicle"); VTL Section 114-b (defining "emergency operation" in pertinent part as "The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in . . . responding to, or working or assisting at the scene of . . . a police call").<sup>11</sup>

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<sup>10</sup> According to PO Ahearn, PO Militello actually made this call at PO Ahearn's request. This was confirmed by PO Militello.

<sup>11</sup> Under VTL Section 1104-b(3)(c), the exemption applies when a police vehicle has on its lights and sirens "as may be reasonably necessary." PO Ahearn was responding to a call in light traffic at approximately 6:30 am to a call from someone the BPD believed may have misperceived that an intruder was in her house. Under these circumstances, it was not reasonably necessary to drive with lights and sirens on. See, BPD Manual of Procedure (attached heretro as Exhibit 1); see generally, Lacey v. City of Syracuse, 144 A.D.3d 1665 (4th Dept. 2016) (Defendant police officer's motion for summary judgment granted when he established as a matter of law that he did not act with reckless disregard for the safety of others when plaintiff, a bicycler, and the defendant's police vehicle collided while the police vehicle in emergency operation (i.e., the officer followed a motorist to give the motorist a warning for a traffic violation)).

Moreover, “it takes some additional affirmative act by the defendant to transform ‘speeding’ into ‘dangerous speeding;’ conduct by which the defendant exhibits the kind of “serious[ly] blameworth[y]” carelessness whose “seriousness would be apparent to anyone who shares the community's general sense of right and wrong.” People v. Cabrera, 10 N.Y.3d 370, 377 (2008)(alterations in original). “[O]ur decisions have uniformly looked for some kind of morally blameworthy component to excessive speed in determining criminal negligence; for example, consciously accelerating in the presence of an obvious risk.” Id. at 378.

\* \* \*

Based on foregoing, we find that the death of Ms. LoTempio was a tragic accident for which there is no criminal culpability.

### **RECOMMENDATION**

The placement of the MCT in PO Ahearn’s car obstructed a portion of his view of the side of the road on which Ms. LoTempio was walking. While changing the placement of the MCT may not have prevented this accident, we recommend that BPD explore changing the placement of the MCT so as not to obstruct the driver’s view.<sup>12</sup>

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<sup>12</sup> As an example, the New York State Police use a similar mobile computer, which is built into the dashboard so as not to obstruct the driver’s view.

# EXHIBIT 1

7.2 TYPES OF RESPONSE

There are basically three types of response to incidents requiring the police:

- A. Routine Response
- B. Rapid Response
- C. Emergency Response

7.3 ROUTINE RESPONSES

Routine responses are those in which there is no need for an immediate police presence at the scene. Examples include: reporting property crimes; assisting motorists; loud music; gangs; etc. Members shall respond to routine calls as expeditiously as their other assigned police related duties permit. The use of emergency lights or the siren should not be used.

7.4 RAPID RESPONSES

A rapid response is one in which the presence of the police is needed without delay, under non-emergency circumstances. In these type calls there is no imminent threat of death or injury, nor does it involve a serious crime in progress or the flight of a violent felon. Examples include: alarms, domestic disputes, prowlers, suspicious persons, etc. The use of emergency lights and siren will be determined by the information received from the Radio Dispatcher.

7.5 EMERGENCY RESPONSES

An emergency response is one in which the presence of the police is needed immediately under emergency circumstances. These type calls involve an imminent threat of death or injury, serious crimes in progress, the flight of a violent felon or the imminent threat of severe property damage. Examples include: Officers in trouble, shootings, burglary/robbery in progress, assault in progress, etc. Emergency lights and/or siren shall be used when engaged in this type response.

7.6 CAUTION REQUIRED

- A. Members operating a Department vehicle with emergency lights or siren activated must exercise due regard for the safety of all persons including the Officers themselves.
- B. Members operating a police vehicle when emergency lights and/or siren is activated, must drive cautiously, traveling at a reasonable and prudent speed, and at all times maintaining control of the vehicle. They shall not proceed through intersections in which they face a red light, flashing red light, stop sign or yield sign, without first stopping the police vehicle and checking to make sure that cross traffic has halted and it is safe to continue. When two or more emergency vehicles approach an intersection simultaneously, the

# EXHIBIT 2



Delaware Avenue

Hertel Avenue

Tennyson Avenue

# EXHIBIT 3

**Single Vehicle – Pedestrian  
Fatal Collision**

**Hertel and Tennyson Avenues  
City of Buffalo  
Erie County**

**March 30, 2018 6:33 A.M.**



**Troop A  
Collision Reconstruction Unit**

**4525 West Saile Drive  
Batavia, New York 14020  
Telephone (585) 344-6287  
Facsimile (585) 345-9412**

**Prepared by  
Investigator Troy D. Ford**

NYSP Station / Outside Agency <b>Buffalo Police Department</b>		T/Z/S --	Case Number <b>18-089-121</b>
Collision Date <b>3/30/2018</b>	Time of Collision <b>6:33 A.M.</b>	C/T/V of Collision <b>C/Bufalo</b>	County <b>Erie</b>

Location  
**Hertel and Tennyson Avenues**

Report Type:  Full Report  Summary Report  Diagram Report  
 Supplemental Report  Amended Report  No Report / Consultation (Explain)

Comments:  
The Troop "A" Collision Reconstruction Unit was requested by Lieutenant Timothy O'Rourke of the Buffalo Police Department to assist their agency with a single vehicle - pedestrian fatal collision that involved one of their patrol vehicles.

<input checked="" type="checkbox"/> Vehicle 1	<input type="checkbox"/> Bicyclist	<input type="checkbox"/> Pedestrian	<input type="checkbox"/> Vehicle	<input type="checkbox"/> Bicyclist	<input checked="" type="checkbox"/> Pedestrian
Last, First, MI <b>Ahearn, Daniel G.</b>	DOB [REDACTED]	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured	Last, First, MI <b>LoTempio, Susan</b>	DOB [REDACTED]	<input checked="" type="checkbox"/> Deceased <input type="checkbox"/> Injured
Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured	Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured
Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured	Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured
Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured	Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured
Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured	Last, First, MI	DOB	<input type="checkbox"/> Deceased <input type="checkbox"/> Injured

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Submitted By (Rank & Name) Investigator Troy D. Ford <i>Troy D. Ford</i>	Shield 166	Date Submitted 9/05/2018	FIU Senior Investigator C.I. <i>(Signature)</i>
Troop CRU / Station Troop A / SP Batavia	CRU Case Number A2018-0330		Date 9/07/2018
1 <sup>st</sup> Peer Review By Investigator Thomas K. Rzepecki <i>Thomas K. Rzepecki</i>	Shield 5495	Date Reviewed 9/06/2018	
2 <sup>nd</sup> Peer Review By Senior Investigator Glenn P. Walsh <i>Glenn P. Walsh</i>	Shield 4430	Date Reviewed 9/17/2018	Date Published 9/20/18

## **COLLISION RECONSTRUCTION REPORT**

**Incident: Single Vehicle – Pedestrian Fatal Collision**

**Location: Hertel and Tennyson Avenues, City of Buffalo, Erie County**

**Collision Reconstructionists: Investigators Troy D. Ford, Thomas K. Rzepecki and  
Trooper Kyle D. Folts**

### **INTRODUCTION**

On March 30<sup>th</sup>, 2018 at approximately 8:20 A.M., I was requested by Officer Keith LaFalce of the Buffalo Police Department to assist his agency with a single vehicle – pedestrian fatal collision. Officer LaFalce explained that this collision had occurred approximately two hours earlier that morning on Hertel Avenue, near Tennyson Avenue, in the City of Buffalo and that the vehicle involved was one of their patrol cruisers. After notifying Senior Investigators Christopher Iwankow and Glenn Walsh, I responded to the collision scene with Investigator Thomas Rzepecki and Trooper Kyle Folts. After arriving there at approximately 9:30 A.M., I was briefed by Buffalo Police Lieutenant Timothy O'Rourke who related the following:

Earlier that morning, while Buffalo Police "D" District officers were receiving their 6:00 A.M. briefing at 669 Hertel Avenue in Buffalo, New York, two officers were dispatched to a call for service, east of the collision scene, for the report of an "irrational subject." The officers left the briefing and responded to the call in two separate marked patrol vehicles. One officer operated a Chevrolet Tahoe while the other drove a Dodge Charger. The two officers proceeded in an easterly direction on Hertel Avenue toward the call for service. Lieutenant O'Rourke explained that as the patrol vehicles had reached the intersection of Hertel Avenue and Delaware Avenue, the officer operating the Dodge was ahead of the Chevrolet. He further stated that after the Dodge drove through the intersection, it impacted a pedestrian in the roadway. Lieutenant O'Rourke led Investigator Rzepecki, Trooper Folts and I through the collision scene, where we found the police vehicle involved was a black and white colored 2016 Dodge Charger (Vehicle 1). This vehicle was identified with the number "639" affixed to its trunk lid (license plate D-639). It was found to be parked and unoccupied with the engine running. It was located parallel to, and mostly on, the south shoulder of Hertel Avenue, however a portion of the vehicle's left side rested in the eastbound driving lane. Vehicle 1 appeared to have been brought to a controlled final rest after the impact took place and Lieutenant O'Rourke advised us that it had not been moved since that time. Lieutenant O'Rourke also led us to the final rest location of the impacted pedestrian, who was in center of the roadway, approximately 30 feet east of Vehicle 1. Lieutenant O'Rourke stated that although lifesaving attempts were made by rescue personnel at the collision scene, the pedestrian had not been moved from the final rest location.

A cursory examination of the remaining area of the collision scene showed that the previously mentioned Chevrolet Tahoe was positioned in the roadway, west of the pedestrian, presumably to prevent motorists from driving into the collision scene. We noticed several empty aluminum soda cans rolling about the roadway due to a slight breeze. We also noted, lying in the roadway, what appeared to be personal effects that belonged to the pedestrian, such as a pair of gloves, a broken pair of eyeglasses, a pair of boots, a sock, a knit hat and an empty soda can box. A "Dodge" emblem, that would have otherwise been affixed to the grille of Vehicle 1, was also noted in the roadway.

At the time of our arrival, numerous Buffalo Police Department personnel were present at the collision scene and the roadway was closed. By that time, it was daylight, it was approximately 36 degrees Fahrenheit with cloudy skies and the roadway was mostly dry. First responders at the collision scene reported that, at the time of the collision, it was dark, it had recently stopped raining and the entire roadway was wet.

Measurements of the collision scene and items of evidentiary value were taken by Investigator Rzepecki with the use of a Leica TCRP 1205+ Electronic Total Work Station (serial #265601). I assisted him with identifying collision scene evidence. Scene photographs were taken by Trooper Folts.

### **COLLISION SCENE DESCRIPTION**

The collision occurred on Hertel Avenue, approximately 207 feet east of Delaware Avenue and approximately 45 feet west of Tennyson Avenue. In the area of the collision, Hertel Avenue was a relatively straight and level roadway, comprised of asphalt, that ran in an east to west direction. Adjacent to the eastbound lane was a left turn lane that accommodated motorists turning north on Tennyson Avenue. Adjacent to the westbound lane (just west of the collision scene) was a left turn lane to accommodate motorists turning south on Delaware Avenue and a right turn lane to accommodate motorists turning to head north on Delaware Avenue. A turn lane was also present in the center of the roadway, east of the collision scene, to accommodate motorists turning into businesses that bordered both sides of Hertel Avenue. There were white (fog) lines in place on both sides of Hertel Avenue. These lines separated the eastbound and westbound lanes from their respective shoulders. They tapered toward, and came to an end at, both pavement edges as they extended westerly toward Delaware Avenue. The shoulder on the south side of Hertel Avenue measured as wide as 10 feet. However, in the area of the collision, the south shoulder measured approximately 4 feet 10 inches in width. A solid double yellow centerline was also present. This centerline separated the eastbound lane from the westbound lane. The width of these lanes ranged from approximately 11 feet in width to 20 feet in width,

depending upon where the tapered fog lines were located. Both sides of the roadway were bordered with curbs, sidewalks and street lamps. Among other businesses on Hertel Avenue, a Burger King restaurant was located on the southeast corner of the intersection of Hertel Avenue and Delaware Avenue.

It was noted that there was a crosswalk and pedestrian signals located at the intersection of Hertel and Delaware Avenues.

Looking westerly, the sight distance from the area of impact to where Hertel Avenue intersected with Delaware Avenue measured approximately 207 feet in length.

### **COLLISION SCENE EVIDENCE**

Proceeding easterly through the collision scene, the first evidence noted was a left glove. This glove was black in color and was found on the south shoulder of the roadway against the curb.

Next, a broken piece of eyeglass lens was noted, which was also found on the south shoulder of Hertel Avenue between the fog line and the curb. This broken piece of eyeglass lens was located approximately 8 feet 10 inches east of the left glove.

An eyeglass lens was noted next. This eyeglass lens was found in the eastbound lane of the roadway approximately 2 feet 8 inches north of the fog line.

A sock was noted next. This sock was found in the eastbound lane of the roadway approximately 1 foot 2 inches north of the fog line. It was located approximately 17 feet 1 inch east of the eyeglass lens.

A soda can box was noted next. This box was located in the eastbound lane of the roadway. It was found lying beneath the passenger side running board of the previously mentioned Chevrolet Tahoe.

A right glove, that matched the previously mentioned left glove, was found next, just east of the soda can box.

Three broken pieces of eyeglass lens were noted next, all of which were located near the center of the eastbound lane.

Amid the three broken pieces of eyeglass lens was a grey knit hat.

A right boot was noted next. This boot was black in color and was located approximately 18 feet 6 inches east of the grey knit hat.

A “Dodge” grille emblem was noted. This emblem was found in the center of the roadway near the west end of the center turning lane.

Lastly, a left boot, that matched the previously mentioned right boot, was noted. This boot was located on the northeast corner of Hertel and Tennyson Avenues.

The impacted pedestrian was identified as Susan LoTempio, a 65 year old female. She came to an uncontrolled final rest within the west end of the center turning lane. There was an area of apparent blood and a clothing transfer trail that measured approximately 14 feet in length and led to her final rest. The pedestrian was found to have been wearing a pair of dark green sweat pants and a gray fleeced jacket over a red t-shirt.

I determined that the distance the pedestrian traveled from the area of impact to her final rest location was approximately 103 feet.

Vehicle 1 came to final rest approximately 33 feet southeast of the pedestrian’s final rest and approximately 133 feet east of the area of impact. It straddled the fog line with its driver side resting in the roadway and its passenger side resting on the shoulder.

### VEHICLE 1 EXAMINATION

Registration State:	New York
Registration Number:	D-639
VIN:	2C3CDXKT7GH333730
Year:	2016
Make:	Dodge
Model:	Charger – Police Interceptor
Color:	Black & White
Odometer:	39,536
Inspection:	1170293
	Expires: 01/31/2019



**Operator:**Daniel G. Ahearn  
[REDACTED]**Owner:**City of Buffalo  
65 Niagara Square  
Buffalo, New York 14202

A cursory examination of Vehicle 1 was conducted at the collision scene. On March 30<sup>th</sup>, 2018, shortly after clearing the collision scene, I conducted a more thorough examination at the location where Vehicle 1 had been towed, the Buffalo Police service garage, 341 Seneca Street in Buffalo, New York.

The exterior showed an area of cleaning and a fabric impression on the lower bumper cowl directly beneath the front license plate. Another area of cleaning was found on the bottom of the front license plate bracket. The push bumper was found to have been pushed rearward on the right (passenger) side and driven into the area just above the grille. An LED (light emitting diode) that was mounted on the right side of the push bar was slightly bent rearward and found not to be working properly. A dent and an area of cleaning were noted to the leading edge of the engine hood, just to the right of center. There were several areas of cleaning that were found on the engine hood, mostly just left of center, that led to damage located at the trailing edge of the engine hood and at the bottom of the windshield. An apparent strand of human hair was noted amid this damage. Bodily fluid was also noted on the center of the windshield, just above this damage. Although the roof and emergency lighting mounted on the top of Vehicle 1 appeared pristine, there was a significant amount of apparent human blood that was noted to the rear window on the left side, the "C" pillar on the left side and the trunk lid on the left side of the vehicle. A small amount of apparent human blood was also found on the left rear passenger door of Vehicle 1.

**Lamp Examination:**

An examination of Vehicle 1's headlights revealed that the driver side head light was working properly, however, the passenger side headlight was inoperable. This did not include the LED (light emitting diode) running strips that bordered the outer perimeter of the headlights, both of which were in working order. Further examination of the passenger side headlight bulb showed cold shock to its filament, indicating that the light would not have been illuminated at the time of the collision. A surveillance video that showed Vehicle 1 traveling through the collision scene moments before the collision verified this account. This video will be addressed in greater detail later in this report.

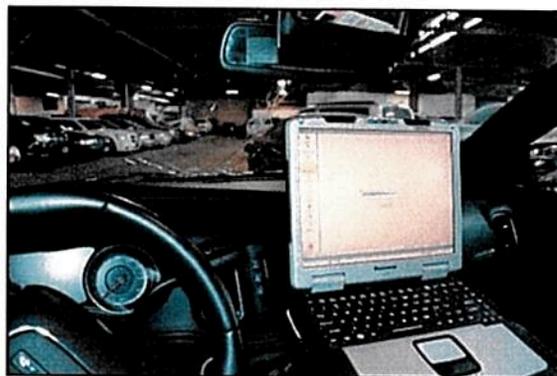
The interior showed that, other than the previously mentioned damage and apparent blood stains, the windshield itself was clean and free from any type of dirt or haze that could have otherwise rendered it difficult for a driver to see through it. However, as my attention was drawn to a computer that was mounted inside Vehicle 1, I noted that the open and vertical computer screen appeared to cover a significant portion of the right side of the windshield. I then seated myself into position in the driver's seat of Vehicle 1 and took measurements of the computer screen. During this time, I concluded the following:

\* The computer screen measured approximately 12 inches in width and 10 inches in height.

\* When this computer screen was open and vertical, I found it to consist of a bright white lighted background.

\* When this computer screen was open and vertical, there was approximately 1.5 inches of a viewable area available (from a driver's vantage point) between the top of the computer screen and the bottom right half of the mounted rearview mirror.

\* When this computer screen was open and vertical, its protrusion obstructed approximately 3 inches into the viewable area (from a driver's vantage point) from the bottom of the windshield to the top of the computer screen.



### **CRASH DATA RETREIVAL ANALYSIS**

Vehicle 1's Airbag Control Module (ACM) was imaged with Bosch Crash Data Retrieval (CDR) software, version 17.7. Authorization to perform this imaging was given by Lieutenant O'Rourke, who provided a signed consent form. The imaging revealed that the ACM recorded no events.<sup>1</sup>

## INJURY PATTERNS/ AUTOPSY

On March 30<sup>th</sup>, 2018 at approximately 1:00 P.M., Trooper Folts attended the decedent's autopsy that was performed by Doctor **Scott F. Lapoint, MD** at the Erie County Medical Examiner's Office, 501 Kensington Avenue, Buffalo, New York.

The decedent's primary injuries were noted to her head and torso, as her skull, spine and ribs were fractured. A compound fracture to the left ankle was observed. There were multiple bruises, lacerations, abrasions and punctures noted to the lower extremities, mostly on the left leg of the decedent. Road abrasions were found on the decedent's backside. Trooper Folts submitted an Autopsy Summary (ID-10) that reflected these findings.<sup>2</sup> The Erie County Medical Examiner's Office provided a fatality certification, signed by Doctor Lapoint, stating that the cause of death was *multiple blunt force injuries* and the manner of death was *accidental*.<sup>3</sup>

## MATHEMATICAL FINDINGS

A range of speeds for Vehicle 1 at impact with the pedestrian was determined through the use of two separate published and accepted collision reconstruction formulas. Using the first formula, the Searle equation, the speed was calculated based upon physical evidence located at the collision scene. Using the second formula, a time and distance equation, the speed was based on an Automated Vehicle Location (AVL) analysis of Vehicle 1 that was provided by the Buffalo Police Department.<sup>4</sup>

The Searle equation determined the minimum and maximum speed of Vehicle 1 by estimating the velocity achieved by the pedestrian at impact. The variables required for these formulas was the distance traveled by the pedestrian from impact to final rest (approximately 103 feet) and the friction value for the total trajectory for the pedestrian (.66). The Searle equation revealed a speed that ranged from **37 miles per hour 45 miles per hour**. At these speeds, it would have taken between 3.8 seconds and 3.1 seconds for Vehicle 1 to travel the sight distance of 207 feet between Delaware Avenue and the area of impact. \*Note - The distance the pedestrian traveled at impact was based on the measurement taken from the location in which the pedestrian's personal effects were first located in the roadway as well as a conservative estimate of Vehicle 1's location at the time it impacted the pedestrian. Therefore, the above range of speeds should be considered a minimum range and may not reflect Vehicle 1's actual speed.

The time and distance equation determined the approximate speed of Vehicle 1 by factoring the time it took Vehicle 1 to travel a known distance as it approached the collision scene. Based on time-stamped AVL data provided by the Buffalo Police Department, a scale map of the travel route taken by Vehicle 1 showed that it took Vehicle 1 between 10 and 11 seconds to travel a distance of 700 feet. This yielded a range of speeds between **43 miles per hour and 47 miles per hour**. At these speeds, it would have taken between 3.2 seconds and 3.0 seconds for Vehicle 1 to travel the sight distance of 207 feet between Delaware Avenue and the area of impact.

### **SPECIAL TOPICS**

#### **Surveillance Video:**

A surveillance camera, that was mounted just east of the Burger King restaurant and faced west, was found to have recorded video footage moments before the pedestrian was impacted by Vehicle 1. The outdoor camera was positioned toward and recorded activity directly in front of the restaurant, the restaurant's drive-thru exit and the sidewalk that was present. The footage also showed a portion of Hertel Avenue where eastbound traffic approached the collision scene and where westbound traffic approached the intersection of Hertel and Delaware Avenues after having traveled through the collision scene. The footage revealed that at approximately 6:33 A.M., it was completely dark, the roadway was wet and there was a light to moderate flow of traffic. Also, at that time, the pedestrian could be seen walking easterly along the sidewalk in front of the restaurant. Although the immediate area outside of the restaurant was well lit, the area of the sidewalk in front of the restaurant had not been afforded the same lighted conditions. Therefore, due to the pedestrian being concealed under the cover of darkness and because she was wearing dark clothing, she could not be observed on the surveillance footage as she walked along the sidewalk until she reached an area just west of the restaurant's drive-thru exit. At that time, it appeared that the pedestrian was carrying an object under her left arm (presumably the soda can box). At just before 6:34 A.M., the pedestrian walked off the curb and onto the shoulder. The pedestrian did this without stopping and continued to move at the same pace at which she was observed walking along the sidewalk. It appeared that, as the pedestrian walked off the curb, she momentarily turned her head and upper body in a westerly direction, presumably to check for on-coming eastbound traffic. Also, at that time, Vehicle 1 could be seen traveling through the intersection of Hertel and Delaware Avenues, proceeding easterly toward the collision scene. As this occurred, the pedestrian continued to walk over the fog line and into the roadway in a northeasterly direction (not perpendicular to the roadway). She continued walking in that direction until she was outside the view of the surveillance camera.

As Vehicle 1 approached the collision scene, I observed that it had maintained its lane of travel throughout the video footage. I observed that the operator of Vehicle 1 did not take evasive action, such as applying the brakes or swerving to avoid impacting the pedestrian. Vehicle 1 continued easterly on Hertel Avenue until it traveled outside the view of the surveillance camera. It was also noted that, just prior to Vehicle 1 traveling outside the view of the camera, an uninvolved westbound vehicle had entered the view of the camera and eventually turned right (northbound) on Delaware Avenue.

\* *Note* – While viewing the surveillance footage, as Vehicle 1 approached the collision scene, it “appeared” that both head lamps were illuminated. Upon further observation, I noted that the driver side headlight reflected off the wet roadway while the passenger side headlight did not. I determined that this observation supported what has been previously mentioned in this report with respect to Vehicle 1’s lamp examination – that although the passenger side LED running strip was in proper working order, cold shock was present to the filament within the passenger side headlight, rendering the lamp inoperable. It was also noted that both headlights to other uninvolved vehicles that traveled through the collision scene, did reflect off the wet roadway.<sup>5</sup>



#### **Driver Interview:**

On April 19<sup>th</sup>, 2018, the operator of Vehicle 1 was interviewed at Buffalo Police Headquarters, 74 Franklin Street, Buffalo, New York. The following is a summary of the key points made by Officer Daniel Ahearn as to what transpired on the morning of March 30<sup>th</sup>, 2018 as he began his tour of duty:

Officer Ahearn stated that he reported for duty at 6:00 A.M. and attended a morning briefing at his assigned “D” District station located at 669 Hertel Avenue. During the briefing, he and another officer, Nicholas Militello, were dispatched to an “irrational person” call on Colvin Avenue, which was located east of the police station. He explained that he (and the other officer) left the briefing, exited the station and walked to his patrol vehicle, a 2016 Dodge Charger. Officer Ahearn also explained that when he started the ignition on his patrol vehicle, he turned on the mobile computer terminal (MCT) that was mounted to the vehicle’s center console. He explained that when the MCT is first turned on, it takes a certain amount of time for it to

warm up. As the MCT was warming up, he stated that Officer Militello had already exited the station parking lot in his assigned patrol vehicle, a Chevrolet Tahoe. (It should be noted at this point that Officer Militello was training a probationary officer who had recently graduated from the police academy. I later learned that this probationary officer, Jordan Lengel, had prepared the Chevrolet Tahoe and its MCT for patrol prior to the call for service coming in. As a result, Officer Ahearn's MCT had not fully booted up by the time Officer Militello and his partner, Officer Lengel, initiated their response to the call for service.) Officer Ahearn stated that he was familiar with the address they were responding to because he had responded to that location approximately three to four times in the past. It was also his understanding that Officer Militello and his probationary partner had never been called to respond to that location before. He stated that although this was not the type of call that he would respond to with his lights and siren on, he felt that this particular call for service warranted a prompt police response because, in the past, he had been required to arrest the subject of the call for the purpose of obtaining a 9.41 mental health evaluation.

Officer Ahearn stated that as he headed east on Hertel Avenue, he came upon a red traffic light at the intersection of Hertel and Elmwood Avenues. There, he pulled up alongside officers Militello and Lengel's patrol vehicle. While the two patrol vehicles were stopped at the traffic light, Officer Ahearn continued to prepare his MCT for patrol. He stated that when the MCT was first turned on, the screen display initially showed a blue background. He explained that while he was stopped, he began to enter into the MCT his patrol car number, his call sign and his password. A point in time would come when the initial blue background screen had transitioned to a bright white screen, indicating that the MCT was in "daytime" mode. Officer Ahearn explained that this condition could not be changed to "night time" mode until after the user has fully signed on to the MCT. Officer Ahearn stated that while he was stopped at the red traffic light, he was not able to fully enter the above mentioned data into the MCT. He explained that when the traffic light turned green, he pulled ahead of Officers Militello and Lengel and became the lead responding patrol vehicle. Officer Ahearn went on to explain that he had finished entering the required data into the MCT before he reached Delaware Avenue. When asked to describe the roadway conditions and surroundings of the collision scene as he approached it, Officer Ahearn stated that because of the early morning hour and because it had previously rained and the roadway was wet, that particular area of Hertel Avenue was an "open dark road" and compared it to a "black hole." Officer Ahearn also stated that, as he approached the collision scene, he never saw any pedestrians in the roadway, on either side of the roadway or anywhere else within the collision scene. He also stated that, just after he drove through the intersection, the MCT in which he had just moments prior finished login onto, had made an

audible chime indicating that the call for service that he was responding to had just been displayed on the screen. Officer Ahearn stated that the sound of the chime prompted him to briefly take his attention away from the roadway and look at the MCT screen. He further explained that often times, when an officer is responding to a call for service that he or she had received over the police radio, further pertinent information regarding the call for service can be found on the MCT that may not have been given over the police radio. Officer Ahearn stated that, just after passing Burger King, as he had redirected his attention toward the MCT screen, he heard his patrol vehicle impact something that he could not immediately identify. He further stated that after hearing the impact, he looked toward his left and “saw a person land in the street.” Officer Ahearn then stated that he pulled over to the right and stopped his patrol vehicle.

When asked if he thought that the placement of the MCT screen interfered with or obscured his view as he traveled through the collision scene, Officer Ahearn stated that, at the time, he had not considered that thought – that he has become used to glancing at the MCT screen from time to time throughout his career.

When asked if there was an adjustment function to raise or lower the position of the MCT screen, Officer Ahearn stated that there was. He further stated that many of the adjustment functions within the patrol vehicles he has operated were broken and that he has never utilized that particular adjustment function of the MCT. (It was not made clear during the interview whether or not the adjustment function for the MCT in Vehicle 1 was working properly.)

When asked if he had a sense of whether or not his patrol car had veered out of his lane as he traveled through the collision scene, Officer Ahearn stated that he remained in control of his vehicle and maintained a straight path within his lane.

When asked if he was aware of any malfunctions with Vehicle 1, specifically the headlights, Officer Ahearn stated that, as far as he knew, the lights were working properly. He also stated that he had not checked them prior to the start of his shift. Officer Ahearn stated that if he had discovered any malfunctioning equipment that would have rendered Vehicle 1 unworthy of patrol, including lighting malfunctions, he would have reported the problem to his Lieutenant.

When asked how fast he was traveling at the time of impact, Officer Ahearn stated that he was not looking at the speedometer and therefore could not say for sure. He then estimated his speed between 30 – 35 miles per hour.<sup>6</sup>

**Conspicuity:**

The lack of visual conspicuity of the pedestrian in relation to her background was considered. The color of the pedestrian's clothing was predominately dark (gray jacket, gray hat, dark green pants, black boots and gloves). These colors had a limited contrast against a background of dark and wet pavement at night. Studies have shown that these conditions would have made the pedestrian more difficult to observe than if she had been wearing bright colored clothing.

**COLLISION PHASES**

Based upon the evidence located at the collision scene, an examination of Vehicle 1, autopsy findings, footage observed from the surveillance video and information gathered during the interview of Officer Ahearn, the following sequence of events was reconstructed.

**Pre-Impact:**

On March 30<sup>th</sup>, 2018 at approximately 6:33 A.M., a 2016 Dodge Charger Police Interceptor (Vehicle 1), operated by Officer Daniel Ahearn with the Buffalo Police Department, was eastbound on Hertel Avenue in the City of Buffalo, New York. At the same time, a pedestrian identified as Susan LoTempio, was walking eastbound on a sidewalk that was located on the southeast corner of Hertel and Delaware Avenues. At this time, it was dark, the skies were cloudy and the roadway was wet as it had recently stopped raining. There were illuminated street lights in the area of the collision scene.

Officer Ahearn was responding to a call for service for a report of an irrational person on Colvin Avenue. Just moments earlier, he had entered Vehicle 1 at his "D" District station for the first time that day, started the vehicle's engine and turned on the Mobile Computer Terminal (MCT). Before the MCT had warmed up and became functional, Officer Ahearn, knowing that another officer was already enroute to the same call for service with a probationary officer in training, initiated his response. He was unaware that the headlight on the passenger side of his patrol vehicle was inoperable. Officer Ahearn took the opportunity to continue to prepare the MCT for his tour of duty when he stopped for a red traffic light at the intersection of Hertel and Elmwood Avenues and was able to complete the process before he reached the intersection of Hertel and Delaware Avenues. A time came when the MCT screen, which obstructed a significant portion of the right side of Vehicle 1's windshield, transitioned from a blue background to a white (daytime mode) background. When Officer Ahearn came upon the intersection of Hertel and Delaware Avenues, he proceeded through it at a calculated speed of

37–47 miles per hour, as the traffic light for eastbound motorists was green. Just after Vehicle 1 passed through the intersection, the MCT made an audible chime that alerted Officer Ahearn and caused him to glance at the screen. As this occurred, at least one uninvolved westbound motorist was traveling toward the collision scene and would eventually turn right onto Delaware Avenue.

As Vehicle 1 approached the collision scene, the pedestrian, Mrs. LoTempio, had walked to a point on the sidewalk until she had almost reached the drive-thru exit of the Burger King restaurant. Without stopping, she appeared to have glanced westerly and simultaneously walked off the curb and onto the south shoulder of Hertel Avenue. At the same walking pace, the pedestrian re-directed her path to a northeasterly direction, over the fog line and onto the roadway. (The pedestrian may have chosen this particular direction of travel as the result of the previously mentioned uninvolved westbound motorist, as she would have been unable to cross the road directly at her current pace without entering its path. In doing so, however, the pedestrian had turned her back on, and entered the path of, Vehicle 1.)

**Impact:**

The front of Vehicle 1 impacted the left side of the pedestrian. This was evidenced by the injuries noted to her left leg and the compound fracture that was sustained to her left ankle. It was also evidenced by the area of cleaning and fabric impression found on the lower bumper cowling beneath the license plate bracket, the push bumper that was driven rearward, the LED light that was damaged and the dent and area of cleaning that was noted to the leading edge of the engine hood. Because Vehicle 1 impacted the pedestrian below her center of mass, her body was projected above Vehicle 1's engine hood as the vehicle passed beneath her. This was evidenced by the area of cleaning found on the engine hood. As the front of Vehicle 1 continued to pass beneath the pedestrian, her head struck the trailing edge of the engine hood and the bottom of the windshield. This was evidenced by the damage noted to those areas of Vehicle 1, the apparent strand of hair that was found amid the windshield damage and the fracture that was sustained to the pedestrian's skull. Vehicle 1 continued to pass beneath the pedestrian. As this occurred, she was projected upward and over the windshield and roof. This was evidenced by the apparent blood that was noted on the rear window, the "C" pillar and the trunk lid on the left side of Vehicle 1.

**Post-Impact:**

The resulting impact caused several personal effects (worn or carried) to become separated from the pedestrian and fall onto the roadway. This included her gloves, eyeglasses, hat, boots and a box of empty soda cans. It also caused a "Dodge" emblem, that was mounted to the front

of Vehicle 1, to become dislodged and fall onto the roadway. The pedestrian was projected forward in a northeasterly direction for a conservatively estimated distance of 103 feet before coming to rest in the center turning lane of Hertel Avenue. Her path of travel on the roadway was evidenced by an area of apparent blood and a clothing transfer trail that led to her final rest.

The operator of Vehicle 1, realizing that he had been involved in a collision, applied the brakes, steered toward the right and stopped. Vehicle 1 came to a controlled final rest approximately 133 feet east of the area of impact.

#### **MV104A POLICE ACCIDENT REPORT REVIEW:**

The Buffalo Police Department has completed a Police Accident MV104A report. This report is generally consistent with the facts and findings that pertain to this investigation.

#### **CONCLUSION:**

A pedestrian, wearing dark colored clothing and while walking easterly on a sidewalk parallel to Hertel Avenue in Buffalo, New York, walked off the curb and into the roadway at a time when it was completely dark and a place where there was no crosswalk present. She subsequently entered the path of a Buffalo Police Officer who had the right of way and who was responding to a call for service. The police officer, who was distracted by the function of a mobile computer screen that, at the time of the collision, was not conducive for night time driving and which partially obstructed his field of vision, failed to observe the pedestrian enter his path of travel from the right side of his patrol vehicle – the same side of the vehicle where a headlight was found to have been inoperable. As a result, Vehicle 1 impacted the pedestrian without Vehicle 1's operator taking any evasive action to avoid the collision.

The primary cause of this collision was pedestrian error. Section 1152 (a) of the New York State Vehicle and Traffic Law states that *every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway*. Since there was no crosswalk within the collision scene, it was the pedestrian's responsibility to ensure that it was completely safe to cross the roadway before doing so. Based upon an analysis of the sight distance (approximately 207 feet) at the scene and a review of surveillance footage that recorded the actions of the

pedestrian moments before she was impacted, the pedestrian had ample opportunity to, before walking out into the roadway, stop and observe the oncoming vehicle. Furthermore, the direction in which the pedestrian walked after she entered the roadway (northeasterly) placed her at a disadvantage since she most likely would not have been able to observe Vehicle 1 as it approached her from outside of her field of vision.

Another contributing factor to consider was the wet roadway and the glare that reflected off it as opposing headlights from other uninvolved vehicles traveled through the collision scene. The lighting from the overhead street lamps would also have reflected off the pavement. This glare may have influenced both the driver and pedestrian at the time of the collision.

This collision most likely would not have occurred if the pedestrian had chosen to cross the roadway at the intersection of Hertel and Delaware Avenues, where there was a traffic light, a pedestrian signal and a crosswalk present. There, if the pedestrian had adhered to the pedestrian signal and utilized the crosswalk, she would have had the right of way and would have been able to cross the roadway in a controlled environment.

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<sup>1</sup> Refer to Bosch Crash Data Retrieval report generated by Investigator Troy Ford on 03/30/2018

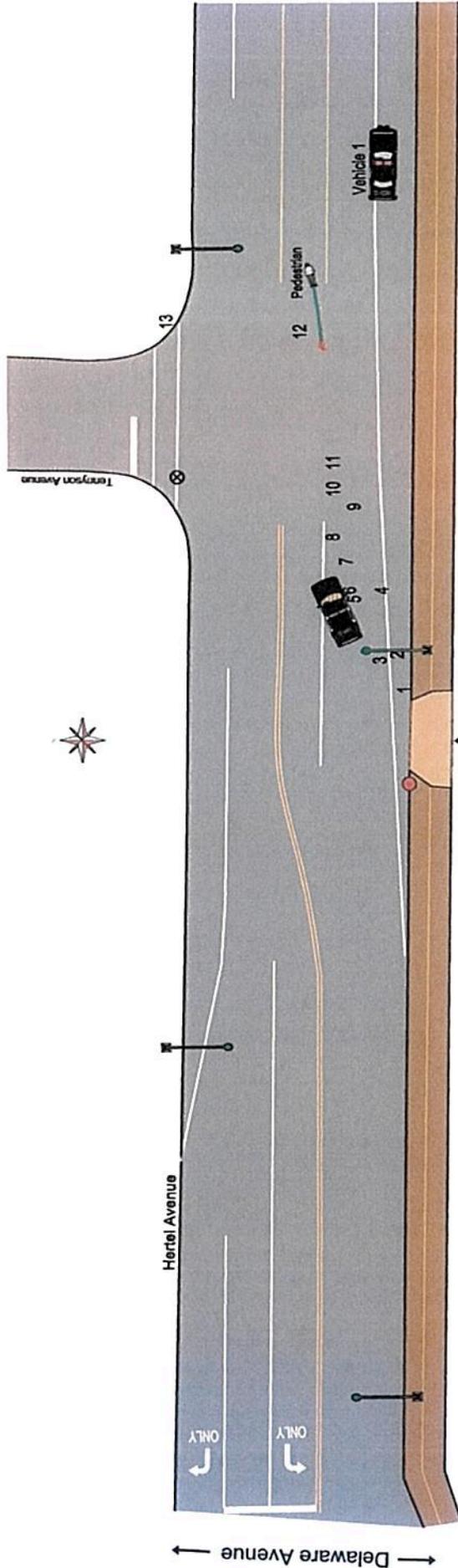
<sup>2</sup> Refer to NYSP Crime Scene Summary – Autopsy report (ID-10) generated by Trooper Kyle Folts on 03/30/2018

<sup>3</sup> Refer to Erie County Medical Examiner's Office Fatality Certification generated by Dr. Scott Lapoint, M.D. on 03/30/2018

<sup>4</sup> Refer to scale Automated Vehicle Locator analysis generated by the Buffalo Police Department

<sup>5</sup> Refer to Surveillance Video dated 03/30/2018 obtained by the Buffalo Police Department

<sup>6</sup> Refer to Recorded Interview of Officer Daniel Ahearn dated 04/17/2018 generated by the Buffalo Police Department

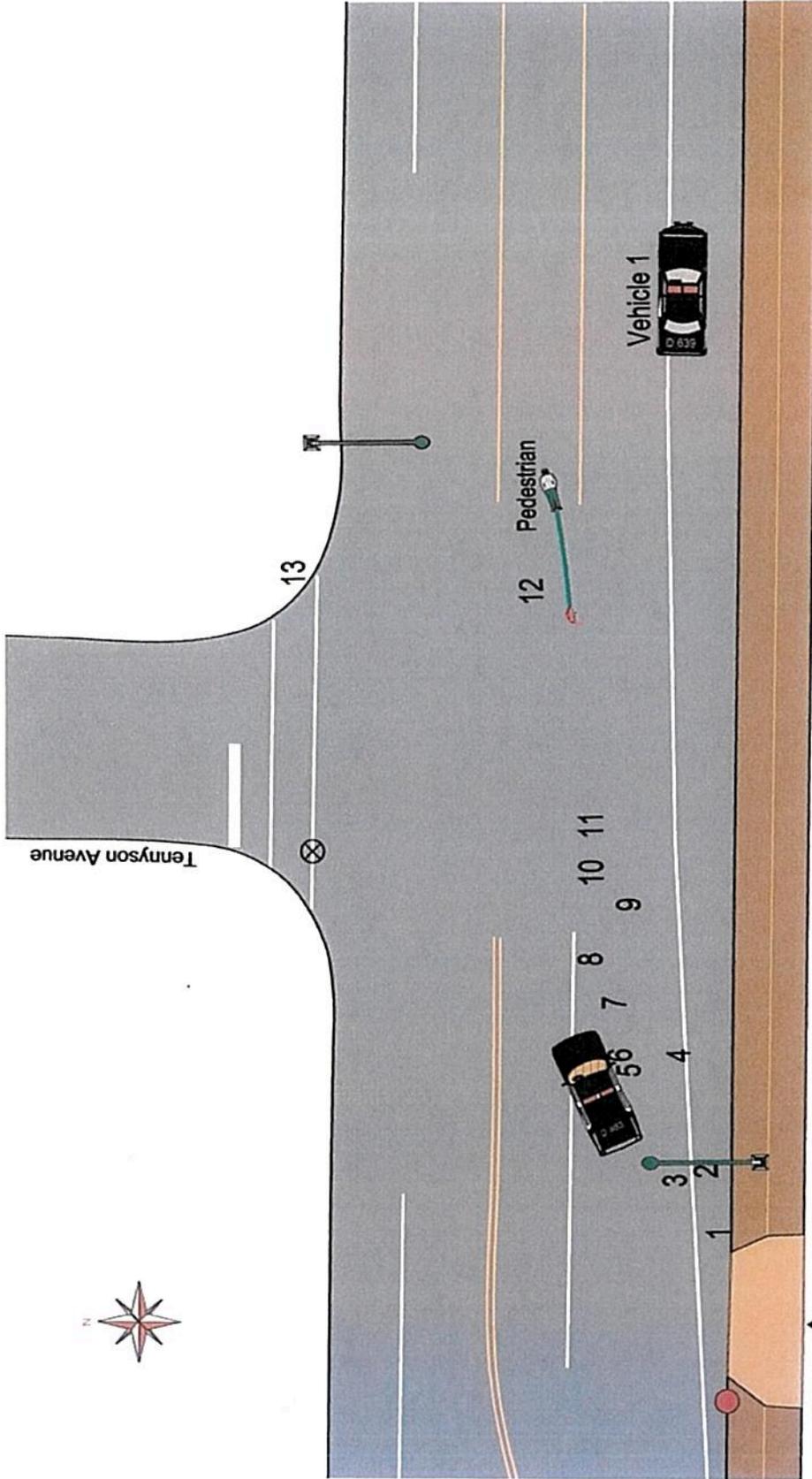


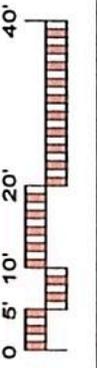
<p>New York State Police 4525 West Salla Drive Batavia, New York 14020</p>	
<p>Single Vehicle - Pedestrian Fatal Collision Hertel Avenue, City of Buffalo, New York March 30, 2018 6:33 A.M.</p>	
<p>Measurements taken by: Investigator Thomas K. Barpecht March 30, 2018</p>	<p>Drawn: July 26, 2018</p>
<p>Signed: <i>Tom Troy D. Ford</i></p>	
<p>SCALE 0' 10' 20' 40'</p>	

- LEGEND**
- 1 - Left Glove
  - 2 - Broken Eye Glass Piece
  - 3 - Eye Glass Lens
  - 4 - Sock
  - 5 - Soda Can Box
  - 6 - Right Glove
  - 7 - Broken Eye Glass Piece
  - 8 - Grey Knit Hat
  - 9 - Broken Eye Glass Piece
  - 10 - Broken Eye Glass Piece
  - 11 - Right Boot
  - 12 - Dodge Grill Emblem
  - 13 - Left Boot
  - Area where pedestrian entered roadway

**BURGER KING**

Drive Through →



 <p>New York State Police 4525 West Saile Drive Batavia, New York 14020</p>	 <p>Single Vehicle - Pedestrian Fatal Collision Hertel Avenue, City of Buffalo, New York March 30, 2018 6:33 A.M.</p>
<p>Measurements taken by: Investigator Thomas K. Rzepecki March 30, 2018</p>	<p>Drawn: July 26, 2018</p> <p>SCALE</p> 
<p>Signed: <i>Inv. Troy D. Ford</i></p>	

# EXHIBIT 4

STATE OF NEW YORK  
DEPARTMENT OF MOTOR VEHICLES  
X-----X

DIVISION OF  
SAFETY AND BUSINESS HEARINGS

In the Matter of Respondent:

**DANIEL G. AHEARN**

Case 37-228108

X-----X

**FINDINGS:**

This hearing was conducted pursuant to Vehicle and Traffic Law (VTL) § 510(3) to investigate a one-vehicle, pedestrian accident involving the death of Susan LoTempio on March 30, 2018 in the City of Buffalo, County of Erie. It was convened to investigate the failure of respondent Daniel G. Ahearn to file an accident report as required by VTL § 605; and to determine whether respondent's registration, license, and/or driving privileges should be revoked or suspended.

VTL § 605 does not require that this respondent file an accident report because I find that when the accident occurred, respondent was an on-duty police officer, operating a police vehicle. Accordingly, as to VTL § 605, the investigation is closed.

The hearing was conducted on August 17, 2018 by the undersigned, Glenn E. Murray, Administrative Law Judge, at the Buffalo office of the NYS Department of Motor Vehicles Safety and Business Hearing Bureau.

Respondent was represented by Catherine Creighton, Esq. Observers at the hearing included attorneys Mark Multerer and Jill C. Trembath (on behalf of decedent's estate) and attorneys Robert Quinn and Maeve Higgins (on behalf of The City of Buffalo).

An adjournment was requested 30 minutes before the hearing was scheduled to commence. All attorneys joined in that request. They argued that because the investigation of this accident was pending by the NYS Office of the Attorney General (OAG). I denied the request. No subpoenas had been requested to compel the production of evidence at the hearing.

A total of seven exhibits were received in evidence.

The notice of hearing was received in evidence as exhibit 1.

I FIND:

On March 30, 2018 at 06:33 hours, during hours of darkness, Buffalo Police Officer Daniel G. Ahearn was on duty, operating a 2016 Dodge Police Cruiser in the City of Buffalo eastbound on Hertel Avenue, an east-west city street with one lane in each direction. Ahearn was responding to a radio dispatch call to investigate an "irrational person."

As Ahearn approached the intersection of Tennyson Avenue, he failed observe a pedestrian in the roadway. His vehicle struck Susan LoTempio and she was fatally injured. Where the accident occurred, the city-wide speed limit is 30 MPH and he was travelling at approximately 35-40 MPH. As to the police cruiser, its headlights were on and its emergency lights and siren were not activated. Buffalo Police Department protocol did not require activation of emergency lights or siren when responding to a dispatch reporting an irrational person.

Officer John Petricca, assigned to the Buffalo Police Department Accident Investigation Unit testified at the hearing. Upon arriving at the scene of the accident he was ordered to "Stand Down." This order directed him to cease and desist from any further

investigation of the accident. The order to "Stand Down" was based on an interpretation that Executive Order No. 147. (Exhibit 3) granted exclusive authority to OAG to investigate and prosecute matters relating to the deaths of civilians caused by law enforcement officers. Notice of the hearing was provided to OAG, however no representative appeared.

Officer Petricca testified that when he was directed to "stand down" he understood that the investigation of this accident must await the arrival of New York State Police. Eventually, NYS Troopers arrived to investigate the accident. The investigation conducted by the NYS Police was not available at the hearing. Such NYS Police investigative reports are typically extensive and include the kind of highly relevant information that could not be provided by Officer Petricca or any other hearing witness, such as vehicle data recorder download, identification and mapping of physical evidence regarding the vehicle, pedestrian clothing and witness depositions, as well as the observations made at and photographs taken of the accident scene. Respondent testified he provided a statement to the NYS Police Investigators. That statement was not available at the hearing.

Respondent's commanding officer, Lieutenant James Stabler, prepared the police accident report (MV-104A) (exhibit 2). Lieutenant Stabler was notified of the hearing but did not appear.

According to Lieutenant Stabler's Police Accident report, there was no traffic control device involved, the roadway character was "straight and level" and the light conditions were "dark-road unlighted." It was noted that the street was wet from recent rainfall but it was not raining when the accident occurred.

Respondent testified his blood was tested and there was no evidence of alcohol or drugs; and that he consented to examination of his personal cell phone which revealed no communications that would have distracted his driving. No hearing evidence contradicted his testimony.

Respondent's police vehicle was equipped with a computer in laptop configuration, affixed between the front driver and passenger seat. This obstructed respondent's view because its lid extended above the dashboard to within inches of the rear-view mirror.

There was no evidence at the hearing to explain why Ms. LoTempio stood or walked in front of respondent's approaching vehicle with its headlights activated. She was not within a crosswalk and there was none nearby.

I find no evidence that at the time of the accident respondent suffered from any physical or mental impairment, or was under the influence of drugs or alcohol. I do find that his view was substantially obstructed by his computer screen and his attention was divided between his windshield, and his computer. An instant before the accident, he heard an audible beep, glanced at his computer and noted that it the beep had signaled entry of the dispatch call he was responding to. Although such equipment partially obstructed the view of the driver through the windshield and the computer was a distraction, because those features are required and permitted, they did not constitute a violation of VTL § 375, subdivision 30 (obstructed view through windshield) or VTL § 1225-d(1-a) (operating a motor vehicle while using a portable electronic device).

VTL § 1104 provides that operators of authorized emergency vehicles are not subject to several generally applicable provisions of the VTL, however those exemptions

do not relieve such driver from the duty to drive with due care for the safety of all persons or drive with a reckless disregard for the safety of others.

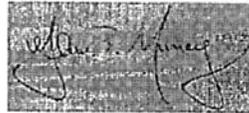
I found respondent's testimony to be uncontradicted, credible and believable. The record does not present evidence that respondent was unlawfully operating his vehicle when the accident occurred or that he operated his vehicle with gross negligence. The occurrence of a fatal accident does not, by itself, establish that respondent operated his vehicle unlawfully, operated it with gross negligence, or caused the accident.

**DISPOSITION:**

As to VTL § 510(3), close case.

As to VTL § 605, close case.

Dated: August 28, 2018



004

Glenn E. Murray  
Administrative Law Judge

# EXHIBIT 5



**OFFICE OF THE MEDICAL EXAMINER  
COUNTY OF ERIE**



**REPORT OF EXAMINATION**

**Name of Decedent:** Susan Lotempio

**M.E. #:** 0758-18

**Exam Performed by:** Scott F. LaPoint, M.D.

**Date of Exam:** 3/30/2018

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**FINAL DIAGNOSES**

**I. MULTIPLE BLUNT FORCE INJURIES**

- A. Extensive fracture of skull including basilar hinge fracture
- B. Cerebral contusion and subarachnoid hemorrhage
- C. Fractures of cervical and thoracic vertebral column
- D. Fracture of left femur
- E. Multiple bilateral rib fractures with bilateral hemothorax
- F. Dislocation of left ankle
- G. Multiple cutaneous contusions, abrasions and lacerations

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**CAUSE OF DEATH: MULTIPLE BLUNT FORCE INJURIES**

**MANNER OF DEATH: ACCIDENT**

**OFFICE OF THE MEDICAL EXAMINER  
COUNTY OF ERIE**

**REPORT OF EXAMINATION**

**CASE NO. 0758-18**

*I hereby certify that I, Scott F. LaPoint, M.D., Forensic Pathologist, have performed an examination of the body of Susan Lotempio, on March 30, 2018 at the Erie County Medical Examiner's Office.*

**CLOTHING:**

The body is received clad in the following articles of clothing:

1. Grey fleece jacket.
2. Red long sleeve shirt.
3. Floral pattern bra.
4. Green sweatpants (right pocket contains coupons, a shopping list and a flosser).
5. White underwear.
6. Left dark green sock.

**GROSS FINDINGS**

**EXTERNAL EXAMINATION:**

The body is that of a normally developed, well nourished, adult White female appearing consistent with the reported age of 64 years. The body measures 66 ½ inches in length and weighs 135 pounds. Rigor mortis is absent. Blanching livor mortis is present on the posterior aspect of the body. The body temperature is slightly warm to touch. There is no evidence of decompositional change.

Scalp hair is grey, wavy, measuring 16-18 cm in length. Irides are hazel. There is no conjunctival congestion or petechiae. Dentition is natural and in good repair. The oral mucosa and frenula are intact. Ear canals and nose are unremarkable. The neck appears symmetric, without mass but with deformity which will be described below.

The torso is symmetric with a flat abdomen and no palpable breast mass. The genitalia are atraumatic, with a normal full length distribution of brown pubic hair. The extremities are symmetric, with traumatic deformities which will be described below. There is

neither edema nor discoloration. The fingernails are short and well kept. The toenails are of moderate length and well kept. The pedal surfaces are clean. The back is unremarkable aside from trauma. The anus is intact and without evidence of trauma.

Scars are present encircling both inferior aspects of the breast, each measuring approximately 12 cm in length.

A 2.4 cm horizontally oriented scar is present in the midline of the upper abdomen just below the xiphoid process.

A 10 cm horizontally oriented scar is present just above the pubis.

A 10 cm vertically oriented scar is present in the midline of the lower back overlying the lumbar sacral region.

#### **EVIDENCE OF RECENT MEDICAL/SURGICAL INTERVENTION:**

An endotracheal tube is present in the mouth, and upon internal inspection is found to be positioned appropriately within the trachea.

Thoracentesis needles are present on the upper aspect of both sides of the chest.

EKG leads are present on the anterior aspect of both shoulders and the right lower quadrant of the abdomen.

A medication patch is present in the right lower quadrant of the abdomen, delivering estradiol.

#### **EVIDENCE OF RECENT TRAUMA:**

Head and Neck:

1. Located on the posterior medial left scalp is a 10 x 5 cm full thickness irregular and branched laceration with underlying depressed fracture of the skull. The fracture lines run in multiple directions including into bilateral temporal floors leading to a hinge fracture through the sella turcica, as well as into the posterior fossa bilaterally.

2. Located slightly anterior to the anterior edge of the above large laceration is a 2.1 cm diagonally oriented full thickness laceration of the scalp.
3. Upon internal inspection, there is complete transverse fracture between cervical vertebrae 5 and 6.
4. Located on the medial inferior forehead is an array of linear abrasions ranging from 4 to 12 mm in length.
5. Located on the nasal bridge is a 1.5 x 1.2 cm roughly rectangular area of lacerations.
6. Located adjacent to the left lateral edge of the left eye, is a 5 x 3 mm abrasion with surrounding 2.2 cm contusion.

Torso:

1. Located on the left lower back is a 19 x 10 cm array of faint linear superficial abrasions.
2. Located on the lower back spanning the upper buttocks is a 27 x up to 8 cm area of abrasion with a predominantly vertical pattern but some admixed horizontal stretch lacerations.
3. Upon internal inspection, there is a transverse fracture between thoracic vertebrae 3 and 4.
4. Upon internal inspection, there are multiple anterolateral bilateral rib fractures, though it is unclear if these represent impact trauma versus resuscitation.
5. Upon internal inspection, there is approximately 150 ml of left hemothorax and approximately 250 ml of right hemothorax.

Upper extremities:

1. Located on the posterior left elbow is a 1.0 cm abrasion with surrounding 4 x 2.5 cm contusion.
2. Diffuse ecchymosis is present over the majority of the left dorsal hand.
3. Located on the dorsal right second finger is a 9 mm avulsed laceration.

Lower extremities:

1. Located on the anterolateral left thigh is an 11 cm long vertically-oriented abrasion with a vague perpendicular patterning. This injury extends from 22 to 27 inches from the bottom of the feet and appears to be in impact site.

2. There is fracture of the left distal femur, with overlying full thickness 1.5 cm laceration of the distal thigh.
3. There is a pair of full thickness lacerations of the anterior left knee measuring 2.5 and 2.6 cm in length.
4. Located on the anterior inferior left knee is a pair of abrasions, each measuring 1.7 cm in diameter.
5. Located at the left ankle is a 9.5 cm full thickness laceration of the skin and soft tissue with readily visible displacement of the distal tibia, which protrudes through the defect.
6. Located on the right anterior-medial distal shin and ankle are multiple abrasions ranging from 0.5 x 1.5 cm up to 2.2 x 0.9 cm.
7. Located on the dorsal right foot is an 8 x 6 mm abrasion with surrounding 2.5 cm contusion.
8. Located on the posteromedial right thigh is a 17 x 9 cm contusion with central pallor.
9. Located on the posterior medial right calf is a 16 x 7 cm green ecchymosis.

**The injuries listed above, having been described once, will not be repeated.**

**INTERNAL EXAMINATION:**

The body is opened using the standard Y-shaped incision. Traumatic intracavitary blood is noted above. The abdominal fat measures approximately 1 cm in thickness. No significant adhesions are seen.

**CARDIOVASCULAR SYSTEM:** The heart weighs 275 grams. The epicardial surface has a normal distribution of adipose tissue. Sectioning through coronary arteries reveals no significant atherosclerotic stenosis involving the left main, left anterior descending, circumflex, or right coronary artery systems. Sectioning through myocardium reveals homogenous brown-maroon parenchyma with no focal lesions. The left ventricle free wall measures 1.3 cm in thickness. The right ventricle free wall measures 0.2 cm. Dissection along lines of flow reveals four unremarkable cardiac valves. The foramen ovale is closed. The aorta throughout its length has mild distal intimal atherosclerotic change.

**RESPIRATORY SYSTEM:** The right lung weighs 310 grams. The left lung weighs 270 grams. The pleural surfaces are smooth and unremarkable, with only minimal scattered particulate anthracotic pigment deposition. The dissection of the bilateral bronchial trees reveals a moderate amount of slightly blood tinged foamy material. Dissection of bilateral pulmonary arterial trees reveals no intimal atherosclerosis or emboli.

Sectioning through both lungs reveals tan-pink to maroon spongy parenchyma with no focal visible or palpable lesions.

**HEPATOBIILIARY SYSTEM:** The liver weighs 970 grams. The capsular surface is smooth, glistening and unremarkable. The gallbladder is absent.

**LYMPHORETICULAR SYSTEM:** The spleen weighs 70 grams. The capsular surface is blue-grey and intact. Sectioning reveals homogenous firm maroon parenchyma with abundant white pulp. Lymph nodes throughout the body are not enlarged.

**GENITOURINARY SYSTEM:** The kidneys are approximately equal in size and together weigh 220 grams. The capsular surfaces are slightly granular. Sectioning reveals distinct corticomedullary junctions. The pelves are nondilated. The ureters follow the normal anatomic course into the bladder, which is devoid of urine.

**GASTROINTESTINAL TRACT:** The esophagus is unremarkable. The stomach is devoid of contents. The small and large bowel are unremarkable. The appendix is present.

**NECK ORGANS:** Trauma to the neck is noted above. The hyoid bone and thyroid cartilages are intact.

**ENDOCRINE ORGANS:** The thyroid, pancreas and bilateral adrenal glands are sectioned and unremarkable.

**MUSCULOSKELETAL EXAM:** Except as noted above, the muscles and bony structures are of normal development and without pathologic change.

**CENTRAL NERVOUS SYSTEM:** The brain weighs 1280 grams. There is slight posterior subarachnoid hemorrhage, and a small amount of subarachnoid hemorrhage around the basilar cisterna. External examination reveals a normal pattern of gyri without grossly appreciable atrophy or swelling. There is minimal bilateral symmetric uncal notching and no tonsillar notching. The cerebral vasculature follows its normal anatomic course and is free of significant atherosclerotic disease or aneurysm. Coronal sectioning through cortical structures reveals a normal pattern of gray and white matter, including deep gray nuclei. There is no ventriculomegaly. The hippocampi are grossly unremarkable. Transverse sectioning through brainstem and cerebellum reveals normal nuclear structures including normal pigmentation of the substantia nigra. The dura and leptomeninges are unremarkable and there are no bony abnormalities of the cranial vault.

**TOXICOLOGY:** Heart and chest cavity blood, vitreous humor

**HISTOLOGY:** Not examined

**SPECIAL STUDIES:** None

**RADIOGRAPHY:** Full body x-rays show fractures of the skull, pelvis, left femur, thoracic vertebrae 3-4, multiple ribs, and left ankle.

**EVIDENCE:** Clothing, property, blood spot card to Buffalo Police Dept.

**OPINION STATEMENT:**

This 64 year old woman was stuck by a vehicle while crossing a road. Autopsy showed multiple blunt force injuries, to which the death is attributed. Toxicology studies were negative. This is an accidental death.



10/16/18

Scott F. LaPoint, M.D.  
Forensic Pathologist

SFL:dt  
DRAFT: 5/18/2018



Forensic Toxicology Laboratory  
Erie County Medical Examiners Office  
Erie County Department Of Health  
501 Kensington Avenue, Buffalo, NY 14214  
716-961-7591

Forensic Toxicology Report

Decedent: **Lotempio, Susan White/Female/64 Years**  
Pathologist: **Scott LaPoint, MD**  
Agency Case #: **0758-18**

Laboratory Number: **0758-18**  
County: **Erie**

*EC*  
*16/6/18*

**Specimens Submitted**

<u>Collected or Submitted by / Specimen Type</u>	<u>Sample Control #</u>	<u>Container Type</u>	<u>Collection site</u>	<u>Approximate amount</u>	<u>Date/Time collected</u>	<u>Date rec'd in lab</u>
<b>LaPoint, M.D., Scott</b>						
Blood	18040210161541189	Tube, plastic	Heart	5 ml	3/30/18 13:00	4/2/18
Blood	18040210163646126	Tube, plastic, w/NaF	Chest Cavity	45 ml		
Vitreous Humor	18040210165465537	Tube, red top		5 ml		

**Results of Toxicological Examination**

Analysis of the submitted sample(s) did not identify the presence of drugs or chemicals based on the submitted request.

The following tests were run in this case. Negative findings or where a drug or other chemical was identified but was below our reporting limit may not be reported.

<u>Test</u>	<u>Method of Analysis</u>	<u>Specimen</u>	<u>Sample Control #</u>
<u>Qualitative screen</u>			
ELISA	Enzyme Immunoassay	Blood	18040210163646126
<u>Quantitation and/or Confirmation</u>			
Volatiles	Headspace-GC/FID	Blood Vitreous Humor	18040210163646126 18040210165465537

Christine R. Giffin, M.S.  
Chief County Toxicologist

April 14, 2018

Definition of terms used in this report can be located within the Report Standardization Manual at:  
<http://www.criminaljustice.ny.gov/forensic/labreportstandards.htm>. This report does not constitute the entire case file. The file may contain worksheets, images, analytical data and other documents.  
Remaining specimens will be retained for a minimum of 60 days after report date. Contact laboratory if a longer retention period is necessary.