

In the
Supreme Court of Ohio

14-0862

PAUL RISNER AS CO-ADMINISTRATOR
OF THE ESTATE OF AMBER RISNER,
A DECEASED MINOR, et al.,

Plaintiffs-Appellees,

v.

OHIO DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Case No. _____

On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 12AP-828

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
OHIO DEPARTMENT OF TRANSPORTATION**

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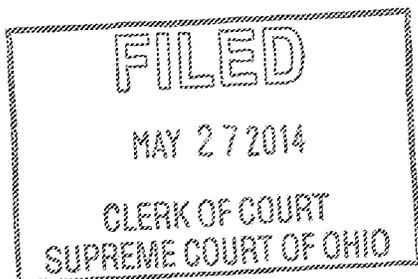


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INTRODUCTION

No state agency has unlimited resources. Instead, just like every Ohio household, those agencies must engage in prioritization, deciding how to allocate the limited funds that have been budgeted to them across the many potential projects that they might undertake. The Ohio Department of Transportation is not exempt from this general rule of scarcity, and it too must make similar judgments about how best to use its resources in its ongoing obligation to maintain Ohio's roadways in the safest possible manner. In particular, ODOT must decide whether to devote its relatively fixed budget to a small number of significant road projects or instead to spread that budget across more, but less significant projects.

ODOT has a general duty of care to the public that uses Ohio's roadways. Under R.C. 5501.11, it must maintain state highways in a reasonably safe condition. But this legal duty to maintain Ohio's roadways does not include a duty to redesign or reconstruct those roadways. *See Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-362, 2010-Ohio-5969 ¶ 12 (collecting cases). The Tenth District judgment below, however, creates a new, pervasive duty for ODOT—beyond its limited statutory duty—to redesign and reconstruct a state highway following the most minor of improvements.

The judgment below stands in sharp contrast to a long line of precedent that limited ODOT's duty to upgrade a roadway to only those projects involving *substantial* improvements. Under the new rule, ODOT must upgrade a roadway (such as the intersection here) to current design standards, even when it undertakes the most minor improvement. So, in this case, ODOT's decision to add a flashing-red/flashing-yellow light and associated signs to an intersection triggered a duty to re-grade the road to improve the line of sight. At this intersection, that would have meant re-grading hundreds of feet of roadway and more than a year of construction, even though ODOT engineers had concluded that the flashing lights and warning

signs made the intersection safer. If the Tenth District's rule is allowed to stand, it would mean that when ODOT makes *any* improvement to a stretch of roadway, it must make *all* possible improvements. As a consequence of that rule, ODOT's limited budget would prohibit it from implementing certain safety programs it had planned because it lacks the funds to make every possible improvement at each of those planned projects. In other words, even if ODOT executes its planned changes with no trace of negligence, it could still face lawsuits because it did not make *additional* improvements at every stretch of road on which it worked.

STATEMENT OF THE CASE AND FACTS

This case arises from a tragic automobile accident in Pike County in 2009. Shortly after midnight four teenage girls were traveling to nearby Lake White to meet several other friends to go night fishing. As they left a nearby gas station, the girls were discussing what music to play on an iPod. The girls' car exited to State Route 220, which almost immediately intersected with State Route 32. State Route 32 is a four-lane divided highway (that is, there were two lanes traveling in each direction along State Route 32, and those lanes were divided by a median).

At the intersection in the girls' direction of travel along State Route 220, they faced a stop sign and a flashing red light; the opposite traffic in both directions of the divided Route 32 faced flashing yellow lights. The girls proceeded northbound through this red light, but did not stop in the median of the divided Route 32. At the same time, a tractor trailer traveled westbound in the far lanes of the four-lane Route 32. All of its lights were working.

The girl driving the vehicle northbound along State Route 220 testified that she stopped at the stop sign and looked both ways before starting across Route 32. Based on her prior experience with that intersection, she was aware of sight limitations to the east because of a rise in the road

where it passed over a bridge over a railroad. Nevertheless, she did not stop in the median dividing the four lanes of Route 32.

The driver of the tractor trailer traveling west on Route 32 noticed the girls' vehicle when he was about 100 yards from the intersection. As he testified, he noticed that the girls' vehicle was "not slowing down or responding to [his] presence in the highway." He immediately locked down his brakes. The driver of the automobile said in her deposition that she "must not have been paying attention to the road if [she] didn't see the big truck coming." Despite the tractor trailer's braking, as the girls proceeded through the median and into the westbound lane of Route 32, they hit the side of the trailer. Tragically, one of the teenage girls was killed; two others were injured.

The intersection where the girls struck the truck did not meet the thresholds that ODOT currently uses to determine whether to install a full-on traffic light that stops traffic in each direction with timed red, yellow, and green lights. Those standards are contained in the Ohio Manual of Uniform Traffic Control Devices (OMUTCD). The intersection also met ODOT's design standards for sight distance at the time it was built in the mid-1990s.

The estate of the deceased teenager (Amber Risner) sued ODOT in the Court of Claims. The suit offered two distinct theories of ODOT's liability. First, that ODOT breached a duty to Risner because it did not install a four-way stop-and-go traffic signal that alternately stops traffic in both directions. Second, that ODOT breached a duty when, at the time it installed the flashing-red/flashing-yellow lights it did not also re-grade the rise in the road to improve the line of sight to the east of the intersection.

In separate decisions, the Court of Claims granted summary judgment in favor of ODOT on each of Risner's claims. In the first decision, the Court of Claims held that the OMUTCD did not call for installing a four-way stop-and-go traffic signal. The court further ruled that ODOT

was entitled to discretionary immunity regarding its decision to install the flashing-red/flashing-yellow lights instead of another type of traffic signal. In the second decision, the Court of Claims held that the addition of overhead flashing lights and advance-warning intersection signs created no additional duty to upgrade the entire intersection to current design standards by re-grading the road to increase the line of sight. As part of this second summary-judgment ruling, the court also found that the intersection satisfied sight-distance requirements when originally constructed in the mid-1990s. Risner appealed only the second summary-judgment ruling.

On appeal, Risner narrowed the issue to “whether ODOT’s addition of the overhead flashing lights and advance warning signs constituted ‘substantial improvements’ or ‘maintenance.’” In Risner’s view, if installing the lights were substantial improvements, it triggered a duty for ODOT to improve the line of sight by changing the slope of the road. The Tenth District reversed, but did not accept Risner’s exact formulation of the legal question. Instead, the Tenth District held that ODOT’s installation of flashing warning lights and advance warning signs constituted “improvements,” that the term “substantial” did not aid the analysis, and that the “pertinent distinction [is] between ‘preservation’ of existing highway facilities and ‘improvements’ to highway facilities.” *Risner v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-828, 2013-Ohio-5698 ¶ 15 (hereafter “App. Op.,” attached as Ex. 4). ODOT sought reconsideration and en-banc review in the Tenth District, highlighting the break from past precedent and the problems that the new rule would present to ODOT in planning future highway improvements. The Tenth District denied the request. ODOT now seeks review by this Court.

**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST AND RAISES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The decision below greatly expands ODOT's liability in a way that calls out for this Court's review. The expanded liability represents both a change in course from the Tenth District's own precedent and a continued erosion of the distinction between liability for negligence and (what should be) non-liability for discretionary policy decisions.

The Tenth District has changed course and cast aside a long line of precedent by holding that there is no significance to the word "substantial" as modifying "improvement" when determining whether or not ODOT has a duty to upgrade an intersection. Until this case, the Tenth District had held that ODOT's duty to upgrade an intersection was triggered only when the improvement was "substantial." Now ODOT's duty is greatly expanded. As illustrated in this case, that duty means that placing flashing lights and "intersection ahead" signs requires ODOT to improve all aspects of the intersection, even to the point of redesigning the roadway.

This break from precedent is not merely a squabble about the adjective "substantial." The Tenth District's decision here is simply the latest step in an evolution away from a distinction between holding ODOT liable for what it undertakes and not holding ODOT liable for policy decisions about what projects to defer based on the necessary prioritization decisions flowing from a limited budget. With this case, that evolution is complete: ODOT is potentially liable both for negligent performance and discretionary policy decisions. That decision warrants review for three reasons.

First, it raises a question of public interest because it leaves a major state agency guessing about what projects it should undertake and how it should undertake them. ODOT has 43,000 lane miles of roadway to maintain throughout the State. It has a relatively fixed budget to undertake this vast task, and its state funds are set bi-annually by the General Assembly. If the

Tenth District's decision stands, any improvement ODOT makes to a roadway, no matter how minor, would trigger a duty to make all possible improvements to that stretch of road as well. Under that expansive duty ODOT would be unable to make small, but safety-driven improvements to many parts of Ohio's roads and intersections because it would instead need to undertake only those projects where it can make all upgrades consistent with existing standards. To do otherwise would conflict with the duty the Tenth District announced in this case. But to follow the Tenth District's rule would block many smaller ODOT projects because it would be required to focus instead on a fewer number of larger projects.

This case perfectly illustrates the problem. There can be no dispute that ODOT's decision to install the flashing-red/flashing-yellow lights and associated warning signs makes the Route 32/Route 220 intersection safer. Doing that same type of improvement in dozens of places in the State could prevent many accidents in the aggregate. By contrast, improving only a handful of intersections by installing lights and also rebuilding the roadway to improve the line of sight hundreds of feet from the intersection might make those *few* intersections safer, but it would sacrifice ODOT's ability to make *more* minor (but still safety-driven) improvements to many more stretches of Ohio roadways.

Beyond the direct facts here, other applications of the Tenth District's principle show its problems. A landlord who chooses to make all units safer with new steps does not inherit a duty to refurbish the entire house. A car mechanic retrofitting an older car with a driver airbag would not inherit a duty to rebuild the car with crumple zones, lane-change sensors, and back-up cameras. But the Tenth District's rule suggests otherwise.

The law in other areas reflects the view—contrary to the Tenth District's holding—that undertaking a limited task does not translate into a full-scale duty. A person who repairs a

product “is not obligated to provide safety precautions against hazards unrelated to the defect that it is called on to repair.” *Am. Law of Prod. Liab.* 3d, § 112:5 (2014) (collecting cases). And a repair contract of limited scope does not impose a duty to discover latent defects outside the scope of the repair. *See, e.g., Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, syl. ¶ 7 (1954). In contrast, the Tenth District’s rule opens wide ODOT’s liability. That is a problem not merely because it exposes ODOT to unpredictable liability, but also because it ultimately could undermine safety for all Ohioans.

Second, the case raises question of great general interest because the safety of road travel affects nearly every Ohioan nearly every day. As shown above, the Tenth District’s rule puts ODOT in the position of limiting itself to a small number of larger road-improvement projects where it can confidently do everything possible to make that particular stretch of roadway conform to the latest safety standards. At the same time, ODOT must delay hundreds of other projects where lesser improvements might still yield substantial safety benefits. When government takes actions that affect the daily lives of millions of Ohioans, it is a matter of great general interest. *See, e.g., Ne. Ohio Reg’l Sewer Dist. v. Bath Twp.*, 138 Ohio St. 3d 1413, 2014-Ohio-566 (discretionary appeal accepted to consider power of regional political subdivision to manage storm water in several counties); *Coleman v. Portage Cnty. Engineer*, 133 Ohio St. 3d 28, 2012-Ohio-3881 (deciding scope of municipal liability for maintenance of public-works project); *see also Sanderbeck v. Medina Cnty.*, 130 Ohio St. 3d 175, 2011-Ohio-4676 ¶ 2 (O’Donnell, J., dissenting from decision dismissing case as improvidently accepted) (municipal liability for condition of roadway presented “question of great significance that affects political subdivisions and their residents across this state”) *id.* ¶ 19 (Lanzinger, J., dissenting from decision dismissing case as improvidently accepted) (case raised “important question for all

political subdivisions”). This case stands at the intersection of public safety and the government’s role in assuring that safety. It is of interest to all Ohioans.

Third, the case triggers a substantial constitutional question because judicially imposed tort liability for discretionary agency decisions is a separation-of-powers issue. Separation-of-powers principles are “implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 159 (1986). The doctrine “represents the constitutional diffusion of power” among the three branches. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶ 114. When it comes to setting policy for Ohio’s public roadways, two of the branches have a major role: The “General Assembly creates policy in regard to public roads and the director [of highways] executes such policy.” *State ex rel. City of Cleveland v. Masheter*, 8 Ohio St. 2d 11, 13 (1966). The judiciary has, at best, a minor role. That minor role respects the separation of powers inherent in the Ohio Constitution.

And that minor role is reinforced by doctrines that recognize the limits of state waivers of sovereign immunity. The State has waived immunity for acts of negligence, but not discretionary acts of government. *Garland v. Ohio Dept. of Transp.*, 48 Ohio St. 3d 10, 12 (1990) (State immune from discretionary decision about what type of traffic signal to install). As the Florida Supreme Court explains, the “underlying premise” for the non-waiver of immunity for government functions is that it “cannot be tortious conduct for a government to govern. . . . [T]here are areas inherent in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine.” *Dept. of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla.1982).

As to each of these questions, there is no chance of further appellate development outside of this Court. The Tenth District is the only court that can hear appeals from Court of Claims decisions assessing ODOT's negligence liability. *See* R.C. 2743.03(A)(1) (Court of Claims jurisdiction); R.C. 2743.20 (Tenth District jurisdiction). And the Tenth District has already rejected ODOT's en-banc request. The questions are substantial, and this case is ideally postured to settle them in this Court.

ARGUMENT

Appellant's Proposition of Law:

When ODOT makes discrete highway improvements, only those particular improvements need to meet the current construction standards.

ODOT has a statutory duty to maintain state highways in a reasonably safe condition. *See* R.C. 5501.11. A long line of precedent recognizes this duty. *See, e.g., Morgan*, 2010-Ohio-5969 ¶ 11 (citing *White v. Ohio Dept. of Transp.*, 56 Ohio St. 3d 39 (1990); *Galay v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-383, 2006-Ohio-4113 ¶ 52; *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013 ¶ 29; *Gregory v. Ohio Dept. of Transp.*, 107 Ohio App. 3d 30 (10th Dist. 1995); *Leskovac v. Ohio Dept. of Transp.*, 71 Ohio App. 3d 22 (10th Dist. 1990); *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App. 3d 723, (10th Dist. 1990)).

But this duty to maintain the roads does not make ODOT an insurer of those traveling the state highways. *Morgan*, 2010-Ohio-5969 ¶ 11 (collecting cases). Nor does ODOT's duty to maintain state highways include a duty to redesign or reconstruct those highways. *Id.* ¶ 12. Instead, “[m]aintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements.” *Id.* (quoting *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324 ¶ 7 (collecting cases)). The bottom line from these precedents is that ODOT does not have a duty to upgrade existing state highways to current

design standards when performing maintenance. *Id.* ¶ 12. And ODOT’s duty to make improvements to existing state highways is discretionary. *See* R.C. 5501.31.

Until the decision in this case, the Tenth District routinely noted that improvements to state highways must be “substantial improvements” or “substantial reconstruction” to trigger ODOT’s duty to upgrade to current design standards. *See, e.g., Morgan*, 2010-Ohio-5969 ¶ 12; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499 ¶ 29; *Sobczak*, 2010-Ohio-3324 ¶ 7; *Galay* 2006-Ohio-4113 ¶ 29; *Wiebelt v. Ohio Dept. of Transp.*, No. 93AP-117, 1993 WL 238846, at *2 (10th Dist. June 24, 1993). In this case, however, the Tenth District discarded this precedent when it held that there is no significance to the word “substantial” as modifying “improvement” when determining whether or not ODOT has a duty to upgrade an intersection.

Indeed, in *Morgan*, while discussing ODOT’s duty of care to maintain the state highways in a reasonably safe condition, the Tenth District said that “[m]aintenance involves only the preservation of existing highway facilities, rather than the initiation of *substantial* improvements . . . [and] ODOT does not have a duty to upgrade highways to current design standards when acting in the course of maintenance.” 2010-Ohio-5969 ¶ 12 (internal quotation marks omitted) (emphasis added). Likewise, in *Hurier*, while again discussing ODOT’s duty to maintain the state highways in a reasonably safe condition, the Tenth District explained that there must be “substantial reconstruction” before the duty to upgrade to current design guidelines is triggered. 2002-Ohio-4499 ¶ 29; *see also Sobczak*, 2010-Ohio-3324 ¶ 7; *Wiebelt*, 1993 WL 238846, *2. In contrast, and without overruling its prior decisions, the Tenth District here held that any improvement to state highways beyond the maintenance of existing conditions triggers the duty to upgrade the area involved in the project to current design standards. App. Op. ¶ 35.

Now, even the most minor of improvements to an intersection will result in a duty on ODOT to bring all aspects of that intersection to current-day construction standards. The consequence is that ODOT will not be able to make even a minor improvement to the safety of intersections without devoting what could be the substantially more resources necessary to bring the entire intersection up to current-day standards. The Tenth District Rule handcuffs ODOT's discretionary decision making about roadway improvements.

Beyond the Tenth District's reordering of the established rules for ODOT's liability, there is reason to reexamine even that framework. As a matter of first principles, the distinction between maintenance and improvements is not the right dichotomy to define ODOT's duty to bring a roadway to current-day standards. Rather than task courts with distinguishing between the amorphous concepts of "maintenance" and "improvements" (or substantial improvements), the relevant question is whether or not ODOT performed its task negligently.

Framed as a matter of whether ODOT negligently executes a roadway project, the duty inquiry is simpler, historical, and more judicially administrable than the line between maintenance and (substantial) improvement. Under this rule, when ODOT constructs a highway, it must do so in accord with current standards. When ODOT improves existing roadways, it must do so non-negligently as to the improvements it makes. And when ODOT maintains the roadways, it must do so under principles of ordinary care. This simplified rule has several advantages.

The simplified rule is more straightforward from ODOT's operations perspective. Requiring ODOT to upgrade to current design standards every time it makes any effort to improve the safety of state highways would limit ODOT's ability to make state highways safer as a whole. As illustrated in this case, the flashing lights and traffic signs merely served to warn

motorists that they are approaching an intersection; they did not alter the speed or direction of traffic. Yet the Tenth District holding requires ODOT to make extensive improvements at this intersection, including changing the slope of the road to the east where it passes over a railroad. If the Tenth District's rule stands, ODOT's ability to plan road projects is severely compromised. The simplified rule offers bright-line rules for courts in ODOT negligence cases. If ODOT installs a flashing warning light, that light should be to current-day standards. If ODOT installs an "intersection ahead" sign, that sign should be to current-day standards. But the mere installation of such devices should not trigger a duty to improve the entire intersection, including potentially hundreds of feet of roadway in each direction. There should be no need to wrestle with the rather difficult question of whether a change is "maintenance" or "improvement." It is enough that the changes are done to current construction standards.

This simplified rule also accords with the discretion that should attach to ODOT's choices about what projects it should undertake and how extensive those projects should be. *Cf. Garland*, 48 Ohio St. 3d at 11 (recognizing immunity for "the exercise of an executive or planning function involving the making of a basic policy") (internal quotation marks omitted). Those judgments require engineering and resource questions that ODOT must continually evaluate for all 43,000 miles of roads that it oversees. Those judgments are appropriately left to ODOT's administrative expertise, not a court deciding an individual tort suit outside of the context of the broader highway picture. And leaving these judgments to ODOT instead of the judiciary respects the ultimate policy judgment of the General Assembly that ODOT, not the courts, makes judgments about the best way to manage Ohio's road system as a whole.

The simplified rule is also in line with traditional fault principles. Traditional fault principles do not convert minor repair into a full-blown duty to reconstruct. *See, e.g., Am. Law*

of Prod. Liab. 3d, § 112:5 (collecting cases); *Landon*, 161 Ohio St. 82, syl. ¶ 7. And traditional fault principles frown on rules that could disincentivize safety. *Cf. McFarland v. Bruno Mach. Corp.*, 68 Ohio St. 3d 305, 307-08 (1994) (discussing Evidence Rule 407); *McFall v. Youngstown State Univ.*, 10th Dist. No. 91AP-1357, 1992 WL 132462 (June 11, 1992) (public policy encourages the implementation of remedial measures); *Immormino v. J & M Powers, Inc.*, 91 Ohio Misc. 2d 198 (Cuy. C.P. 1998) (restaurant’s efforts to enhance warnings on cups containing hot beverages, after a large verdict was entered against the restaurant in a case involving a hot coffee spill, was not admissible).

The simplified rule also meshes with federal law barring the use as evidence of “data compiled for the purpose of identifying[,] evaluating, or planning safety enhancements.” 23 U.S.C. § 409; *cf. Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 146 (2003) (noting that the most recent amendment to this statute was designed to “overcome judicial reluctance” to protect data collected under the federal program). That evidentiary bar recognizes the discretion inherent in planning highway improvements and that administrative expert evaluation, not tort liability, should drive that discretion.

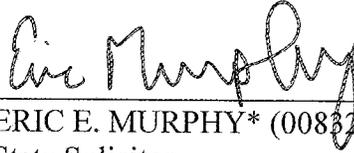
The simplified rule is the better one, and this Court should adopt it.

CONCLUSION

The Court should accept discretionary review over this case, reverse the judgment of the Tenth District, and reinstate the judgment of the Court of Claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant Ohio Department of Transportation was served by U.S. mail this 21st day of May, 2014 upon the following counsel:

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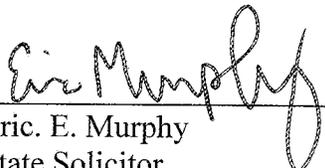
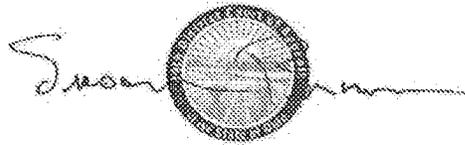

Eric. E. Murphy
State Solicitor

EXHIBIT 1

Tenth District Court of Appeals

Date: 04-10-2014
Case Title: PAUL RISNER -VS- OHIO DEPARTMENT OF
TRANSPORTATION
Case Number: 12AP000828
Type: JOURNAL ENTRY

So Ordered

A handwritten signature in cursive script, appearing to read "Susan Brown", is written over a circular seal. The seal is embossed and contains the text "JUDGE SUSAN BROWN" around the perimeter and "TENTH DISTRICT COURT OF APPEALS" in the center.

/s/ Judge Susan Brown, P.J.

EXHIBIT 2

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paul Risner as Co-Administrator	:	
of the Estate of Amber Risner, a	:	
Deceased Minor et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 12AP-828
	:	(Ct. of Cl. No. 2011-03332)
v.	:	
	:	(REGULAR CALENDAR)
Ohio Department of Transportation et al.,	:	
	:	
Defendants-Appellees.	:	

MEMORANDUM DECISION

Rendered on April 10, 2014

Blue + Blue, LLC, and Douglas J. Blue, for appellants.

Michael DeWine, Attorney General, William C. Becker, and Amy S. Brown, for appellee Ohio Department of Transportation.

ON APPLICATION FOR RECONSIDERATION/
EN BANC REVIEW

BROWN, J.

{¶ 1} The Ohio Department of Transportation ("ODOT"), defendant-appellee, has filed a January 9, 2014 application for reconsideration and en banc review regarding this court's December 24, 2013 decision in which we sustained the assignment of error raised by Paul and Catherine Risner, plaintiffs-appellants, and reversed the judgment of the Court of Claims of Ohio granting summary judgment in favor of ODOT.

{¶ 2} The test to be applied in ruling on an App.R. 26(A) application for reconsideration in the court of appeals is whether the motion calls to the attention of the

court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *State v. Rowe*, 92 Ohio App.3d 652, 677 (10th Dist.1993).

{¶ 3} App.R. 26(A)(2), which governs en banc procedure, states in part:

En banc consideration

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. * * * Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) * * * An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

{¶ 4} With regard to the application for en banc review in the present case, ODOT argues that our decision conflicts with the decisions in *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324; *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-362, 2010-Ohio-5969; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499; and *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117 (June 24, 1993). However, we find no intra-district conflict exists. Initially, as we stated in our original decision, *Morgan* clearly did not analyze whether certain work activities on the roadway constituted a "substantial" improvement, but, rather, only analyzed whether the activities constituted an improvement. *See Morgan* at ¶ 14. Therefore, the analyses in *Morgan* and the present case are in accord. With regard to *Sobczak* and *Wiebelt*, neither of those cases ever reached the issue of whether the particular work activities constituted substantial improvements; thus, those two cases cannot conflict with our conclusion in the present case that the term "substantial" is unnecessary to the analysis. As for *Hurier*, in ¶ 29, we did state that "[b]ecause no substantial reconstruction occurred between 1990 and the time of the accident, ODOT was not required to remove the brick walls or relocate the pipe according to the current

design guidelines contained in the 1990 ODOT LD manual." However, in *Hurier* there is no indication that a distinction between a substantial improvement and any other kind of improvement is relevant. The use of "substantial reconstruction" in *Hurier* merely parrots the word "substantial" from *Wiebelt* without any suggestion that the term has any impact on the analysis. Indeed, this court has never found in any case that "substantial improvement" has any meaning different than "improvement," and even *Wiebelt* does not attribute the term "substantial" to any legal authority. Similarly, this court has never found a non-substantial improvement to constitute "maintenance." Our decision in the present case does not represent a change in the analysis in these types of cases but merely clarifies that the pertinent distinction is between "maintenance" and "improvement." For these reasons, we find no conflict exists between the present case and *Sobczak*, *Wiebelt*, *Morgan*, and *Hurier*. Therefore, ODOT's application for en banc review is denied.

{¶ 5} In ODOT's application for reconsideration, ODOT argues that, in our decision, this court did not address the paramount issue as to whether its work activities were "substantial improvements" or "maintenance." ODOT asserts that the determination of whether the improvements in question were "substantial" is a key issue that must be decided. However, we already addressed this issue in our decision and explained why we did not need to discuss the term "substantial" and why the use of "substantial" did not further aid any analysis of the issue. Although ODOT disagrees with our analysis and reasoning, such is not a proper ground for an application for reconsideration. *See Bae v. Drago & Assoc., Inc.*, 10th Dist. No. 03AP-254, 2004-Ohio-1297, ¶ 2 (an appellate court will not grant an application for reconsideration just because a party disagrees with the logic or conclusions of the appellate court). Because this court has already fully considered this issue, we must deny ODOT's application for reconsideration.

{¶ 6} Accordingly, we deny ODOT's application for reconsideration and application for en banc review.

*Application for reconsideration and
application for en banc review denied.*

TYACK and CONNOR, JJ., concur.

EXHIBIT 3

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Paul Risner as Co-Administrator	:	
of the Estate of Amber Risner, a	:	
Deceased Minor et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 12AP-828
	:	(Ct. of Cl. No. 2011-03332)
v.	:	
	:	(REGULAR CALENDAR)
Ohio Department of Transportation et al.,	:	
	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 24, 2013, appellants' assignment of error is sustained and it is the judgment and order of this court that the judgment of the Ohio Court of Claims is reversed and this matter is remanded for further proceedings in accordance with law, consistent with this decision. Costs assessed against the Ohio Department of Transportation.

BROWN, TYACK, & CONNOR, JJ.

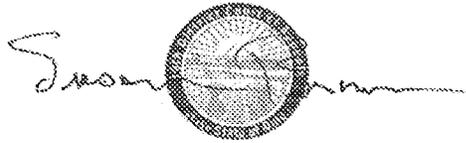
 /S/ JUDGE
Judge Susan Brown

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Dec 30 10:37 AM-12AP000828

Tenth District Court of Appeals

Date: 12-30-2013
Case Title: PAUL RISNER -VS- OHIO DEPARTMENT OF
TRANSPORTATION
Case Number: 12AP000828
Type: JEJ - JUDGMENT ENTRY

So Ordered

A handwritten signature in cursive script, appearing to read "Susan Brown", is written over a circular official seal. The seal has a textured, halftone-like appearance and contains some illegible text or a logo.

/s/ Judge Susan Brown, P.J.

EXHIBIT 4

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Paul Risner as Co-Administrator	:	
of the Estate of Amber Risner, a	:	
Deceased Minor et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 12AP-828
	:	(Ct. of Cl. No. 2011-03332)
v.	:	
	:	(REGULAR CALENDAR)
Ohio Department of Transportation et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 24, 2013

Blue + Blue, LLC, and Douglas J. Blue, for appellants.

Michael DeWine, Attorney General, William C. Becker, and Amy S. Brown, for appellee Ohio Department of Transportation.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶ 1} Paul and Catherine Risner, plaintiffs-appellants, appeal from the judgment of the Court of Claims of Ohio, in which the court granted the motion for summary judgment filed by the Ohio Department of Transportation ("ODOT"), defendant-appellee.

{¶ 2} On September 12, 2009, around midnight, Amber Risner ("Amber"), the daughter of appellants, was traveling as a front-seat passenger in a vehicle driven by Ashley Royster on northbound State Route 220 ("SR 220"). Kayla Thompson was a rear-seat passenger in the vehicle. Royster's vehicle stopped at a stop sign at the intersection of SR 220 and State Route 32 ("SR 32"), a four-lane, divided highway. The intersection was

newly constructed in the mid-1990s when SR 32 was upgraded from two lanes to four. A flashing red light facing northbound SR 220 is also above the intersection. After seeing no cars, she proceeded to cross the intersection. The intersection contains a median between the eastbound and westbound lanes of SR 32, and a flashing yellow light faces eastbound and westbound SR 32 traffic. There are also advance warning signs on eastbound and westbound SR 32 prior to the intersection with SR 220. The overhead flashing red and yellow lights and advance warning signs were added to SR 220 and 32 in 2000 and 2004. Royster's vehicle proceeded into the intersection without stopping in the median and was struck by a vehicle being driven by Robert Boring, who was traveling westbound on SR 32. Amber was killed in the collision.

{¶ 3} On March 4, 2011, appellants filed a complaint in the Court of Claims against ODOT, asserting claims for wrongful death and survivorship based upon ODOT's negligent design and maintenance of the intersection at SR 220 and 32. Appellants claimed that ODOT was negligent with respect to the lack of sight distance available to motorists approaching the intersection from northbound SR 220, as well as the use of overhead red and yellow flashing lights at the intersection instead of a four-way stop-and-go traffic light.

{¶ 4} On March 2, 2012, ODOT filed a motion for summary judgment. ODOT claimed that it constructed the intersection in accordance with design standards in place at the time of construction and had no duty to later upgrade the intersection, it was immune from liability for the discretionary decisions it made with regard to the placement of traffic signals at the intersection, and the driver's negligence was the sole and proximate cause of Amber's death. On May 8, 2012, the trial court granted partial summary judgment in favor of ODOT, finding that the decisions made by ODOT concerning what traffic control devices to install at the intersection were discretionary decisions for which ODOT was entitled to immunity. However, the court found that there existed genuine issues of material fact relative to the sight distance at the intersection and the issue of proximate cause.

{¶ 5} On August 8, 2012, ODOT filed a second motion for summary judgment. On September 12, 2012, the Court of Claims granted ODOT's motion for summary judgment. The court concluded that the intersection conformed to the minimum sight distance

standards set forth in the 1993 edition of the Location and Design Manual ("L & D manual"), which was the manual in effect at the time of the original construction; even though the 1993 L & D manual only required additional safety measures at intersections where the minimum sight distance standards cannot be provided, ODOT installed overhead flashing lights and advance warning signs after the original construction; because the installation of the overhead flashing lights and advance warning signs were highway "maintenance" and not highway "construction" or "improvements," ODOT did not have a duty to upgrade the entire intersection to current design standards set forth in later editions of the L & D manual. Appellants appeal the judgment of the trial court, asserting the following assignment of error:

THE TRIAL COURT ERRED WHEN IT HELD THAT REASONABLE MINDS COULD ONLY CONCLUDE THAT DEFENDANT WAS ACTING IN THE COURSE OF MAINTENANCE WHEN INSTALLING ADVANCE WARNING SIGNS AND OVERHEAD FLASHERS IMPOSING NO DUTY TO UPGRADE THE INTERSECTION TO CURRENT DESIGN STANDARDS.

{¶ 6} Appellants argue in their assignment of error that the trial court erred when it granted summary judgment in favor of ODOT. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 7} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial

court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id.*

{¶ 8} In the present case, appellants' claims sound in negligence. To recover on a negligence claim, a plaintiff must prove that: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) the breach of the duty proximately caused the plaintiff's injury. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 22. The duty element of a negligence claim may be established by common law, legislative enactment, or the particular circumstances of a given case. *Id.* at ¶ 23.

{¶ 9} As outlined above, in finding ODOT was not negligent, the trial court made three relevant findings: (1) the intersection conformed to the minimum sight distance standards set forth in the L & D manual, which was the manual in effect at the time of the original construction, (2) even though the L & D manual only required additional safety measures at intersections where the minimum sight distance standards cannot be provided, ODOT installed overhead flashing lights and advance warning signs after the original construction, and (3) because the installation of the overhead flashing lights and advance warning signs were highway "maintenance" and not highway "construction" or "improvements," ODOT did not have a duty to upgrade the entire intersection to current design standards set forth in later editions of the L & D manual after it installed the flashing lights and advance warning signs.

{¶ 10} Appellants narrow the issue before us to whether ODOT's addition of the overhead flashing lights and advance warning signs constituted "substantial improvements" or "maintenance." ODOT's duty to maintain the highways does not

encompass a duty to redesign or reconstruct the highways. *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324, ¶ 7. "Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements." *Id.*, quoting *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117 (June 24, 1993). Thus, ODOT does not have a duty to upgrade highways to current design standards when acting in the course of maintenance. *Id.* However, when designing, redesigning, constructing, or reconstructing a highway project, ODOT must adhere to current written standards in order to fulfill its duty of care. *Lunar v. Ohio Dept. of Transp.*, 61 Ohio App.3d 143, 146 (10th Dist.1989).

{¶ 11} Appellants claim that ODOT's erection of flashing lights and advance warning signs in 2000 and 2004 constituted substantial improvements because it necessarily involved design and construction. Appellants contend that ODOT determining the height and location of the warning signs, as well as the number, location, and height of the yellow and red flashers, involved "design," while the erecting of poles needed for the flashing lights, the stringing of electric wires, the securing of wires to the flashers, and the providing of electricity to the wires involved "construction." Accordingly, appellants argue that these circumstances amounted to a substantial improvement rather than the preservation and maintenance of an existing highway, thereby requiring ODOT to adhere to the current L & D manual standards in place at the time of the installation of the signs and lights.

{¶ 12} There is a dearth of case law providing definitions of the terms "maintenance," "substantial improvement," "preserving," "designing," "redesigning," "constructing," and "reconstructing," as used in the present context. This court could find only a few cases that shed light on some of these terms. In *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-362, 2010-Ohio-5969, ¶ 14, this court found that, where no guardrails existed previously on a roadway, ODOT's installation of new guardrails constituted an "improvement." In *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶ 30, this court found that a highway project that widened and paved the shoulders on the roadway; widened all four travel lanes; changed the width, grade, and surface of the median; and added paved turn lanes was not a "redesign," "construction," or "reconstruction" operation but was merely "rehabilitative" and

"maintenance." In *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, ¶ 29, we found that ODOT's resurfacing and asphalt patching of a roadway constituted "maintenance."

{¶ 13} We note that in a different context, that being governmental immunity, the Supreme Court of Ohio discussed the meaning of "maintenance." In *Coleman v. Portage Cty. Engineer*, 133 Ohio St.3d 28, 2012-Ohio-3881, ¶ 26, the court quoted *Murray v. Chillicothe*, 164 Ohio App.3d 294, 2005-Ohio-5864 (4th Dist.), which found that Webster's Dictionary defines "maintenance" as the "'act of maintaining or state of being maintained.'" *Id.*, quoting *Webster's New College Dictionary* 660 (1999). The dictionary then defines "maintain" as "[t]o preserve or keep in a given existing condition, as of efficiency or good repair." *Id.* This definition is helpful to the present case, though not controlling.

{¶ 14} Although *Morgan* and *Rahman* are clearly not on all fours with the present case because of their differing facts, they are the most applicable to the present circumstances. We find *Morgan* the more instructive of the two cases, and conclude that the addition of warning signs and lights in the current case amounts to an "improvement." Like the guardrail in *Morgan*, structural elements in the present case were added to the existing highway in order to improve safety and usability. Also similar to the guardrail in *Morgan*, the flashers and signs were added here where none existed previously. It cannot be said that the addition of completely new components constitutes maintaining the roadway. The circumstances here are unlike those in *Rahman*, where changes were made to the roadway merely to preserve the existing highway and keep the roadway in good repair without totally reconstructing or redesigning the roadway. Therefore, we find that ODOT's erection of flashing lights and advance warning signs in 2000 and 2004 constituted improvements rather than maintenance.

{¶ 15} Having found the installation of flashing warning lights and advance warning signs constituted "improvements," we find our analysis to be at an end. Although we previously mentioned without comment the term "substantial improvements," in *Wiebelt*, the use of "substantial" does not further aid our analysis. The pertinent distinction is between "preservation" of existing highway facilities and "improvements" to highway facilities. In *Morgan*, although we cited *Wiebelt* for the "substantial

improvements" standard, we did not use it in our analysis and found it only necessary to conclude that "[t]he duty to maintain does not include a duty to institute improvements. In that case, where no guardrails existed previously, the installation of new guardrails constituted an improvement." Therefore, we find that, in the present case, ODOT's erection of flashing lights and advance warning signs in 2000 and 2004 constituted improvements rather than maintenance. For the foregoing reasons, we find the trial court erred when it granted summary judgment in favor of ODOT, and appellants' assignment of error is sustained.

{¶ 16} Accordingly, appellants' assignment of error is sustained, the judgment of the Court of Claims of Ohio is reversed, and the matter is remanded for further proceedings in accordance with the law, consistent with this decision.

*Judgment reversed;
cause remanded.*

TYACK and CONNOR, JJ., concur.

EXHIBIT 5



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

PAUL RISNER, Co-Admr., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2011-03332

Judge Joseph T. Clark

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

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OF OHIO

On August 8, 2012, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On August 31, 2012, plaintiffs filed a response. The motion is now before the court for a non-oral hearing.

Civ.R. 56(C) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

Plaintiffs bring this action for wrongful death and survivorship arising out of an automobile collision that caused the death of plaintiffs' decedent, Amber N. Risner. The accident occurred in the early morning of September 12, 2009, at the intersection of Germany Road and State Route 32 in Pike County. The intersection was configured such

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that motorists on Germany Road were required to stop for a stop sign and an overhead flashing red light before crossing or turning onto State Route 32, a four-lane divided highway. Motorists on State Route 32 were not required to stop, but were warned of the intersection by way of advance warning signs and an overhead flashing yellow light. The driver of the car in which Risner was a passenger approached the intersection via northbound Germany Road and attempted to proceed across State Route 32, whereupon the car was struck by a tractor-trailer traveling in the westbound lanes of State Route 32.

In their complaint, plaintiffs claim that defendant was negligent in its design and maintenance of the intersection, specifically with respect to the alleged lack of sight distance available to motorists approaching the intersection from northbound Germany Road, as well as the use of an overhead flashing light at the intersection rather than a four-way stop-and-go light. On May 8, 2012, the court granted partial summary judgment in favor of defendant as to the decisions it made concerning what traffic control devices to install at the intersection. As to the claim of insufficient sight distance, the court determined that issues of material fact remained; defendant addresses those issues in its present motion.

In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed the decedent a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused the decedent's injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984).

"The duty element of a negligence claim may be established by common law, legislative enactment, or the particular circumstances of a given case." *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. Nos. 10AP-362 & 10AP-382, 2010-Ohio-5969, ¶ 10. "Pursuant to R.C. 5501.11, ODOT has the responsibility to construct and maintain highways in a safe and reasonable manner. However, the state is not an insurer of the

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safety of its highways." *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 729-730 (10th Dist.1990).

When acting in the course of its highway construction responsibilities, defendant's duty of care is to adhere to "the current written standards in effect at the time of the planning, approval or construction of the site * * *." *Longfellow v. State*, 10th Dist. No. 92AP-549 (Dec. 24, 1992), citing *Lunar v. Ohio Dept. of Transp.*, 61 Ohio App.3d 143, 146 (10th Dist.1989) and *Lopez v. Ohio Dept. of Transp.*, 37 Ohio App.3d 69, 71 (10th Dist.1987). "When there are no guidelines in place at the time of the act, the proper standard of care is that of a reasonable engineer using accepted practices at the time of the act." *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499, ¶ 25.

In support of its motion, defendant submitted the affidavit of Kathleen A. King, P.E., who is employed by defendant as a Geometrics Engineer. King avers that when defendant constructed the intersection, the applicable written standards that it was required to follow were set forth in the July 30, 1993 edition of its Location and Design Manual, portions of which are attached to the affidavit and authenticated therein. See *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶ 38 (Recognizing that the Location and Design Manual "establishes policies and standards to follow when designing and maintaining highways in a reasonably safe condition.").

King explains that the Location and Design Manual establishes standards for both "intersection sight distance," which is "the distance a motorist should be able to see other traffic operating on the intersected highway so that the motorist can enter and cross the highway safely," and "stopping sight distance," which is "the distance a motorist should be able to see ahead so that he will be able to stop from a given design speed." In the present case, the sight distance relevant to the driver of the car in which Risner was riding was intersection sight distance, whereas the sight distance relevant to the driver of the tractor-trailer was stopping sight distance.

As King explains in her affidavit, although the Location and Design Manual includes tables that set forth minimum sight distance values, the manual does not impose a

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mandatory requirement to meet those minimum values. In regard to intersection sight distance, however, section 201.3 states the following: "In those cases where the table values from Figure 201-3 cannot reasonably be obtained, the minimum sight distance available to the driver of the waiting vehicle should not be less than the stopping sight distance for the design speed of the through roadway. * * * If the minimum sight distance outlined above cannot be provided, additional safety measures must be taken. These may include, but are not limited to, advance warning signs and flashers and/or reduced speed limit zones in the vicinity of the intersection."

Although there is some discrepancy in the sight distance measurements calculated by King and plaintiffs' expert, Daren E. Marceau, P.E., there is no dispute that the relevant intersection sight distance is less than the applicable table value from Figure 201-3. However, there is also no dispute that the relevant intersection sight distance was not less than the relevant stopping sight distance. As such, the design of the intersection conformed to the minimum sight distance standards set forth in the Location and Design Manual.

Even though the Location and Design Manual only requires that additional safety measures be taken at intersections where the minimum sight distance standards cannot be provided, there is no dispute that additional safety measures (e.g., an overhead flashing light and advance warning signs) were put in place in the interim period between the construction of the intersection and the September 12, 2009 accident. Plaintiffs argue that when those devices were installed, defendant "had a duty to upgrade the subject intersection to current design standards" set forth in later editions of the manual that prescribed greater sight distance.

As previously stated, "[t]he state has a duty to maintain its highways in a reasonably safe condition. * * * However, '[the state's] duty to maintain state highways is distinguishable from a duty to redesign or reconstruct.' * * * 'Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements.'" *Galay v. Dept. of Transp.*, 10th Dist. No. 05AP-383, 2006-Ohio-4113,

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ENTRY

¶ 58, quoting *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117 (June 24, 1993). "Accordingly, ODOT does not have a duty to upgrade highways to current design standards when acting in the course of maintenance." *Estate of Morgan* at ¶ 12.

Reasonable minds can only conclude that the installation of an overhead flashing light and advance warning signs constituted highway maintenance, not highway construction. Accordingly, because defendant acted in the course of maintenance in performing those functions, it was under no duty to upgrade the intersection to current design standards.

Based on the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All other pending motions are DENIED as moot and all previously scheduled events are VACATED. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.



JOSEPH T. CLARK
Judge

cc:

Amy S. Brown
William C. Becker
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150 East Gay Street, 18th Floor
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001

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EXHIBIT 6



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

PAUL RISNER, Co-Admr., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2011-03332

Judge Joseph T. Clark

ENTRY GRANTING, IN PART, AND
DENYING, IN PART,
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

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COURT OF CLAIMS
OF OHIO

On March 2, 2012, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiffs filed a response, with leave of court, on March 27, 2012. Defendant's April 2, 2012 motion to strike the documents attached as Exhibit 1 to plaintiffs' response is DENIED as moot inasmuch as the documents were not authenticated pursuant to Civ.R. 56(E) and shall therefore not be considered. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

Civ.R. 56(C) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

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Case No. 2011-03332

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Plaintiffs bring this action for wrongful death and survivorship arising out of an automobile collision that resulted in the death of plaintiffs' decedent, Amber N. Risner. According to the complaint, on September 12, 2009, Risner was a passenger in a car traveling northbound on Germany Road in Pike County, and when the driver of the car attempted to proceed through an intersection with State Route 32, the car was struck by a tractor-trailer traveling westbound on State Route 32.

Plaintiffs allege that defendant was negligent in its design, operation, and maintenance of the intersection, particularly with respect to the alleged lack of sight distance available to motorists approaching the intersection from northbound Germany Road, as well as the use of an overhead red and yellow flashing light at the intersection rather than a four-way stop-and-go light.

In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed the decedent a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused the decedent's injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶8, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984).

"The duty element of a negligence claim may be established by common law, legislative enactment, or the particular circumstances of a given case." *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. Nos. 10AP-362 & 10AP-382, 2010-Ohio-5969, ¶10. "Pursuant to R.C. 5501.11, ODOT has the responsibility to construct and maintain highways in a safe and reasonable manner." *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 729 (10th Dist.1990).

"The duty to maintain the highways does not encompass a duty to redesign or reconstruct the highways. * * * 'Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements.' * * * Accordingly, ODOT does not have a duty to upgrade highways to current design standards when acting

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in the course of maintenance.” (Citations omitted.) *Estate of Morgan, supra*, at ¶12, quoting *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117 (June 24, 1993).

“ODOT’s duty to maintain state highways in a reasonably safe condition is further defined by the Manual of Uniform Traffic Control Devices (‘manual’), which was adopted and utilized by ODOT. The manual ‘mandates certain minimum safety measures.’ * * * [T]he state is liable in damages for accidents which are proximately caused by its failure to conform to the requirements of the manual. * * * [N]ot all portions of the manual are mandatory and, therefore, some areas are within the discretion and engineering judgment of ODOT.” (Citations omitted.) *Jeska v. Ohio Dept. of Transp.*, 10th Dist. Nos. 98AP-1402 & 98AP-1443 (Sept. 16, 1999), quoting *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App. 3d 22, 27.

In *Reynolds v. State*, 14 Ohio St.3d 68 (1984), the Supreme Court of Ohio held that “[t]he language in R.C. 2743.02 that ‘the state’ shall ‘have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *’ means that the state cannot be sued for * * * the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Id.* at paragraph one of the syllabus. Pursuant to the doctrine of discretionary immunity as set forth in *Reynolds*, “decisions concerning what traffic control devices and whether extra traffic control devices are necessary at a given intersection is a decision which rests within the sound discretion of ODOT and to which ODOT is entitled to immunity.” *Cushman v. Ohio Dept. of Transp.*, 10th Dist. No. 95API07-8844 (March 14, 1996); see also *Garland v. Ohio Dept. of Transp.*, 48 Ohio St.3d 10, 12 (1990) (“a governmental entity is immune from tort liability when it makes a decision as to what type of traffic signal to install at an intersection”).

In its motion, defendant argues that it constructed the highway intersection in accordance with design standards in place at the time of construction and had no duty to later improve or upgrade the intersection, that it is immune from liability for the discretionary decisions it made with regard to placement of traffic signals at the

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intersection, and that negligence on the part of the driver of the vehicle in which the decedent was riding was the sole proximate cause of the decedent's injuries.

In support of its motion, defendant submitted the affidavit of Kathleen A. King, who is employed by defendant as a Geometrics Engineer. King avers, in part:

"7. The sight distance provided at the Germany Road intersection exceeds the preferred stopping sight distance for a vehicle in either lane of west-bound, State Route 32.

"8. This intersection met ODOT's design standards for sight distance at the time it was built."

Defendant also submitted the affidavit of Jason M. Yeray, Section Head of defendant's Office of Traffic Engineering. Yeray avers, in part, that "[t]he Intersection of SR-32 at SR-220/Germany Rd. did not meet the signal warrants outlined in the Ohio Manual of Uniform Traffic Control Devices for a stop-and-go traffic signal, and such a signal would increase the potential for rear-end crashes for motorists traveling westbound on SR-32."

In response to defendant's motion, plaintiff submitted the deposition transcript of Richard Chaffin, an employee of defendant, wherein he states that the intersection as configured when the accident occurred was constructed by defendant "in the mid-1990's" and that the red and yellow flashing light was installed sometime afterward.

Plaintiff also submitted the affidavit of Daren Marceau, a traffic engineer who states that he visited the intersection and determined that the relevant sight distance does not meet the minimum standard as set forth in defendant's Location and Design Manual as it appeared when the intersection was built. Marceau goes on to state that "[p]lacing a traffic signal at the intersection of State Route 32 at State Route 220 and Germany Road would have made this intersection reasonably safe for motorists * * * [and] would also reduce the number of angle crashes that are the most dangerous intersection collisions. * * * I am of the opinion that had ODOT constructed the intersection in accordance with * * * ODOT standards, and/or installed a traffic signal at the intersection, this collision would not have happened."

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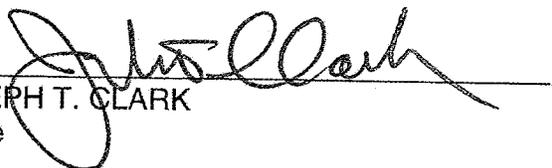
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Upon review, the court concludes that defendant is entitled to judgment as a matter of law on the claim that it was negligent in failing to install a traffic signal at the intersection. It is undisputed that sometime after the intersection was constructed, defendant decided to install a red and yellow flashing light. Defendant has presented evidence that the intersection did not meet the "warrants" set forth in the Manual of Uniform Traffic Control Devices for installing a four-way stop-and-go traffic signal and defendant further argues that it is entitled to discretionary immunity for its decisions to install the red and yellow flashing light and not install another type of traffic signal. The evidence presented by plaintiffs does not demonstrate that the Manual of Uniform Traffic Control Devices required defendant to install a stop-and-go traffic signal when it constructed the intersection, nor that defendant's decision to subsequently install a flashing light rather than a stop-and-go traffic signal violated the manual. As such, reasonable minds can only conclude that the decisions made by defendant concerning what traffic control devices to install or not install at the intersection were discretionary decisions for which defendant is entitled to immunity.

The court also concludes, however, that genuine issues of material fact exist relative to the sight distance at the intersection and the issue of proximate causation. Accordingly, defendant's motion for summary judgment is GRANTED, in part, and DENIED, in part.



JOSEPH T. CLARK
Judge

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