

IN THE
SUPREME COURT OF OHIO

PAUL RISNER AS CO-ADMINISTRATOR :	Case No. 14-0862
OF THE ESTATE OF AMBER RISNER, :	
A DECEASED MINOR, ET AL. :	
	On Appeal from the
Plaintiffs-Appellees, :	Franklin County
	Court of Appeals,
vs. :	Tenth Appellate District
	Court of Appeals
	Case No.: 12API-09-828
OHIO DEPARTMENT OF :	
TRANSPORTATION, :	
Defendant-Appellant. :	

PLAINTIFF-APPELLEE'S MEMORANDUM IN RESPONSE TO DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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INTRODUCTION

ODOT has a duty of care to the motorists of the State of Ohio. This duty includes appropriately responding to a known safety issue on a roadway. ODOT may choose to respond in one of two ways - maintain the existing structure of a roadway or, if warranted, implement an improvement to the roadway. When an improvement is implemented, ODOT has a responsibility to ensure that the improvement addressed the specific concern in front of it. If the improvement does not address this concern, ODOT needs to be held accountable if an injury is directly related to the roadway not meeting updated guidelines. Only this accountability will make the roadway as safe as possible for Ohio motorists.

The Tenth District Court of Appeals (“Tenth District”) unanimously recognized this accountability when faced with ODOT making improvements to the roadway but failing to correct a known safety issue. The Tenth District recognized that ODOT knew of a serious safety issue at the intersection of State Route 32 and State Route 220 for a ten year period before Amber Risner’s death. The Tenth District further recognized that

ODOT, in response to this issue, implemented improvements to the intersection which did not, in any way, resolve this issue.

In following a long line of precedent, the Tenth District held that ODOT, when making improvements to roadways, owed a duty of care to Ohio motorists in ensuring that the intersection complied with its written guidelines. For only if those guidelines are followed, will safety issues be resolved and tragic collisions, like in Amber Risner's case, be avoided.

STATEMENT OF THE CASE AND FACTS

On the evening of September 12, 2009, Amber Risner was a passenger in a vehicle driven by her best friend, Ashley Royster. Ms. Royster was stopped at the northbound stop sign on State Route 220 where it intersects with State Route 32 in Pike County, Ohio. She looked both ways for oncoming traffic and, seeing none, proceeded into the intersection in an attempt to cross State Route 32 and continue north on State Route 220. As she crossed the westbound lanes of State Route 32, a semi-tractor trailer crashed into the front of Ms. Royster's vehicle. Ms. Risner's passenger door was ripped off the vehicle causing Ms. Risner to be thrown from the car and killed.

For ten years before the collision, ODOT knew of, and investigated, the high occurrence of angle collisions at the intersection of State Route 32 and State Route 220. ODOT determined that these angle crashes involved "motorists on westbound 32 colliding with vehicles crossing the intersection from the side roads." ODOT concluded that these collisions were occurring because of "problems with visibility for motorists at the intersection looking toward the east." ODOT addressed this sight distance problem by installing overhead flashers and advanced warning signs. Unfortunately, these

improvements did nothing to correct the limited sight distance of motorists at the intersection looking east. At the time these improvements were made, the intersection failed ODOT's written sight distance requirements.

The Court of Claims granted ODOT's Motion for Summary Judgment holding that the installation of flashers and warning signs were acts of "maintenance" and, therefore, ODOT did not have a duty to ensure that the intersection's sight distances met ODOT's written requirements at the time they were installed.

However, in a unanimous decision, the Tenth District Court of Appeals reversed the Court of Claim's decision holding that the installation of flashers and warning signs were "improvements" and not "maintenance." The Tenth District reasoned that ODOT added components and structural elements to the existing highway and those additions could only be considered "improvements" and not "maintenance." It further held that the "improvements" required that ODOT adhere to the written sight distance standards in place at the time they were installed in order to fulfill its duty of care to Ohio motorists.

THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is not one of public or great general interest because the Tenth District's holding follows, and clarifies, its twenty year line of precedent setting forth ODOT's duty of care to Ohio motorists. *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. 10 AP-362, 2010-Ohio-5969; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499; *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117 (June 24, 1993). In its Memorandum Decision denying ODOT's application for en banc review, the Tenth District specified that "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.’” (Memorandum Decision, p. 3).

The Tenth District’s holding will not impede ODOT’s ability to make “small, but safety- driven improvements” to Ohio’s roads because the holding applies only to a limited, specific set of facts in which a roadway received improvements that did not correct a known safety issue and the uncorrected safety issue was the direct cause of the injury. For example, if the intersection in the present case received a stop and go traffic signal rather than an overhead flasher, this collision would not have occurred. The cause of the present collision was Ms. Royster’s limited sight distance which went uncorrected by ODOT and did not conform to updated requirements at the time ODOT made improvements. The import of the Tenth District’s ruling, and its long line of precedent, is ODOT is accountable for ensuring that the improvements it implements in response to a known safety issue actually correct the problem. It does not require ODOT to make every update available because there still needs to be a causal connection between a known safety issue and lack of an upgrade.

This case does not involve a constitutional question. The State of Ohio has waived its immunity from liability and consented to have its liability determined in accordance with the same rules of law applicable to suits between private parties. R.C. 2743.02. The duty element of a negligence claim can arise from common law, legislative enactment, or the particular circumstances of a given case. *Wallace v. Ohio Department of Commerce, Div. of State Fire Marshall* (2002), 96 Ohio St.3d 266, P23; *Chambers v. St. Mary’s School* (1998), 82 Ohio St.3d 563, 565. ODOT’s legal duty to construct and maintain roadways in a reasonably safe condition arises out of R.C. 5501.11. *Estate of*

Morgan v. Ohio Dept. of Transp., 10th Dist. No. 10AP-362, 2010-Ohio-5969; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 729. Common law has defined the parameters of ODOT's duty when performing these activities. Common law has held that ODOT does not have a duty to upgrade highways when acting in the course of maintenance. *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324, ¶7. When designing, redesigning, constructing or reconstructing a highway project, ODOT must adhere to current written standards in order to fulfill its duty. *Lunar v. Ohio Dept. of Transp.*, 61 Ohio App.3d 143, 146 (10th Dist. 1989). In this case, the Tenth District followed its precedent in holding that improvements to a highway constituted a redesign and reconstruction of that highway imposing a duty on ODOT to ensure the highway met current written standards. The Tenth District's holding did not impact ODOT's immunity with its discretionary power on which roadways to maintain or improve. See R.C. 5511.31.

The Tenth District's reasoning in this case was based on a thorough review of its long history of prior decisions regarding ODOT's duties to Ohio motorists. The Tenth District determined that its prior decisions had hinged on whether ODOT's actions constituted maintenance of a roadway versus improvement of a roadway. Maintenance is simply defined as preservation, or keeping in a given existing condition, of existing facilities while an improvement is defined as the addition of a component. The Tenth District found that the term "substantial" in front of the term "improvement" did not aid its analysis because the term had not been helpful in its previous decisions and had no legal authority. The Tenth District found that its previous decisions had relied on the workable issue of whether ODOT performed "maintenance" or implemented an

“improvement” to a roadway. Focusing on this distinction eliminates the indeterminate issue of whether an improvement is “substantial.”

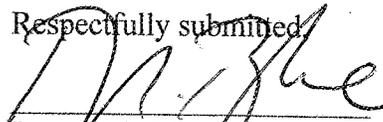
APPELLEE’S RESPONSE TO APPELLANT’S PROPOSITION OF LAW

Appellant-Defendant’s proposition of law eliminates the long established principles of ordinary care which ODOT owes to Ohio’s motorists. ODOT’s proposal would, in effect, expand its immunity to include negligent acts of maintenance and improvements to roadways. ODOT has proposed that “if [it] installs a flashing warning light, that light should be to current-day standards....if [it] installs an ‘intersection ahead’ sign, that sign should be to current-day standards.” (ODOT’s Memorandum in Support, p. 12). Over many years, ODOT’s statutory and common law duties have placed a responsibility on ODOT to properly respond to a known problem. The duty has focused on the type of action, not the action itself. To focus solely on the act without accountability for the type of action, or response, amounts to judicially imposed immunity. This immunity would pose no incentive for ODOT to properly correct known safety concerns and put Ohio motorists at risk for injury on unsafe roadways.

CONCLUSION

Appellee respectfully requests that this Court deny jurisdiction allowing the Tenth District’s decision to stand and this case to proceed to trial.

Respectfully submitted,

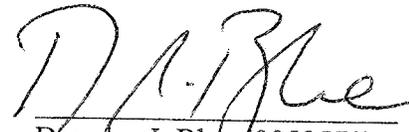

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served via regular U.S. Mail this 26th day of

June, 2014, to the following counsel of record:

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