

In the
Supreme Court of Ohio

PAUL RISNER, Co-Admr., et al.,

Plaintiffs-Appellees,

v.

OHIO DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Case No. 2014-0862

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

Court of Appeals
Case No. 12AP-828

**MERIT BRIEF OF DEFENDANT-APPELLANT
OHIO DEPARTMENT OF TRANSPORTATION**

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INTRODUCTION

It is no tort for the government to govern. When the government makes itself amenable to tort liability, it does not also create new tort duties for the acts of governing. Yet that is essentially what the judgment below does. The Tenth District's judgment means that a court will be expected to review decisions of the Ohio Department of Transportation ("ODOT") about what safety improvements to make and when to make them. Those policy choices are for the agency and the General Assembly, not the courts. Courts interpret law in specific cases and controversies; they do not set statewide policy. That is a foundational principle of government.

This basic principle of governmental liability arises here because of an intersection accident in Pike County. An SUV ran into the side of a tractor trailer when attempting to cross a four-lane road shortly after midnight in the summer of 2009. The claims against ODOT included the allegation that it negligently failed to install a traffic light at the intersection and that it negligently failed to improve the line of sight at the intersection after it was built. The Court of Claims granted ODOT summary judgment on both claims, but the Tenth District reversed on the second theory. That reversal is inconsistent with the limits of the State's liability in tort.

First, the statutory waiver of the State's sovereign immunity does not extend to actions that only the State can carry out. The State is liable as if it were a private party. If a State employee negligently drives a car and injures someone, the State is liable. If a State doctor commits malpractice, the State is liable. But when the State governs, courts do not sit to second-guess the policy choices that are the sine qua non of governing. This division between State liability and non-liability finds expression in the discretionary-function doctrine, which recognizes that when the State acts in a way that private citizens do not, the State cannot be liable in tort for breaching a duty to private actors.

This principle is expressed in the Court of Claims Act's language that limits suits against the State to those that can be decided by the same "rules of law" applicable to private parties. Private parties do not govern; therefore the State is not liable in tort for acts of governing. That reading of the "rules of law" clause is confirmed by two familiar canons of statutory interpretation. The rule that waivers of sovereign immunity are construed narrowly tells us that the scope of liability for the State cannot extend to acts of governing. The State was not liable for those actions at common law, and it is not liable for them under the Act. The rule of constitutional avoidance points the same way. Imposing tort liability on the State through court cases would put the courts in the position of reviewing policy choices of the legislative and executive branches. That trespasses separation-of-powers principles. The "rules of law" clause is not so broad as to violate a core structural feature of the Ohio Constitution.

Second, this Court's cases have long recognized the discretionary-function doctrine, including in ODOT cases. Those decisions, like decisions from other state and federal courts, recognize that when government makes policy choices in the area of traffic policy, it is not subject to tort liability for breaching a duty to the motoring public. To be sure, ODOT (or its counterpart in other States or the federal government) may be liable for negligently *executing* a policy choice that itself involves no policy-setting of its own. But the core distinction between setting policy and carrying it out is a line that separates the State's amenability to tort lawsuits and its immunity from them. The Tenth District's judgment deviates from that fundamental distinction, and therefore must be reversed.

Third, even if ODOT's actions were (erroneously) analogized to private conduct, it would have breached no duty by deciding what safety measures were appropriate at this intersection. Whenever the State is liable in tort, it is by analogy to conduct that would subject a private actor

to tort liability. The closest analogies may be the duties of private sellers of goods and services. Those analogies further undermine the Tenth District's judgment. Imposing liability on ODOT here is akin to imposing liability for state-of-the art designs today, rather than at the time ODOT constructed this intersection. That theory would not fly in a private tort suit and it should not fly here. Imposing liability on ODOT is also akin to creating a duty to upgrade beyond the scope of the work performed. That duty finds no solid footing in private tort law and it should find no footing here. Finally, imposing liability on ODOT would violate the spirit of tort principles like the subsequent-remedial-measures doctrine because, like that rule, liability here would negatively affect safety improvements. If any change improving the safety of a stretch of roadway is packaged with a duty to make all possible improvements, ODOT has only one choice—make platinum improvements in a few places at the expense of gold improvements in more places. The choice between those options is for ODOT, not the courts.

Fourth, the rule embraced in the Tenth District's judgment creates confusion for litigants, including the State, and it is simply wrong as a matter of basic legal principles. So even if the Tenth District were free to create new doctrine in this area, its proposed rule should be rejected. The Tenth District focused on a distinction between maintenance and improvements, holding that only when ODOT performs maintenance is it free from a duty to fully upgrade the section of roadway where it is working. That distinction may be useful to decide whether ODOT was merely maintaining a road (an act for which it *may* be held liable), but it is useless in deciding whether ODOT was making a policy decision when it improved a roadway. The unhelpfulness of the distinction to the discretionary-function question has led several courts to reject it. This Court should do the same.

At bottom, the Tenth District lost its way and created a new, pervasive duty for ODOT to redesign and reconstruct a state highway following the most minor improvement. If the Tenth District's rule is allowed to stand, it would mean that when ODOT makes any minor improvement to a stretch of roadway, it must make all possible improvements. The practical result of this new all-or-nothing rule is a net reduction in roadway safety. That judgment should be reversed.

STATEMENT OF THE CASE AND FACTS

Shortly after midnight three teenage girls were traveling to Lake White in Pike County to meet friends and go night fishing. *See* Thompson Depo. at 22-24 (Supp. 459). As they left a nearby gas station, the girls were discussing what music to play on one of their iPods. *Id.* at 27-29 (Supp. 460). From the gas station, the girls' car exited to State Route 220, which almost immediately intersected with State Route 32. ODOT First Mot. Sum. Judg., Diehl Aff., Attached Traffic Crash Report at 3 (Supp. 19). State Route 32 is a four-lane divided highway. *Id.*

The driver of the girls' vehicle approached the intersection traveling northbound on Route 220 intending to cross all four lanes of Route 32 to continue north. Royster Depo. at 11 (Supp. 435). There were no view obstructions. *See* ODOT First Mot. Sum. Judg., Diehl Aff., Attached Traffic Crash Report at 34 (Supp. 50). In the girls' direction of travel, they faced a stop sign and a flashing red light; traffic in both directions of the divided Route 32 faced flashing yellow lights. Boring Depo. at 20-21 (Supp. 410). The girl driving the vehicle northbound testified that she stopped at the stop sign and looked both ways before starting across Route 32. Royster Depo. at 7, 11 (Supp. 434-35). The girls proceeded northbound through this red flashing light, but did not stop in the median of the divided Route 32. *Id.* at 7 (Supp. 434). Based on her prior experience with that intersection, the driver was aware of sight limitations to the east because of a rise in the road where it crossed a bridge over a railroad. *See* Royster Depo. at 13-

14 (Supp. 436). Nevertheless, she did not stop in the median dividing the four lanes of Route 32. *Id.*

At the same time the girls' vehicle entered the intersection, a tractor trailer was westbound in the far lane of the four-lane Route 32. *See Boring Depo.* at 19 (Supp. 410). The driver of the tractor trailer noticed the girls' vehicle when he was about 100 yards from the intersection. *See Boring Depo.* at 41-43 (Supp. 415-16). A passenger of the girls' vehicle said in her deposition that she "didn't see the big truck coming." *See Thompson Depo.* at 29 (Supp. 460). The truck driver testified that he noticed that the girls' vehicle was "not slowing down or responding to [his] presence in the highway." *See Boring Depo.* at 6 (Supp. 407). He therefore immediately locked down his brakes. *Id.* Despite this maneuver, the girls' vehicle hit the side of his tractor trailer behind the last set of wheels on the tractor as it passed through the intersection. *Id.* at 6-7 (Supp. 407). Ms. Risner—who was not wearing a seatbelt—was ejected from the vehicle and suffered fatal injuries. *See Traffic Crash Report* at 27 (Supp. 43); *Thompson Depo.* at 29-30, 46-47 (Supp. 460-61, 465). The driver of the girls' car was subsequently charged with involuntary manslaughter and placed on probation. *See Royster Depo.* at 15-17 (Supp. 436).

The intersection where the girls' car struck the truck met ODOT's design standards for sight distance at the time it was built. *See ODOT First Mot. Sum. Judg., King Aff.* ¶ 9 (Supp. 14); *ODOT Second Mot. Sum. Judg., King Aff.* ¶ 12 (Supp. 377). Those standards are contained in the Ohio Manual of Uniform Traffic Control Devices. *ODOT Second Mot. Sum. Judg., King Aff.* ¶¶ 3-4 (Supp. 375). Looking east of the Intersection, (the lanes where the truck approached) there was a rise in the road where a bridge carries the road over a railroad. *ODOT First Mot. Sum. Judg., King Aff.* ¶ 9 (Supp. 14). To further warn traffic about the approaching intersection after crossing the bridge, ODOT installed a flashing light at the intersection after construction. *Pl.*

Resp. to Second Mot. Sum. Judg., Chaffin Depo. at 25-28 (Supp. 219). Later, ODOT added a flashing sign ahead of the intersection as yet another warning to traffic crossing the bridge. *Id.* at 29 (Supp. 220).

Through a parent, the estate of the girl killed when the car struck the side of the truck sued ODOT in the Court of Claims. *Risner v. Ohio Dep't of Trans.*, 10th Dist. No. 12AP-828, 2013-Ohio-5698 ¶ 3 (hereafter "App. Op."). The suit offered two distinct theories of ODOT's liability. *Id.* First, that ODOT breached a duty to Risner because it did not install a four-way traffic signal that alternately stops traffic in both directions. *Id.* Second, that ODOT breached a duty when, at the time it installed the flashing-red/flashing-yellow lights, it did not also regrade the rise in the road to improve the line of sight to the east of the intersection. *Id.*

In separate decisions, the Court of Claims granted summary judgment in favor of ODOT on each of Risner's claims. *Risner*, 2013-Ohio-5698 ¶¶ 4-5. In the first decision, the Court of Claims held that the Ohio Manual of Uniform Traffic Control Devices did not call for installing a four-way stop-and-go traffic signal. *Id.* at ¶ 4. 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. *Id.* 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 by re-grading the road to increase the line of sight. *Id.* at ¶ 5. As part of the second summary-judgment ruling, the court found that the intersection satisfied sight distance requirements when originally constructed. *Id.* Risner appealed only the second summary judgment ruling. *Id.*

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.’” *Id.* at ¶ 10. 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. *Id.* The Tenth District reversed, but did not accept Risner’s exact formulation of the legal question. *Id.* at ¶¶ 15-16. Instead, the Tenth District held that the 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.” *Id.* at ¶ 15.

ODOT sought reconsideration and review en banc 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. *Risner v. Ohio Dep’t of Trans.*, 10th Dist. No. 12AP-828 (Apr. 10, 2014). The Tenth District denied the request and reiterated that the “pertinent distinction is between ‘maintenance’ and ‘improvement.’” *Id.* at ¶ 4.

ODOT appealed and this Court accepted jurisdiction. *Risner v. Ohio Dep’t of Trans.*, 140 Ohio St. 3d 1415, 2014-Ohio-3785.

ARGUMENT

Appellant Ohio Department of Transportation’s Proposition of Law:

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

The State statute delimiting the State’s liability in tort restricts liability to the same “rules of law” that govern private tort lawsuits. R.C. 2743.02(A)(1). That language does not extend liability to acts of governing, like setting and implementing policy. That reading is confirmed by tools of statutory construction, including that the separation of powers in our Constitution requires that the clause not impose liability for policy actions of the legislative and executive

branches. This Court's precedent, like precedent in other courts, implements this principle through the discretionary-function doctrine. That doctrine applies to decisions about traffic policy like the one challenged in this tort suit. The Tenth District's errant focus on whether ODOT's actions as to the intersection here were maintenance or improvements subverts the discretionary-function doctrine and represents an unprecedented expansion of liability.

A. State entities, including ODOT, are liable only for acts that mimic conduct that would expose a private entity to liability.

The State's liability is set by statute. The relevant text waives sovereign immunity to the extent that "rules of law applicable to suits between private parties" would impose liability on private litigants. R.C. 2743.02(A)(1). The State's liability must rest on "a rule of law that is generally applicable to private parties." *Bennett v. Ohio Dep't of Rehab. & Corr.*, 60 Ohio St. 3d 107, 110 (1991). One of the key expressions of this mimicry of private tort rules is the discretionary-function doctrine. As this Court explained in its first case defining the doctrine under the statute, the language of the Court of Claims Act "means that the state cannot be sued for its legislative or judicial functions or 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." *Reynolds v. State, Div. of Parole and Cmty. Servs.*, 14 Ohio St. 3d 68, 70 (1984). For actions that do not fit this mold, "the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities." *Id.*

This divide between "basic policy" and actions that mimic private negligence recognizes that "in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability" *Evangelical United Brethren Church of Adna v. State*, 407 P.2d 440, 444 (Wash. 1965) (citation

omitted). That is, it reflects the truism that “it is not a tort for government to govern.” *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).

The retained immunity to set and enforce policy preserves a wide berth for State action that is not reviewable through individual tort lawsuits. That breadth is compelled by the plain text of the “rules of law” clause and tools of statutory construction.

1. The plain meaning of “rules of law applicable” to private parties excludes liability for acts of governance.

As with any statutory case, the judicial task is to “give effect to the plain meaning of the words used in a statute.” *State v. Steele*, 138 Ohio St. 3d 1, 2013-Ohio-2470 ¶ 17. The “rules of law applicable to suits between private parties,” R.C. 2743.02(A)(1), do not plausibly include acts of governing like setting policy. As this Court has said, the Act imposes no liability for “essential acts of governmental decisionmaking.” *Wallace v. Ohio Dep’t of Commerce*, 96 Ohio St. 3d 266, 278 (2002) (superseded on other grounds by R.C. 2743.02(A)(3)(a)); *cf. Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St. 3d 536, 2014-Ohio-2440 ¶ 38 (it “is not the role of the courts to . . . second-guess policy choices the General Assembly makes”); *Swallow v. Indus. Comm’n of Ohio*, 36 Ohio St. 3d 55, 56 (1988) (deferring to “policy” of Industrial Commission). The divide between government action that looks like private negligence and government action that is simply governing is often shorthanded as the discretionary-function doctrine. The doctrine rests on a few key insights.

The doctrine respects the different roles and competencies of courts and other branches of government. Like sovereign immunity more generally, it “derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of . . . government, and from a proper commitment to majoritarian rule.” Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530 (1992). “Immunity thus plays a vital role in

our system; it is not so much a barrier to individual rights as it is a structural protection for democratic rule.” *Id.* at 1531. The doctrine also tracks the different ways that courts and the other branches operate. Unlike the legislative and executive parts of the state, the “judiciary confines itself . . . to adjudication of facts based on discernible objective standards of law.” *Kirby v. Macon Cnty*, 892 S.W.2d 403, 408 (Tenn. 1994) (citations omitted). The discretionary-function doctrine therefore “prevent[s] . . . judicial intervention in policymaking” that forces courts to “second-guess the political, social, and economic judgments of an agency exercising its regulatory function.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984). The tasks of deciding cases and controversies through case-by-case adjudication and of balancing often incommensurate social values are dramatically different. The courts are not set up to deal with broad social balancing because “it is difficult for the judiciary by way of decisional law to comprehensively deal with . . . matters of practical public policy.” *Enghauser Mfg. Co. v. Eriksson Eng’g Ltd.*, 6 Ohio St. 3d 31, 38 (1983) (Holmes, J., dissenting) (superseded by statute, R.C. 2744.01-10 (codifying municipal liability)). The roles of courts and other government actors is a core insight that anchors the discretionary-function doctrine.

Another insight of the doctrine is that letting courts decide broad matters of social policy invites bad policy because individual tort actions lack the relevant metrics to balance competing social values. That remains true whether the courts are well-meaning or not.

Even when courts are well-intentioned, they are likely to make bad policy by deciding cases about how the other branches should govern. “[I]f the courts were to accept common-law review on the merits of an allegedly negligent or otherwise wrongful governmental action that hinges on disputed questions of policy, the traditional legal standard of reasonableness would too

easily shade into an evaluation of political wisdom.” Gregory Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 Vill. L. Rev. 899, 919 (2010). The doctrine “prevents the judiciary from abusing tort law concepts like negligence and strict liability to substitute its judgment for the policy choices made by the political branches.” *Id.* at 900. Succinctly: “In the context of tort actions . . . these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not [reasonableness] but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.” *Kirby*, 892 S.W.2d at 408 (citations omitted).

Allowing courts to judge social policy also hampers the other branches from governing and undermines democratic values. For one thing, tort suits that “attack . . . the wisdom of [an] initial policy decision” “chill[]” the “free exercise of . . . discretion” and lessen governments’ ability “to deal effectively with the difficult policy issues confronting it on a daily basis.” *Winwood v. City of Dayton*, 37 Ohio St. 3d 282, 285-86 (1988) (superseded by statute, R.C. 2744.01-.10 (codifying municipal liability)). For another, tort suits reviewing the wisdom of government policy run contrary to majoritarian values. When courts set policy, it undermines “the rule of law by referring questions infused with policy considerations to the courts. . . . If we . . . expand governmental liability too extravagantly, we injudiciously ask jurists to step out of their constitutionally-assigned legal role and instead speak as political or moral actors. In a democratic society, questions of conscience in public policy should be reserved to the people and those they elect to office.” Sisk, 55 Vill. L. Rev. at 907.

Ohio judges are elected to apply facts to law, not sift facts to determine the best way to balance social, scientific, and budgetary priorities. That is especially true in light of the vast range of policy that tort law might challenge. This case is about transportation policy, and all the

engineering, safety, regulatory, and budget ingredients that comprise it. But tort law without immunity for policy choices would force courts to judge the wisdom of tax policy, workers' compensation policy, and licensing policy, to name just a sample. *See Ashland Cnty. Bd. of Comm'rs v. Ohio Dep't of Taxation*, 63 Ohio St. 3d 648, 656, (1992); *Hatala v. Ohio Bur. of Workers' Comp.*, 88 Ohio App. 3d 77, 81 (10th Dist. 1993); *Applegate v. Ohio Dep't of Agric.*, 19 Ohio App. 3d 221, 223 (10th Dist. 1984). Those are tasks for the other branches, not courts.

Perhaps the closest courts come to approximating policy is when employing Learned Hand's formula for negligence, which asks if the burden of a precaution is greater than the product of the expected loss and its probability. *See United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). But that formula only asks judges to weigh those variables when they are manageable. When those variables intersect with governmental policy choices, courts stand down. "The broad theme of the cases involving discretion is that a court will judge only when it perceives that it is capable of assessing the relative values of B [benefit] and PL [probability x loss] in the conduct of the defendant. . . . There are times when the public interest is so substantial in a particular governmental decision that it dwarfs other interests to the point that the relative values of B, P, and L cannot be ascertained; such a decision is discretionary." William Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law*, 60 St. John's L. Rev. 221, 271-72 (1986). The choices that legislatures, executives, and agencies make in formulating and setting policy are simply not amenable to judicial review in discrete tort suits.

All of this means that the "rules of law" clause, which codifies the distinction between government action that imposes a tort duty and action that does not, "should not be interpreted as

abolishing immunity to those certain acts which go to the essence of governing.” *Enghauser*, 6 Ohio St. 3d at 35 (pre-statutory municipal immunity case).

2. Common tools of statutory construction confirm the breadth of the discretionary-function doctrine.

Common tools of statutory construction point the same way as the text and show that the “rules of law” clause embodies a robust discretionary-function doctrine. The canons of strict construction and constitutional avoidance support this view.

Changes to the common law require a clear statement of that intent. “[T]he General Assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention.” *State ex rel. Merrill v. Ohio Dep’t of Natural Res.*, 130 Ohio St. 3d 30, 2011-Ohio-4612 ¶ 34 (citation omitted). Acts “in derogation of the common law,” “must be strictly construed” to avoid greater waiver than the plain language conveys. *See Ward v. Summa Health Sys.*, 128 Ohio St. 3d 212, 2010-Ohio-6275 ¶ 15.

This Court has applied the clear-statement principle for abrogating the common law to waivers of sovereign immunity, including other waivers of the State’s immunity. *See, e.g., Starcher v. Logsdon*, 66 Ohio St. 2d 57, 59 (1981) (“Courts of this state have previously held that this statute, . . . being in derogation of the common-law doctrine of sovereign immunity, must be strictly construed.”); *Royce v. Smith*, 68 Ohio St. 2d 106, 115 (1981) (“On a number of occasions this court has held that statutes waiving the state’s sovereign immunity are in derogation of the common law and must therefore be strictly construed.”) (Homes, J., dissenting) (collecting cases). A change to the common law of State immunity must be accomplished with a clear statement to that effect.

The waiver of sovereign immunity in the Court of Claims Act changed existing law and “abrogat[ed]” the common-law “sovereign immunity of the state.” *Reynolds*, 14 Ohio St. 3d at 70. But, as *Reynolds* explained, that abrogation stopped short of foisting tort liability on the State for the acts of running the State. The Court of Claims Act lacks a clear statement changing the common law rule that the State is not liable for acts of governing.

The canon of constitutional avoidance reinforces that view of the Act and dispels any thought that the “rules of law” clause lacks a fulsome discretionary-function doctrine. “Courts have a duty to liberally construe statutes to save them from constitutional infirmities.” *Mahoning Educ. Ass’n of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St. 3d 257, 2013-Ohio-4654 ¶ 13 (citation omitted). That is, courts must “give a statute a constitutional construction, if one is reasonably available, in preference to one that raises serious questions about the statute’s constitutionality.” *State v. Keenan*, 81 Ohio St. 3d 133, 150 (1998). When a statute might be read either as trespassing constitutional limits or as consistent with them, the consistent reading is probably the better one.

One cornerstone limit in our constitutional structure is the separation of powers. Promoting “the constitutional diffusion of power” among the three branches is the heart and soul of separation of powers. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799 ¶ 114. That diffusion applies to ODOT and the courts no less than other agencies and the courts. *See, e.g., State ex rel. City of Cleveland v. Masheter*, 8 Ohio St. 2d 11, 13 (1966) (The “General Assembly creates policy in regard to public roads and the director [of highways] executes such policy.”). This constitutional restraint informs the meaning of the “rules of law” clause.

Reading the Court of Claims Act without a full-bodied discretionary-function component would raise serious constitutional concerns because judicial review of “the political, social, and

economic judgments of an agency exercising its regulatory function” through “private tort suits” would involve “judicial intervention in policymaking.” *Varig Airlines*, 467 U.S. at 820. Avoiding that judicial intervention is why this Court in *Reynolds* described the State’s liability as not extending to “legislative or judicial functions” or “executive or planning function[s]” setting basic policy. 14 Ohio St. 3d at 70. And it is why the Florida Supreme—the first state Supreme Court to abrogate sovereign immunity—thought it “advisable to protect our conclusion against any interpretation that would impose liability on the municipality in the exercise of legislative or judicial, or quasi-legislative or quasi-judicial, functions.” *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957) (superseded by statute when Florida codified municipal liability). Indeed, the “underlying premise” for the non-waiver of immunity for government functions is that “there 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.” *Dep’t of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982); *see also* Sisk, 55 Vill. L. Rev. at 904 (In “a democratic society, reserving to the sovereign the power to consent to suit against itself ultimately means reserving the power to govern to the people.”). Respecting the boundaries of separation of powers means reading the “rules of law” clause to avoid judicial intervention in policy choices of the other branches.

The gravitational pull of separation-of-powers principles in this area is so great that, if the Court of Claims Act contained no discretionary-function doctrine, the Constitution would impose one. To illustrate, consider the Suits in Admiralty Act, a federal statute that waives the immunity of the federal government for certain maritime liabilities. *See* 46 U.S.C. 30901-30918. The Act has no discretionary-function exception, but “every circuit [has] . . . concluded that an implied discretionary function exception should be read in” because “our structural separation of powers

is a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another. *McMellon v. United States*, 387 F.3d 329, 338, 343 (4th Cir. 2004) (en banc) (citation omitted).

Separation-of-powers principles mean that the discretionary-function doctrine is an inevitable part of the landscape for tort suits against the State. The inevitability means it is irrelevant whether the limits of State immunity are constitutional or statutory. So even if the “true intent of the [1912] amendment to Section 16, Article I was to abolish sovereign immunity in its entirety,” *Garrett v. Sandusky*, 68 Ohio St. 3d 139, 144 (1994) (Pfeifer, J., concurring), the intent could not have been to impose liability for acts of governing that involve setting policy for the State. Making government play by the same rules as private parties does not mean *creating* tort liability for acts that no private party can perform. *Lifting* immunity does not mean *creating* a new kind of tort.

Ultimately, separation of powers means that the courts may not be able to remedy every wrong. *Cf. Coleman v. Portage Cty. Eng’r*, 133 Ohio St. 3d 28, 2012-Ohio-3881 ¶ 32 (“we are not unmindful that damages suffered by [plaintiffs] . . . can be devastating to property and possessions, as well as physical and mental health[,] . . . [b]ut the same is true for many other claims for which immunity attaches”). But the perceived unfairness flowing from a policy choice is not for the judiciary to correct by bending the policy. Instead the “democratic processes . . . remain available—by political means other than the judicial process—to directly redress grievances.” Sisk, 55 Vill. L. Rev. at 904.

B. The discretionary-function doctrine broadly protects the non-judicial branches’ ability to set policy, including traffic policy

Informed by the necessity of a discretionary-function doctrine, the contours of the State’s tort duty both in Ohio and elsewhere leave no doubt that there is no tort liability for policy

decision like the choices ODOT made about the State Route 32 intersection. The doctrine protects State decisions that reflect policy choices. That includes policy choices about traffic issues. And that is exactly what ODOT was doing when it made decisions about the intersection involved here.

1. The discretionary-function doctrine protects policy choices.

The discretionary-function doctrine protects “basic policy decision[s]” from liability, including “executive decision[s].” *Crawford v. State, Div. of Parole and Cmty. Servs.*, 57 Ohio St. 3d 184, 187, (1991) (citation omitted); *Hurst v. Ohio Dep’t of Rehab. & Corr.*, 72 Ohio St. 3d 325, 327 (1995) (overruled on other grounds by *Wallace*, 96 Ohio St. 3d. 266). That includes “essential acts of governmental decisionmaking,” *Wallace*, 96 Ohio St. 3d at 278, such as “adopt[ing]” policy, *Semadeni v. Ohio Dep’t of Transp.*, 75 Ohio St. 3d 128, 132 (1996), and “the exercise of judgment” in “implementing” policy, *Garland v. Ohio Dep’t of Transp.*, 48 Ohio St. 3d 10, 12 (1990). When a tort suit challenges policy choices such as “the weighing of fiscal priorities, safety, and various engineering considerations” the government is immune from the suit. *Williamson v. Pavlovich*, 45 Ohio St. 3d 179, 185 (1989) (superseded by statute, R.C. 2744.01-10 (codifying municipal liability)). At its core, the doctrine divides actionable from non-actionable government conduct by tracing the line between policy and execution. “[N]o tort action will lie . . . for those acts or omissions involving the exercise of a legislative or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision, [but] . . . once the policy has been made . . . [government] [may] be held liable, the same as private corporations and persons, for . . . negligence . . . in the performance of the activities.” *Enghauser*, 6 Ohio St. 3d at 36.

This Court’s explanation of the doctrine as tied to policy choices matches the way other courts treat similar exceptions under the common law or analogous statutes. The U.S. Supreme

Court's most recent formulation of the test emphasizes the policy grounding for the challenged decision. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. . . . The focus [is whether] . . . the actions taken . . . are susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991) (immunity "apparent" from the "face of the amended complaint"). Earlier the Court explained that the doctrine is designed to avoid "judicial intervention in policymaking." *Varig Airlines*, 467 U.S. at 820; *see also Shansky v. United States*, 164 F.3d 688, 690, 695 (1st Cir. 1999) (rejecting argument that government should have "installed a handrail" to meet current standards when it "refurbished" the property because that decision "required the unrestrained balancing of incommensurable values—including safety, aesthetics, and allocation of resources—typically associated with policy judgments").

This emphasis on policy choices accords with the formulation by state supreme courts. The Washington Supreme Court has framed the issue as whether the lawsuit challenges "the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives." *Evangelical United Brethren Church*, 407 P.2d at 444 (citation omitted). The questions relevant to that inquiry target the allegations' intersection with "basic governmental policy." *Id.* at 445. The Vermont Supreme Court says the "focus" of the immunity question "is on whether the actions taken are susceptible to policy analysis." *Johnson v. Agency of Transp.*, 904 A.2d 1060, 1063 (Vt. 2006) (citation omitted). The theme is consistent; the polestar is whether the lawsuit questions a policy choice.

2. Decisions about roadways and traffic matters are policy matters.

Unsurprisingly, traffic accidents, because they are common, are a common subject of suits against governments. That body of precedent, both in and out of Ohio, illustrates the doctrine in action in traffic cases.

Consider first this Court's cases. The Court has already decided that no liability "may be imposed" for the "lack of traffic control devices at an intersection." *Winwood*, 37 Ohio St. 3d at 283, 286. Similarly, the choice of "whether or not to install different traffic signs . . . in order to control traffic congestion" is a policy choice that does not trigger liability. *Williamson*, 45 Ohio St. 3d at 185. This reasoning follows the same logic as when applying the discretionary-function doctrine outside the traffic context. "The factors involved in determining the necessity or advisability of installing traffic control devices include the regulation of traffic patterns and traffic flow at the specific location and in surrounding areas, fiscal priorities, safety, and various engineering considerations. Thus, the decision . . . [involves] basic policy considerations" and is "immune from tort liability." *Winwood*, 37 Ohio St. 3d at 284.

Winwood and *Williams* are pre-statutory municipal cases, so their interpretation of the common law shows the background principles that R.C. 2743.02 codified. Later, when directly interpreting R.C. 2743.02, the Court "reject[ed] the notion" that ODOT could be liable for the policy decision "to replace" a traffic signal with one design instead of another. *Garland*, 48 Ohio St. 3d at 11-12. Thus, "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." *Id.* at 12. *Garland* went further, rejecting the distinct claim that a "delay in implementing" the policy choice about the traffic signal could trigger liability because "setting a timetable for implementation of a discretionary decision itself involves the exercise of judgment." *Id.* Even when the Court later found ODOT liable in tort for a decision about the roadways, it did not alter these ground rules.

When ODOT “adopt[s]” a policy to improve safety, that “basic policy decision” creates no grounds for a tort claim, but if ODOT fails to execute policy “within a reasonable amount of time,” it may be liable. *Semadeni*, 75 Ohio St. 3d at 132.

This Court’s immunity decisions regarding traffic policy merge seamlessly with cases from other States and the federal courts. The rule that “basic policy decision[s],” *Reynolds*, 14 Ohio St. 3d at 70, do not impose tort liability on a State is widely accepted. The Oregon Supreme Court has held that “state employees are generally immune from liability for alleged negligence in planning and designing highways.” *Smith v. Cooper*, 475 P.2d 78, 90 (Or. 1970). And the Florida Supreme Court has embraced the “principle that traffic control methods . . . are judgmental, planning-level decisions, which are not actionable.” *Dep’t of Transp. v. Konney*, 587 So. 2d 1292, 1295 (Fla.1991). Similarly, a Wisconsin Supreme Court decision rejected liability when a motorist alleged that an “accident occurred . . . because the county failed to erect a sign warning . . . of the likelihood of approaching traffic on the intersecting road.” *Dusek v. Pierce County*, 167 N.W.2d 246, 249 (Wis. 1969). The court reasoned that the decision about warning motorists of the intersection was “a legislative decision that must be undertaken by the county board and not by the courts.” *Id.* at 250; *see also Tex. Dep’t of Transp. v. Garrison*, 121 S.W. 3d 808, 809 (Tex. App. 2003) (government did not breach any tort duty by improving an intersection with an “upgrad[ed] . . . beacon” and “special intersection signs” instead of a “stop and go” signal even though the government had initially planned to install a stop-and-go signal).

This baseline principle that policy choices are not reviewable in tort applies even when the allegations of government fault in traffic policy are extensive. In an Oregon case, the motorist alleged negligence “in the designing and planning of the junction” and also in “continu[ing] in effect the junction as planned and designed.” *Smith*, 475 P.2d at 90-91. The

court rejected liability because the policy choices about the intersection were “dependent upon considerations that a court or jury should not consider, particularly by hindsight, such as the funds available for the project, the amount of additional land necessary to make a more gradual curve, the cost of the land, the loss of the land for recreational or agricultural purposes, the amount and kind of traffic contemplated, the evaluation of traffic and safety technical data, etc.” *Id.* at 90. In a Florida case, the alleged negligence included questions about “the installation of traffic control devices, the initial plan and alignment of roads, or the improvement or upgrading of roads or intersections.” *Neilson*, 419 So. 2d at 1077. Like the Oregon Supreme Court, the Florida Supreme Court decided that these policy choices did not expose the government to liability in tort. Those decisions involved “basic capital improvements and are judgmental, planning-level functions” not reviewable under negligence standards. *Id.*

One last case illustrates the extent of what constitutes policy when the government plans, designs, and makes decision about roadways. The D.C. Circuit reviewed a case arising from an accident on a slick road. The motorist alleged that the condition of the road reflected government negligence. The appellate court disagreed and affirmed summary judgment for the government on that theory. It reasoned that the condition of the road “could have been prevented only by reducing the traffic load, initially paving it with a different surface, resurfacing the curve entirely, or at least milling the curve to create grooves in the surface.” *Cope v. Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995). But each of those choices involved policy decisions left to the executive, not the courts. “Determining the appropriate course of action would require balancing factors such as [the road’s] overall purpose, the allocation of funds among significant project demands, the safety of drivers and other park visitors, and the inconvenience of repairs as compared to the risk of safety hazards.” *Id.*

All of these decisions draw on the same core principles that animate discretionary-function cases outside the traffic-policy context. Traffic policy, no less than policy about inspections or licensing, implicates concerns about judicial expertise and separation of powers. As the Florida Supreme Court put it, the “decision of whether to upgrade [an] intersection is a judgmental, planning-level function, to which absolute immunity applies. To do otherwise would allow the judicial branch to infringe upon the legislative and executive function of deciding where tax dollars should be allocated for our roads and highways.” *Konney*, 587 So. 2d at 1296.

3. ODOT’s choices about the State Route 32 intersection were policy choices.

ODOT’s decisions about the safety of the State Route 32 intersection fall easily into the pattern of these cases because ODOT’s choices balanced statewide traffic and roadway policy. No private actor makes choices like ODOT when it sets and shapes statewide policy for Ohio’s roadways. That conclusion follows both from the statutes setting ODOT’s duties and the facts about the actual decisions.

By statute, ODOT is charged with responsibility for statewide roadway and traffic policy. The General Assembly has assigned ODOT the authority to “develop . . . comprehensive and balanced state policy and planning to meet present and future needs for adequate transportation facilities” in Ohio. R.C. 5501.03(A)(2). That authority includes the “general supervision of all roads comprising the state highway system . . . [and the power to] alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system.” R.C. 5501.31. ODOT has general authority and responsibility for policy decisions about the construction and improvement of Ohio’s roadways.

More narrowly, ODOT has a policy involving roadway safety that focuses on prioritizing projects for improvements. ODOT policy is to evaluate all intersections for safety and rank them in terms of priority. ODOT then decides what resources can make the most safety gains for

intersections on the list. *See* Pl. Resp. to ODOT Second Mot. Sum. Judg., Chaffin Depo. at 9-10, 18-20 (Supp. 215, 217); *id.*, May Depo. at 35-36 (Supp. 208). That policy was applied to this intersection and resulted in additional safety features after the initial construction. At one point, ODOT added a flashing red-yellow light at the intersection itself. Pl. Resp. to Second Mot. Sum. Judg., Chaffin Depo. at 25-28 (Supp. 219). Later, it added a flashing warning for westbound traffic in the four-lane highway to give approaching drivers “advance notice” of an approaching crossing. *Id.* at 29 (Supp. 220). Further safety improvements were also studied and rejected. For example, ODOT initially rejected the idea of restricting left turns or crossing traffic at this intersection. *Id.* at 33-34 (Supp. 221); *see also* Pl. Resp. to ODOT First Sum. Judg. Mot., Oct. 24, 2005 Meeting Minutes at 3 (Supp. 88) (local County Engineer objected to this proposal). Selecting and choosing what safety options were appropriate for this intersection were quintessential policy choices. They are well within the discretionary-function doctrine.

ODOT makes policy choices when it determines whether a roadway is suboptimal. ODOT makes policy when it determines how, when, and whether to remedy any stretch of roadway. And ODOT obviously makes policy when it decides how to balance improving one intersection with the cost and benefits of improving any other part of the 43,000 miles of roadway it oversees. No private actor does something similar. The policy choice here is not reviewable in tort.

C. Even if the policy choices involved in the State Route 32 intersection planning were amenable to tort suits, the closest private analogies show that ODOT would not be liable here.

The discretionary-function doctrine built into the “rules of law” clause in R.C. 2743.02 prevents a tort suit against ODOT here because no private tort defendant engages in policy choices like ODOT when it designs roadways and makes later decisions about upgrading them.

But even setting that aside and looking to the most analogous rules governing private conduct, the Tenth District's decision cannot stand. Three examples prove the point.

State-of-the-art defense. In product-liability law, a defendant may be strictly liable, but several defenses rein in the duty. *See* R.C. 2307.75. One of those is a state-of-the-art defense, which shields product manufacturers from liability for failure to anticipate, and conform products to, standards that arise in the future. In Ohio, therefore, a product is not defective if, “*at the time* the product left the control of its manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover.” R.C. 2307.75(F) (emphasis added). That is, there is no liability if, “at the time of manufacture, there was not a feasible alternative design or formulation available to prevent plaintiff’s injury.” *Broyles v. Kasper Mach. Co.*, 517 Fed. App’x 345, 351 (6th Cir. 2013); *cf. DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St. 3d 149, 2008-Ohio-5327 (new standards of product liability not retroactive). So even if the Revised Code lacked a robust discretionary-function doctrine and ODOT’s liability were determined by analogy to product-liability principles, the failure to update the intersection to later-developed standards would breach no duty owed the public. The Michigan Supreme Court has confronted the intersection of government immunity and state-of-the-art and reached that holding. A plaintiff alleged that injuries could have been avoided if a “building had been up-to-date and had used state-of-the-art technology.” *Hickey v. Zezulka*, 487 N.W.2d 106, 113 (Mich. 1992). The court held that proof the building “was not up-to-date” or lacked “the most modern designs possible” could not “avoid” a “governmental immunity defense.” *Id.* So too here. The analogy to state-of-the-art law shows that ODOT is not liable for failing to upgrade this intersection beyond adding the warning light and warning signs that it did add after original construction.

Duty to upgrade. Another possible analogy—again indulging the fiction of no discretionary-function doctrine—is the very limited scope of a duty to upgrade. In the context of municipal liability, this Court has held that “a claim based on a failure to upgrade is a claim based on a failure of design and construction, for which political subdivisions enjoy immunity.” *Coleman*, 2012-Ohio-3881 ¶ 31. In the private sphere this Court has held that a repair contract does not impose a duty to discover latent defects outside the scope of the repair. *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, syl. ¶ 7 (1954); *see also* Am. Law of Prod. Liab. 3d, § 112:5 (2014) (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”) (collecting cases); Restatement (Third) of Torts: Prods. Liab. § 11 (1998) (explaining very narrow duty to recall or retrofit). There is also no general duty to refurbish a building “in order to comply with each update in the building code.” *Glynos v. Jagoda*, 819 P.2d 1202, 1211 (Kan. 1991). So, even when a building owner had earlier replaced broken glass doors, it did not have a duty to replace them all to upgrade the entire building to the then-prevailing code. *See id.* at 1205, 1211 (rejecting the suggestion to upgrade as an “onerous economic requirement”). Where the law recognizes a duty to upgrade, it is generally explicit, not implied. For example, one requirement of the Americans with Disabilities Act is an obligation to upgrade certain existing buildings by removing “architectural barriers” already in place before new regulations took effect. 28 C.F.R. 36.304(a). When policy makers decide that there is a duty to upgrade, they say so explicitly; they do not leave the choice to courts. By analogy here, ODOT was under no duty to update all intersections in the State each time a new set of standards was developed for new construction, or each time it made any changes to a particular intersection. No tort duty required that, and no statute mandated it.

Subsequent remedial measures. A final analogy—with the caveat of pretending there is no discretionary-function doctrine—comes from the rules of evidence. The subsequent-remedial-measures doctrine is based “on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 471 (7th Cir. 1984) (Posner, J.) (citation omitted). It generally excludes evidence of later changes to a design to prove “culpable conduct in connection” with an injury allegedly caused by a pre-change design. *See* Oh. R. Ev. 407. Although the rule is not a substantive rule of tort, it well illustrates the reasons that a negligence action against a private defendant would not include a “rule[] of law” that imposed an affirmative duty to upgrade whenever the defendant engaged in minor modifications to products or property. Like the subsequent-remedial-measures principle, that rule of liability would “discourage . . . added safety.” *Flaminio.*, 733 F.2d at 471 (citation omitted).

The analogy to rules of evidence is more apt here than in other immunity cases because of a specific rule applicable to highway safety. A federal law shields from evidence data compiled for the purpose of “identifying[,] evaluating, or planning safety enhancements.” 23 U.S.C. 409. The federal statute—like the subsequent-remedial-measures doctrine—recognizes that liability premised on certain assumptions retards rather than promotes safety. *See 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). Any analogy to private rules of tort liability for ODOT’s actions must account for this statute designed to promote safety. A robust discretionary-function doctrine prevents clashes with this federal statute by avoiding suits that ask courts to assess whether the choice to study roadways and make safety improvements was negligent.

D. The Tenth District’s holding subverts the discretionary-function doctrine by focusing instead on the largely irrelevant difference between maintenance and improvement.

Applying the discretionary-function doctrine here shows why the Tenth District’s judgment must be reversed. Rather than apply that doctrine, the Tenth District instead held that ODOT was not entitled to the summary judgment it secured in the Court of Claims because ODOT’s activities at the intersection involved “maintenance” rather than “improvements.” App. Op. ¶ 15; En Banc Op. ¶ 4. The Court even suggested that this distinction involves a “different context” than the discretionary-function question that has always been the core of the case. App. Op. ¶ 13. The Tenth District’s judgment rests on a rule of law that obfuscates, rather than clarifies, whether the State is entitled to the benefits of the discretionary-function doctrine. This Court should reject that rule for four reasons.

One. The distinction between “maintenance” and “improvement” bears little relation to the core question the discretionary-function doctrine asks: Was the government action a “basic policy” choice? *Reynolds*, 14 Ohio St. 3d at 70. The maintenance-improvement distinction is only useful when the conclusion is that ODOT was engaged in maintenance because maintenance largely tracks non-policy activity. But the divide says nothing about when improvements trigger liability. That question—as we show above—turns on whether the improvements involved a policy choice.

If ODOT is maintaining a road, it involves the “manner in which a basic policy decision is implemented,” not the “making of a basic policy decision.” *Semadeni*, 75 Ohio St. 3d at 132 (citations omitted). ODOT’s maintenance activity, therefore, is largely an area where its actions expose it to potential liability. *See Sobczak v. Ohio Dep’t of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324 ¶ 7 (ODOT “has a duty to maintain all highways under its supervision in a reasonably safe condition”) (citing R.C. 5511.01) (emphasis deleted). But when ODOT

improves an intersection, it may or may not be making a policy decision. If ODOT improves an intersection by installing new signs, those signs must comply with mandatory elements of the Ohio Manual of Uniform Traffic Control Devices. The specifications of the signs are not policy choices to be made at the time of installation. But installing the signs (or not) is a policy choice. When activity is improvement, not maintenance, the further question is whether the improvement involves a policy choice. The Tenth District's judgment wrongly equates the decision to make *any* improvement with the end of ODOT's policymaking decisions. Often, that is the start, not the end, of the policy choices.

The decision to improve a roadway is a policy choice (by choosing that stretch of road over another), but that hardly ends the policy choices that must balance “the regulation of traffic patterns and traffic flow at the specific location and in surrounding areas, fiscal priorities, safety, and various engineering considerations.” *Winwood*, 37 Ohio St. 3d at 284; *see also Cope*, 45 F.3d at 451 (“Determining the appropriate course of action would require balancing factors such as [the road's] overall purpose, the allocation of funds among significant project demands, the safety of drivers and other[s], . . . and the inconvenience of repairs as compared to the risk of safety hazards.”). The Tenth District's rule leaves no room for ODOT to make policy choices that involve small improvements to many intersections rather than all improvements to fewer intersections. That is the classic role of an executive administrative agency, and the Tenth District was wrong to submit that choice to the Court of Claims for review through a tort suit.

Two. The Tenth District's error in crafting an unhelpful rule of law is also apparent in light of other cases that have rejected the rule. The cases rejecting the Tenth District's approach do so both explicitly and implicitly.

Explicitly, several courts have rejected as unhelpful the distinction between maintenance and improvement. The D.C. Circuit explicitly refused to engage the parties’ “debate over whether the failure to maintain adequate skid resistance is a question of *design* or *maintenance*.” *Cope*, 45 F.3d at 450 (emphasis added; internal quotation marks omitted). That distinction, the court held, “would divert [it] from the proper analysis”—whether the alleged negligence was “the kind of discretion that implicates social, economic, or political judgment.” *Cope*, 45 F.3d at 450 (internal quotation marks omitted). Similarly, the Vermont Supreme Court refuses to focus on “isolated repair[s]” to the roadways that plaintiffs may call maintenance in favor of asking whether the challenged government action “represent[ed] a policy judgment based on experience and the weighing of multiple factors.” *Estate of Gage v. State*, 882 A.2d 1157, 1162 (Vt. 2005). The Tenth District’s rule is not useful because it misdirects the analysis from the core question of whether the action represents a policy decision.

Implicitly, several courts have rejected the Tenth District’s rule because it is indistinguishable from a duty to upgrade whenever standards for road construction are updated. Courts around the country reject that approach. The Florida Supreme Court concluded that its “legislature had no intent to mandate that all governmental entities immediately upgrade and improve all existing roads to comply with” new construction standards. *Neilson*, 419 So. 2d at 1078. In a later case applying *Neilson*, the Court reversed a lower court holding that “effectively held that the failure to upgrade the intersection by installing a flashing beacon was a proper claim and not protected by the doctrine of sovereign immunity.” *Konney*, 587 So. 2d at 1293. A New York appeals court rejected as “a major undertaking,” a duty to bring a roadway up to “today’s enlightened criteria” because the roadway “did comply with the standards applicable when it was planned and built.” *Kaufman v. State*, 275 N.Y.S.2d 757, 758 (N.Y. App. Div. 1966); *see also*

McDevitt v State of New York, 1 N.Y.2d 540, 545 (1956) (“existing highway signs lawfully installed prior to the resolution adopting the manual and in conformity with the rules and regulations when erected and which are in good serviceable condition at the time of the accident, are adequate to provide a warning to the reasonably careful driver”) (describing earlier holding).

Three. The Tenth District’s rule is wrong because it is unworkable. If installing a single warning sign along the road imposes a duty to change the grade of an intersection or a duty to relocate that intersection, ODOT will essentially have a duty to upgrade almost all roadways to current standards. That is particularly true because improvements may be as minor as adding signage, and may include actions that are not obviously improvements to the roadway. What amount of improvement will require ODOT to upgrade the entirety of the roadway? Is installing a sign enough to trigger ODOT’s duty to redesign and reconstruct the entire intersection? What if ODOT installs other non-roadway improvements such as cable barriers or guardrails? What if ODOT installs raised pavement markings to illuminate the center line, conducts diamond grinding of the roadway to improve skid resistance, adds rumble strips to alert motorists to traffic issues ahead? Which of these imposes a duty to upgrade the entire roadway? Surely some of these do not trigger a full-dress rebuilding of an intersection or stretch of roadway. But which ones? We do not know. Under the Tenth District’s rule, uncertainty reigns.

The Tenth District’s distinction is also unhelpful because it is too easily manipulated by characterizing a lack of improvement as maintenance. An Oregon Supreme Court opinion illustrates. There the plaintiff alleged negligence in the lack of maintenance. The allegation meant maintenance “in the sense that the defendants continued in effect the junction as planned and designed, including the planned and designed safety precautions or lack of safety precautions.” *Smith*, 475 P.2d at 91. The court affirmed governmental immunity. *Id.* Similar,

although not a traffic case, is this Court’s decision in *Coleman*. Reversing a lower court that had accepted the argument, this Court rejected a “creative . . . attempt to characterize . . . claims as ones based on maintenance” that were really claims about the “failure to upgrade.” 2012-Ohio-3881 ¶ 31. A distinction so easy to manipulate, at times successfully, is not a distinction worth preserving.

Contrast the Tenth District’s rule with the rule embraced by this and many other courts that policy choice is the touchstone of the discretionary-function doctrine. That simplified rule offers bright lines 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. There should be no need to wrestle with the rather difficult question of whether a change is “maintenance” or “improvement” when the change itself complies with current standards. It is enough that the change is done to current design and 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. Those judgments require engineering and resource questions that ODOT must evaluate for all 43,000 miles of roads it oversees. Those judgments are appropriately left to ODOT’s administrative policy expertise, not a court focused *only* on deciding an individual tort suit. 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 unworkability of the Tenth District’s rule is perhaps best confirmed by its own precedents. Before this case, the Tenth District had often distinguished between maintenance and *substantial* improvement, observing that the duty to upgrade existed only for substantial (not ordinary) roadway improvements. See, e.g., *Estate of Morgan v. Ohio Dep’t of Transp.*, 10th Dist. Nos. 10AP-362, 10AP-382, 2010-Ohio-5969 ¶ 12; *Sobczak*, 2010-Ohio-3324 ¶ 7; *Hurier v. Ohio Dep’t of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499 ¶ 29. In this case, however, the Tenth District 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. App. Op. ¶ 15. That older distinction came closer to the relevant question of whether an ODOT decision represents a policy choice or not, but it too was imperfect because the substantiality of an improvement did not perfectly trace the line between policy and carrying out policy. But whatever merit the divide between maintenance and substantial improvement had, the Tenth District has discarded it in favor of a rule that is *less* connected to the root question for discretionary functions. The Tenth District’s new distinction is not worth preserving.

Four. The Tenth District has previously rejected the rule it now embraces. The court had earlier ruled that ODOT has no general duty to “implement state of the art” roadway improvements. *Lunar v. Dep’t of Transp.*, 61 Ohio App. 3d 143, 149-50 (10th Dist. 1989); see also *Bowman v. Ohio Dep’t of Transp.* 10th Dist. No. 83AP-516, 1984 WL 5878 (Aug. 30, 1984). That principle—uncited below—should have led the Tenth District to affirm the Court of Claims judgment for ODOT. Instead, the court’s focus on a largely meaningless distinction between maintenance and improvements drove the decision. This Court should reverse to correct that judgment and erase the erroneous rule of law. In the Tenth District, what is old should be new again.

* * * *

The Tenth District's judgment subjects the State to liability in a way incompatible with the separation of powers, the precedent of this Court, the persuasive precedent of other courts, and even with prior Tenth District decisions. When the issue is whether the State acted as the State by governing, the relevant question is whether the State made a policy choice, not whether the State engaged in improvement instead of maintenance. The State made policy choices when it acted here. Those actions are not amenable to a tort suit. The judgment below should be reversed.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Tenth District below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Defendant-Appellant Ohio Department of Transportation was served by U.S. mail this 28th day of October, 2014, upon the following counsel:

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s/Eric E. Murphy
Eric E. Murphy
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APPENDIX

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. 14-0862
On Appeal from the
Franklin County
Court of Appeals,
Tenth Appellate District
Court of Appeals
Case No. 12AP-828

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
OHIO DEPARTMENT OF TRANSPORTATION**

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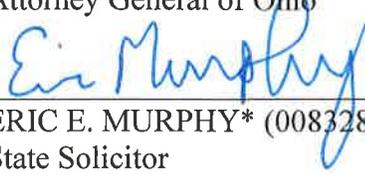
Defendant-Appellant Ohio Department of Transportation gives notice of its jurisdictional appeal to this Court, pursuant to Ohio Supreme Court Rule 5.02 and 7.01, from a decision of the Tenth District Court of Appeals captioned *Paul Risner as Co-Administrator of the Estate of Amber Risner, a Deceased Minor, et al. v. Ohio Department of Transportation, et al.*, No. 12AP-828 issued on December 24, 2013 and journalized on December 30, 2013. A timely application for reconsideration and en banc review was filed on January 9, 2014. The Tenth District denied the application for reconsideration and en banc review and issued and journalized that decision on April 10, 2014.

Date-stamped copies of the Tenth District's Journal Entry and Memorandum Decision denying reconsideration and en banc review, the Tenth District's Judgment Entry and Decision, and the Court of Claims' decisions are attached as Exhibits 1 through 6, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case raises substantial constitutional questions and questions of public and great general interest.

Respectfully submitted,

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Ohio Department of Transportation

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant Ohio Department of Transportation was served by U.S. mail this 27th day of May, 2014, upon the following counsel:

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et al.


Eric E. Murphy
State Solicitor

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.

:

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on April 10, 2014, it is the order of this court that ODOT's January 9, 2014 application for reconsideration and application for en banc review are denied.

BROWN, TYACK, & CONNOR, JJ.

/s/ Judge

Judge Susan Brown

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Apr 10 2:24 PM-12AP000828

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

The image shows a handwritten signature in cursive that reads "Susan Brown". To the right of the signature is a circular official seal. The seal features a central emblem, possibly a scale of justice, surrounded by text that is partially obscured but appears to include "TENTH DISTRICT COURT OF APPEALS".

/s/ Judge Susan Brown, P.J.

Electronically signed on 2014-Apr-10 page 2 of 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

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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.

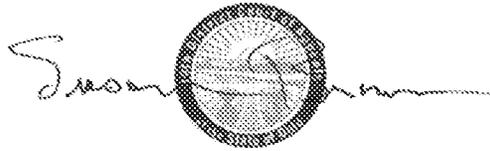
Application for reconsideration and application for en banc review denied.

TYACK and CONNOR, JJ., concur.

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 with some illegible text or a logo inside.

/s/ Judge Susan Brown, P.J.

Electronically signed on 2013-Dec-30 page 2 of 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.	:	

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

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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.



Court of Claims of Ohio

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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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¶ 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:

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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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FILED
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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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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 *Meniffee 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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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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2743.02 State waives immunity from liability.

(A)

(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, that the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3)

(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions that have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to the extent that its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of the indemnified person's duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify those persons, or to agree to so indemnify, shall reserve any funds that are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if the hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for ten thousand dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad

faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) If a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671 , et seq., the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.