[Cite as *Johnson v. Ohio Dept. of Transp.*, 2008-Ohio-4221.]

Court of Claims of Ohio

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DEAN JOHNSON, etc.

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2004-09398

Judge Joseph T. Clark
Magistrate Lee Hogan

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this wrongful death action alleging claims of qualified nuisance and negligence per se. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} This case arises as a result of the death of plaintiff's spouse, Sandra Johnson,[1] on October 5, 2002, in a traffic accident at the intersection of Morse Road and State Route 310 (SR 310) in Licking County, Ohio. Johnson was traveling eastbound on Morse Road when she approached the intersection. The eastbound and westbound traffic on Morse Road was controlled by stop signs on both the right and left side of the road. Cross traffic heading northbound and southbound on SR 310 had no stop signs and could proceed through the intersection. The stop sign on the right side of Morse Road had an attached supplemental sign with black opposing arrows on a white background and the wording "cross traffic does not stop." In addition, there was a flashing red light for eastbound and westbound traffic on Morse Road and a flashing yellow light for northbound and southbound traffic on SR 310. On the northwest corner of the intersection there was a two-story residential dwelling. According to plaintiff, there was also a stop bar painted on the surface of Morse Road at a distance of approximately 19.75 feet from the western edge of the intersection.

[1]For purposes of clarity, use of the term "plaintiff" in this case refers to Dean Johnson and references to "Johnson" are to plaintiff's decedent, Sandra Johnson.

{¶ 3} When Johnson reached the intersection, there was also a vehicle approaching from the right, traveling north on SR 310. That vehicle, which was being operated by Donald Jordon, was stopped at the intersection for a left turn onto Morse Road. Another vehicle, which was being operated by Debra Guiler, was approaching the intersection traveling south on SR 310. Johnson was making a first-time trip through the area and the intersection was not familiar to her. The parties have speculated that, because Jordon's vehicle was stopped, Johnson may have misinterpreted the traffic signals and believed that the intersection was a four-way stop. Johnson proceeded into the intersection and was struck by the Guiler vehicle; the impact thrust her vehicle to the south on SR 310 where it collided with Jordan's vehicle. Johnson and her mother, who was a passenger in the vehicle, were killed instantly.

{¶ 4} Plaintiff maintains that defendant, Department of Transportation (ODOT), negligently created and maintained a qualified nuisance at the Morse Road and SR 310 intersection. Specifically, plaintiff contends that, some time after 1996, defendant moved the stop bar on the eastbound lanes of Morse Road from a distance of approximately 4.5 feet from the intersection to the 19.75 foot distance that allegedly existed at the time of the accident. Plaintiff further contends that the residence on the northwest corner of the intersection created a sight obstruction for drivers who were stopped at the stop bar and who were looking left for traffic that might be traveling south on SR 310. In addition, plaintiff argues that the 55 mile per hour (mph) speed limit on SR 310 contributed to the nuisance. Plaintiff argues that ODOT knew of the dangerous

conditions that existed at the intersection and that it failed to take appropriate actions to alleviate those conditions, such as moving the stop bar back to the 4.5 foot distance, lowering the speed limit on SR 310, changing the intersection to a four-way stop, or using its powers of eminent domain to purchase the residence and destroy it, thereby eliminating the sight obstruction.[2] Further, plaintiff contends that defendant was negligent per se in failing to follow its own guidelines for speed limits on approaches to intersections and in failing to comply with its mandatory duty under R.C. 4511.21(H) to lower the speed limit on SR 310.

{¶ 5} In response to plaintiff's claims, defendant contends that Johnson's failure to yield the right-of-way at the intersection was the sole proximate cause of her death; that if Johnson's view of southbound traffic on SR 310 were obstructed, she had a duty to pull forward and look to assure that she could proceed safely; that defendant's design and maintenance of the roadway complied with all design standards and specifications; and that it is immune from suit for decisions involving the exercise of engineering judgment or discretion.

{¶ 6} It is well-settled that a claim of qualified nuisance is premised upon negligence.[3] A qualified nuisance is a lawful act "so negligently or carelessly done as to

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[2]To the extent that subsequent changes were made, and that plaintiff offered such evidence to prove that, had the changes been made prior to the accident, the accident would have been less likely to have occurred, such evidence has not been considered in rendering this decision. Evid.R. 407.

[3]The court notes that plaintiff's nuisance claim is premised upon an exception to the governmental immunity provisions set forth under former R.C. 2744.02(B)(3). Inasmuch as that statute

create a potential and unreasonable risk of harm, which in due course results in injury to another. * * * Under such circumstances, the nuisance arises from a failure to exercise due care. * * * Thus, the allegations of nuisance and negligence therefore merge, as the nuisance claims rely upon a finding of negligence." *Hurier v. Ohio Dept. of Transp*., Franklin App. No. 01AP-1362, 2002-Ohio- 4499, ¶21. (Citations omitted.)

{¶ 7} In order to prevail in a wrongful death claim predicated upon negligence, plaintiff must prove by a preponderance of the evidence that defendant owed 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 death. *Galay v. Ohio Dept. of Transp*., Franklin App. No. 05AP-383, 2006-Ohio-4113, ¶7.

{¶ 8} "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*. (1990), 67 Ohio App.3d 723, 729. "The scope of ODOT's duty to ensure the safety of state highways is more particularly defined by the Ohio Manual of Uniform Traffic Control Devices [OMUTCD], which mandates certain minimum safety measures. Furthermore, R.C. 4511.10 and 4511.11(D) specifically require that traffic control devices placed on Ohio's roadways conform with the manual's specifications." *State Farm Automobile Insurance Co. v. Ohio Dept. of Transp.* (June 8, 1999), Franklin App. Nos. 98AP-936, 98AP-1028, 98AP-960, 98AP-1536, 98AP-976, 99AP-48. (Citations

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pertains to liability of political subdivisions, and not to state agencies, it is inapplicable to the instant case. Plaintiff may nevertheless maintain a nuisance action against the state; however, there is no similar nuisance exception to the state's discretionary immunity. See, e.g., *Hurier v. Ohio Dept. of Transp.* infra; *Rahman v. Ohio Dept. of Transp*., Franklin App. No. 05AP-439, 2006-Ohio-3013, ¶27.

omitted.) "[N]ot all portions of the manual are mandatory, thereby leaving some areas within the discretion and engineering judgment of [defendant.]" Leskovac v. Ohio Dept. of Transp. (1990), 71 Ohio App.3d 22, 27, citing *Perkins v. Ohio Dept. of Transp*. (1989), 65 Ohio App.3d 487, 491.

{¶ 9} Of central importance to plaintiff's claims is the placement of the alleged stop bar. The court notes that the evidence that the stop bar did exist at the time of the accident, that it was clearly discernable, and that it was placed by ODOT, is not persuasive. Assuming those facts, arguendo, it is clear that the residence on the northwest corner would have obstructed the view of southbound traffic on SR 310 for drivers stopped eastbound on Morse Road at 19.75 feet from the intersection. Jack Holland, an expert in accident investigation and reconstruction, who testified on behalf of plaintiff, related that the speed of Johnson's vehicle at the point of impact was consistent with an average acceleration from a stop bar located at 19.75 feet. Based upon his calculations, Holland opined that Johnson had stopped at that distance from the intersection before proceeding. He also testified that at 19.75 feet, Johnson would not have been able to see Guiler's vehicle until it was within 330 feet of the intersection. Holland characterized the intersection as "unforgiving" based upon the limited amount of time that Johnson would have had to see and react to southbound traffic on SR 310 before proceeding.

{¶ 10} Plaintiff also argued that, pursuant to R.C. 4511. 43,[4] Johnson was legally required to stop at the stop bar where her sight line was obstructed, and that there was evidence that she did so; thus, she fulfilled her duty and there was no other traffic device that would have signaled her to pull forward and stop again. Plaintiff contends that the combination of these factors, the stop bar at 19.75 feet and the known sight obstruction, are evidence that ODOT negligently created an unreasonable risk of harm at the intersection. The court disagrees.

{¶ 11} The plain language of R.C. 4511.43 requires that, after stopping at a stop bar, a driver must "yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard." In addition, the common law of Ohio imposes a duty of reasonable care upon all motorists that includes the responsibility "to observe the environment in which they drive, not only in front of their vehicle, but to the sides and rear as the circumstances may warrant." *Hubner v. Sigall* (1988), 47 Ohio App.3d 15, 17, citing *State v. Ward* (1957), 105 Ohio App. 1; *Scott v. Marshall* (1951), 90 Ohio App. 347, 365. Plaintiff's own expert conceded that "if [Johnson] looked left, she certainly would not have pulled out because

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[4] R.C. 4511.43(A) provides in pertinent part that: "every driver of a vehicle * * * approaching a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. *After having stopped, the driver shall* yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard *during the time the driver is moving across or within the intersection or junction of roadways.* (Emphasis added.)

there's a vehicle coming at her at 80 feet a second, close enough to be an immediate hazard that she shouldn't have pulled out." Jordon testified in his deposition that he was "surprised" when Johnson pulled into the intersection in front of him, not only because he had the right-of- way, but also "because there was a southbound vehicle approaching the intersection and very close to it." Holland also conceded that both Jordon and Guiler had the right-of-way at the intersection and that "some responsibility" for the accident was attributable to Johnson.

{¶ 12} Based upon the totality of the evidence presented, the court is persuaded that Johnson had sufficient, albeit limited, time and opportunity to avoid the accident if she had assured that she had the right-of-way before proceeding into the intersection. Specifically, the weight of the evidence supports the conclusion that Johnson failed either to look to her left and observe Guiler's vehicle approaching the intersection or, if she did observe it, to properly interpret the traffic control devices at the intersection and believed that Guiler would stop. In short, the court is convinced that Johnson's own negligence was the sole proximate cause of the accident.

{¶ 13} However, even assuming that the accident could have been prevented by placement of the stop bar closer to the intersection, "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.* (Mar. 14, 1996),

Franklin App. No. 95API07-8844. See also *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App.3d 30, 33-34. Assuming further that ODOT was not entitled to immunity for that decision, the court finds that placement of the stop bar at 19.75 feet was both reasonable and supported by sound engineering judgment.

{¶ 14} As explained by defendant's expert, David Holstein, P.E., Administrator of ODOT's Office of Traffic Engineering, stop bars are placed in accordance with standard "turning templates" that are used to determine how much distance is required to allow vehicles to safely navigate turns. Holstein related that a sufficient turning radius prevents vehicles from pulling into an intersection and having to stop (while potentially being exposed to on-coming cross traffic), and then having to wait for traffic to back up so that a turn can be completed safely. Holstein testified that the templates applicable to the Morse Road/SR 310 intersection provided for a stop bar at 20 feet, but acknowledged that OMUTCD guidelines allowed for a placement range of 4 to 30 feet. According to Holstein, the use of turning-template standards, coupled with the duty imposed upon drivers to assure that their right-of-way is clear before entering an intersection, complied with engineering and operational practices for placement of a stop bar at 19.75 feet and did not render the intersection unsafe. The court finds that Holstein's testimony was competent, credible, and persuasive on that issue.

{¶ 15} Plaintiff has also argued that ODOT was negligent per se in failing to follow the OMUTCD mandates for safe speed limits on approach to intersections. With respect to the OMUTCD standards, Holland based his opinions upon Form WS-7 set

forth under section 2N-52 of the manual. (Plaintiff's Exhibit 9.) Holland testified that, using the WS-7 formula, a sight distance of 565 feet was required for approach to an intersection at 55 mph, or approximately 235 feet farther than the sight distance that existed with the stop bar located at 19.75 feet. According to Holland, the WS-7 formula would dictate a 35 mph maximum speed limit for southbound vehicles on SR 310. Holland calculated that Johnson's vehicle would have easily proceeded through the intersection without incident if Guiler had been traveling at 35 mph. Moreover, Holland testified that even with a stop bar at 19.75 feet and a sight obstruction, the accident would not have happened if a 35 mph speed limit had been in effect.

{¶ 16} The court notes that, although Holland was competent and credible in his area of expertise, he was not competent to offer an opinion on appropriate design or posting of speed limits for the intersection inasmuch as he did not have an engineering background. Further, the form relied upon by Holland, captioned "Maximum Safe Speed for Intersection Approach" included a prominent parenthetical notation that the form was "For Use of Advisory Speed Sign." Section 2N-52 provides in relevant part that such signs are "intended for use to supplement Warning Signs. * * * The plate *may be used* in conjunction with any standard yellow Warning Sign * * * shall [not] be used alone * * * [and] shall not be erected until the recommended speed has been determined by accepted traffic engineering procedures. * * * At intersections, safe

speeds *may be determined* according to the criteria set forth in Figure WS-5."[5] (Emphasis added.)

{¶ 17} According to the language of Section 2N-52, both the use of advisory speed plates and the method of determining safe speeds at intersections were discretionary acts. Holstein testified that in his experience he had never seen a speed limit lowered at an intersection such as SR 310 and Morse Road, and opined that drivers would simply ignore an advisory speed limit posted at that location. He also offered that in his experience drivers tend to travel at a speed they are comfortable with and that posting a particular speed limit does not guarantee that it will be obeyed. Further, the posted speed limit of 55 mph at the intersection was dictated by R.C. 4511.21.[6] Thus, the court concludes that ODOT did not violate any mandatory duty under the OMUTCD with respect to changing the approach speed at the intersection.

{¶ 18} Plaintiff has further argued that ODOT was negligent per se in failing to comply with its mandatory duty under R.C. 4511.21(H) to lower the speed limit on SR 310. That section provides in relevant part that: " [w]henever the director determines *upon the basis of a geometric and traffic characteristic study* that any speed limit set

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[5]The version of the OMUTCD that was in effect at the time of the accident designated the form relied upon by plaintiff's expert as WS-5 rather than WS-7. The forms are captioned identically and both contain the same parenthetical notation.

[6]R.C. 4511.21(B)(5) provides in relevant part that: "It is prima-facie lawful, in the absence of a lower limit declared pursuant to this section by the director of transportation * * * for the operator of a motor vehicle, * * * to operate the same at a speed not exceeding the following: * * * Fifty-five miles per hour on highways outside of municipal corporations * * *." It is not disputed that the Morse Road/SR 310 intersection was located in a rural area.

forth in divisions (B)(1)(a) to (D) of this section is greater or less than is reasonable or safe * * * the director shall determine and declare a reasonable and safe prima-facie speed limit * * *." Although plaintiff's expert opined that the 55 mph speed limit was unsafe, plaintiff did not present any evidence that the necessary study had been conducted or that the director of ODOT had made a determination that the speed limit was unsafe prior to the accident. Accordingly, the court concludes that ODOT did not violate any mandatory duty under R.C. 4511.21(H) with respect to changing the speed limit on SR 310.

{¶ 19} In sum, the court finds that plaintiff failed to prove by a preponderance of the evidence that ODOT negligently created or maintained an unreasonable risk of harm at the Morse Road/SR 310 intersection, or that it failed to comply with any mandatory duty owed under either the OMUTCD or R.C. 4511.21(H) that would render it negligent per se. Rather, the court finds that the negligent driving of plaintiff's decedent was the sole proximate cause of the accident. Judgment is recommended in favor of defendant.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or

conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

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LEE HOGAN
Magistrate

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LH/cmd
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