

[Cite as *Bennett v. Ohio Dept. of Transp.*, 2005-Ohio-7011.]

IN THE COURT OF CLAIMS OF OHIO
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CORRINIA BENNETT, Admx., etc. :
Plaintiff : CASE NO. 2001-05006
v. : Judge J. Craig Wright
DEPARTMENT OF TRANSPORTATION : DECISION
Defendant :
: : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this cause of action against defendant, Ohio Department of Transportation (ODOT), alleging negligence in that ODOT failed to properly position traffic control and warning devices. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. The case came on for trial October 3-5, 2005, and then reconvened October 14, 2005, for the testimony of defendant's expert.

{¶ 2} The facts of the case are relatively straightforward. Plaintiff's decedent, Corrinia Barnes, was injured and subsequently died after the car she was driving was struck broadside by another vehicle. The accident happened at the intersection of State Route 50 (SR 50) and State Route 690 (SR 690) in Athens County, Ohio. SR 50 was oriented in an east-west direction while SR 690 intersected it in a north-south pattern. For several months prior to the accident, SR 50 had been undergoing a construction and widening project whereby the existing two-lane rural roadway was expanded to a four-lane highway divided by a grass median. As part of the project, ODOT completely reconstructed the eastbound and westbound lanes. The eastbound lanes were completed first and,

while the westbound lanes were being constructed, ODOT maintained travel through the area by diverting all traffic on SR 50 onto the newly built two eastbound lanes such that eastbound traffic traveled in one lane and the other lane was used by westbound traffic. During this phase of the project, drivers coming from SR 690 southbound who intended to turn onto SR 50 had to travel across the barricaded westbound lanes and then stop at a temporary stop sign placed in the median before turning left or right onto SR 50.

{¶ 3} On the day of the accident, ODOT had completed the work on the westbound lanes and all westbound SR 50 traffic was directed onto the newly opened westbound lanes. Both eastbound lanes of SR 50 were similarly limited only to eastbound traffic. Prior to opening the westbound lanes, the temporary stop sign was removed from the median and a permanent stop sign was placed on SR 690 where it intersected with SR 50.

{¶ 4} According to testimony from the passenger in the car that collided with decedent's vehicle, decedent drove across the two lanes of westbound traffic without stopping at the stop sign or yielding to oncoming traffic. The passenger, Mike Bouchard, stated that he had first noticed decedent's car when it was coming down from the north on SR 690 toward SR 50. According to Bouchard, the decedent not only failed to stop at the permanent stop sign at southbound SR 690 and SR 50, she failed to look right or left, and as a result, she failed to notice oncoming traffic which included a westbound tractor-trailer. Bouchard related that decedent was staring straight ahead as she drove, he specifically remembered that he was looking at decedent's left ear immediately prior to the crash.

{¶ 5} An Ohio State Highway Patrol (OSHP) trooper who investigated the accident verified the placement of the following signs on southbound SR 690 before it intersected with SR 50: two

"stop ahead" signs were located on either side of the roadway approximately 700 feet before the intersection; another sign bearing the visual symbol of a stop sign was in place on the right side of the road; and finally, a permanent stop sign was located at the intersection several feet off to the right side of the roadway.

{¶ 6} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed plaintiff's decedent a duty, that it breached that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶ 7} There was a great deal of testimony concerning the placement of the permanent stop sign and the other warning signs. It is undisputed that the stop sign was not placed precisely where the project plans had specified. The evidence established that the sign was positioned farther off to the right side of the road and a few feet closer to SR 50 than was called for in the plans. "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 ('manual'), 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." (Citations omitted.) *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. Not all portions of the manual are mandatory, thereby leaving some areas within the discretion and engineering judgment of defendant. *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App.3d 487, 491.

{¶ 8} Even though the sign was placed farther off the edge of

the roadway than the plans called for, the court finds that the sign placement did not violate the Ohio Manual of Uniform Traffic Control Devices (OMUTCD). In addition, photographs and videotape presented at trial established that the stop sign was clearly visible to SR 690 traffic, as were the signs warning of a stop ahead. Moreover, the presence of all signs on the day of the accident was duly noted by the OSHP trooper. The court notes that decedent's failure to heed the warnings or to obey the stop sign may well have been understandable given her knowledge of the area and the history of prolonged construction activity at the intersection. However, decedent's failure to look right or left before proceeding over the lanes of SR 50 cannot be excused.

{¶ 9} Indeed, decedent's son, James Barnes, testified that in his experience during the construction project, drivers were supposed to stop at the intersection of SR 690 and SR 50, look both ways to determine if any construction vehicles were oncoming, and then cross over to the median and stop again. Another witness familiar with the area, Mary Morgan, testified that SR 690 sloped downward toward SR 50 and that it was her practice to decelerate while approaching the intersection and proceed with caution across the westbound lanes to the median. The court finds that decedent's failure to stop or to look both ways before proceeding across the westbound lanes of SR 50 was a proximate cause of the accident.

{¶ 10} Mr. Hanscom, plaintiff's expert in traffic control devices, testified quite convincingly that ODOT created a hazard by opening up the lanes of travel and reconfiguring the traffic flow without providing proper notice to the motoring public. Plaintiff argues that such notice could have been accomplished by utilizing flaggers and/or portable changeable message signs equipped with flashing lights and text announcing the newly opened lanes.

Although the state is not an insurer of the safety of its highways, the state has a duty to maintain its highways in a reasonably safe condition. *Knickel v. Dept. of Transp.* (1976), 49 Ohio App.2d 335, 339. ODOT has the duty to maintain the system of highways free from unreasonable risk of harm by exercising ordinary, reasonable care. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42.

However, "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.

{¶ 11} More recently, the Tenth District Court of Appeals revisited the issue of ODOT's immunity when it is exercising its discretionary, planning-type function. In reviewing prior case law, the court noted that "***, it is not our role, nor that of the trial court, to second-guess ODOT's discretionary choice of one reasonable option over another. *** [ODOT] had several available options which could have been utilized to diminish the possibility of accident of which defendant chose one. *** Thus, despite the preference of [plaintiffs'] expert, it was within ODOT's discretion to determine the best alternative." *Dunlap v. W.L. Trucking Co.*, 161 Ohio App.3d 51, 60, 2005-Ohio-2386, citing *Pottenger v. Ohio Dept. of Transp.* (Dec. 7, 1989), Franklin App. No. 88AP-832.

{¶ 12} In the instant case, while it is very possible that the implementation of another option may well have prevented this accident, this court cannot impose liability upon ODOT for "exercising its discretion to select one available reasonable option over another." *Id.* As a result, the court finds that ODOT's failure to utilize advisory "changed condition" signage did not constitute a breach of its duty of care.

J. CRAIG WRIGHT
Judge

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