[Cite as *Cherok v. Ohio Dept. of Transp., Dist. 4*, 2006-Ohio-7168.]

IN THE COURT OF CLAIMS OF OHIO

JAMES CHEROK	:	
Plaintiff	:	
v.	:	CASE NO. 2006-01050-AD
DEPT. OF TRANSPORTATION, DISTRICT 4	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff, James Cherok, asserted he suffered property damage to his automobile on December 1, 2005, while traveling through the intersection of Strausser Road and State Route 241, in Stark County. Specifically, plaintiff pointed out the right side lower control arm and sway bar link of his 2000 Dodge Stratus was bent when the vehicle hit a "dip" at the junction of State Route 241 and Strausser Road. Plaintiff noted he was traveling west on Strausser Road at about 35 mph as he approached the intersection with State Route 241, a north-south roadway. Traffic control at the intersection of Strausser Road and State Route 241 consists of automated signal lights. Plaintiff related, "[t]here is a dip at the junction of Route 241 both on the east and west sides, where it meets the 'lower' Strausser Road." Plaintiff further related, "[a]s I proceeded through the intersection the car was elevated over Route 241 and came down hard into the dip at the intersection with Strausser Road." According to plaintiff, his car momentarily became airborne while moving across State Route 241 and the underside of the vehicle struck a "dip" or roadway depression at the

junction with Strausser Road.

{¶ 2} Plaintiff submitted photographs of the intersection of Strausser Road and State Route 241. These photographs depict a roadway area where State Route 241 appears to be at a slightly higher elevation than Strausser Road. The approximate location where plaintiff's car struck against the roadway pavement is at the bottom of an inclined portion of Strausser Road. The variances in elevation between the roadway surfaces of Strausser Road and State Route 241 as shown in plaintiff's photographs appear to be products of roadway engineering and design. These photographs taken several weeks after plaintiff's December 1, 2005, incident depict an asphalt type layered material applied on both sides of State Route 241 where this roadway intersects with Strausser Road. Plaintiff observed the asphalt layer was not put on the roadway surface, "until sometime after I called to complain about this intersection and the damage to my car."

{¶ 3} Plaintiff filed this complaint seeking to recover $212.50, the total cost of automotive repair he incurred, plus $25.00 for filing fee which he paid. Plaintiff contended he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition at the highway intersection. Plaintiff asserted DOT should have posted signs to warn motorists of the condition of the intersection from Strausser Road to State Route 241. No signs were posted at the time of plaintiff's December 1, 2005, property damage event.

{¶ 4} Subsequently, in his response to defendant's investigation report, plaintiff stated his car was damaged when, "I hit the dip in the road and came down on the crown of State Route 241." Plaintiff offered, "[i]t is impossible to travel through this intersection at the posted speed limit without the possibility of hitting the crown the wrong way and damaging your vehicle." Plaintiff reasserted a warning or advisory sign was needed to make motorists aware of the potential for damage at this intersection. Plaintiff contested any DOT assertion that the roadway at the intersection was properly maintained. Plaintiff surmised motorists who drive through the intersection at the posted speed limit are traveling too fast for the road conditions. Plaintiff suggested the intersection at Strausser Road and State Route 241 was defectively designed, constructed, and maintained. Plaintiff did not produce additional evidence to substantiate his contention regarding defective design, construction, or maintenance.

{¶ 5} Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. Defendant has the duty to maintain its highway in a reasonable safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 6} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St. 3d 79, 81, 2003-Ohio-1573, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77. Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶ 7} DOT's duty in placing signs to warn motorists of specific conditions of particular roadway areas is established by the Ohio Manual of Uniform Traffic Control Devices for Streets and Highways ("Manual"). *Dunn v. Ohio Dept. of Transp.* (Jan. 13, 1992), Ct. of Claims NO. 90-07280, unreported. The scope of defendant's duty to ensure the safety of state highways is defined by the Manual. *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App. 3d 22, 27, 593 N.E. 2d 9. Certain portions of the Manual are permissive, meaning some decisions are within defendant's discretion and engineering judgment. *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App. 3d 487, 584 N.E. 2d

794. The issue of whether an act constitutes a mandatory duty or a discretionary act determines the scope of the state's liability because DOT is immune from liability for damages resulting from not performing a discretionary act. *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App. 3d 30, 33-34, 667 N.E. 2d 1009 citing, *Winwood v. Dayton* (1988), 37 Ohio St. 3d 282, 525 N.E. 2d 808. A deviating from the mandatory standards of the Manual renders DOT negligent per se and liable in damages if proximate causation is established. *Madunicky v. Ohio Dept. of Transp.* (1996), 109 Ohio App. 3d 418, 672 N.E. 2d 253; *Perkins*, supra; *Wax v. Department of Transportation*, 2001-Ohio-1856.

{¶ 8} Section 2C.21 of the Manual generally covers the use of "BUMP" and "DIP" signs by DOT. This section reads as follows:

{¶ 9} "BUMP AND DIP Signs (W8-1, W8-2)

{¶ 10} "Guidance:

{¶ 11} "BUMP (W8-1) and DIP (W8-2) signs should be used to give warning of a sharp rise or depression in the profile of the road.

{¶ 12} "Option:

{¶ 13} "These signs may be supplemented with an Advisory Speed plaque (see Section 2C.42).

{¶ 14} "Standard:

{¶ 15} "The DIP sign shall not be used at a short stretch of depressed alignment that may momentarily hide a vehicle.

{¶ 16} "Guidance:

{¶ 17} "A short stretch of alignment that may momentarily hide a vehicle should be treated as a no-passing zone (see Section 3B.02)."

{¶ 18} Additionally, Section 2C.02 of the Manual addresses the mandatory requirements for using Warning Signs and provides:

{¶ 19} "Application of Warning Signs

{¶ 20} "Standard:

{¶ 21} "The use of warning signs shall be based on an engineering study or on engineering judgment.

{¶ 22} "Guidance:

{¶ 23} "The use of warning signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs. In situations where the condition or activity is seasonal or temporary, the warning sign should be removed or covered when the condition or activity does not exist."

{¶ 24} In the instant claim, no evidence has been produced to establish an engineering study or a particular engineer determined a warning DIP sign was warranted for installation along the roadway. Therefore, the mandatory provisions for the placement of warning signs do not apply to the present claim.

{¶ 25} Furthermore, from a review of the Manual in application to the facts of the particular action, it does not appear Manual guidelines for the placement of DIP signs apply. The Manual states a DIP sign, "should be used give a warning of a sharp . . . depression in the profile of the road." Use of the work "should" connotes an advisory, but not mandatory condition and consequently, does not constitute negligence per

se when DOT failed to act on this advisory notation. See *Kocur v. Ohio Dept. of Transp.* (1993), 63 Ohio Misc. 2d 342, 629 N.E. 2d 110. Additionally, the available evidence tends to show the depression in the roadway at the intersection of Strausser Road and State Route 241 was not "sharp," but slight. Therefore, it appears the advisory language in the Manual regarding particular sign placement does not apply to the facts of this claim.

{¶ 26} Plaintiff has also presented a claim in which he appears to allege defendant maintained a nuisance condition on the roadway. To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause physical discomfort to such person. *Dorrow v. Kendrick* (1987), 30 Ohio Misc. 2d 40, 508 N.E. 2d 684.

{¶ 27} "[A] civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176, 180, 297 N.E. 2d 105, 109. Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not

submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his car. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD. The evidence presented does not prove defendant maintained or permitted a nuisance condition on the roadway.

{¶ 28} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his injury was proximately caused by defendant's negligence. Plaintiff failed to show the roadway condition was connected to any conduct under the control of defendant, or any negligence on the part of defendant. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Plaintiff has failed to provide sufficient evidence to prove defendant was negligent in failing to redesign or reconstruct the roadway intersection considering plaintiff's incident appears to be the sole incident at this area. See *Koon v. Hoskins* (Nov. 2, 1993), Franklin App. No. 93AP-642.

IN THE COURT OF CLAIMS OF OHIO

JAMES CHEROK	:	
Plaintiff	:	
v.	:	CASE NO. 2006-01050-AD
DEPT. OF TRANSPORTATION, DISTRICT 4	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/

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