

[Cite as *O'Brien v. Dept. of Transp.*, 2018-Ohio-1558.]

SEAN O'BRIEN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2015-00785JD

Judge Patrick M. McGrath

DECISION

{¶1} Before the court are plaintiff Sean O'Brien's (plaintiff) September 14, 2017 objections to the magistrate's September 1, 2017 decision, which recommended judgment for defendant Ohio Department of Transportation (ODOT). After obtaining an extension, ODOT filed a response to the objections on October 10, 2017. For the following reasons, the court finds the magistrate properly determined the facts and appropriately applied the law and **OVERRULES** plaintiff's objections.

A. Facts and Procedural History

{¶2} Plaintiff's claims stem from an August 3, 2010 automobile collision. On this date, Joseph Alexander (Mr. Alexander) operated a motor vehicle, in which plaintiff was a passenger, southwest on State Route 95 (SR 95), a two-lane rural highway. The accident occurred at the intersection of SR 95, Mishey Road, and Old Mansfield Road after Mr. Alexander failed to follow the sharp curve of SR 95. Mishey Road runs east-west and intersects SR 95 from the east while Old Mansfield Road runs north-south and intersects Mishey Road from the south. Stop signs control traffic from both roads entering onto SR 95 while SR 95 is a through highway with a sharp curve. Southwest motorists, such as Mr. Alexander, must navigate a sharp curve to the right to stay on SR 95. If southwest motorists go straight through the curve, instead of following it, they will travel onto Old Mansfield Road. Plaintiff's exhibit 42 and defendant's exhibit D, F, G, and H, depict the intersection as one travels southwest on SR 95.

{¶3} The speed limit on SR 95 was 55 m.p.h. When traveling southwest on SR 95, motorists first encountered an intersection warning sign, depicted in defendant's exhibit C, that shows Mishey Road intersecting from the left and perpendicular to SR 95. Thereafter, two yellow, diamond-shaped horizontal alignment signs on both sides of SR 95 warned motorists of the impending curve; they depicted right-turn arrows below which were advisory speed limit signs stating 20 m.p.h. These signs appear in defendant's exhibits D and E. A directional sign next advised motorists that Knox Lake, boat ramps, and a marina were straight ahead through the intersection on Old Mansfield Road. Chevrons pointing to the right appeared ahead of the curve on the left-hand side of the road and continued through the curve. In addition, two large, yellow arrow-boards faced motorists and pointed to the right. Defendant's exhibits F and G depict the Knox Lake sign, chevrons and arrow boards. Pursuant to the Ohio Manual of Uniform Traffic Control Devices (OMUTCD), the signs present on the day of the accident were optional. A double-yellow line separated SR 95's two lanes and followed the curve to the right with a break at the intersection. The solid white edge line on the right side of SR 95 followed the curve to the right with no breaks.

{¶4} Mr. Alexander drove approximately 40 m.p.h. straight through the intersection south onto Old Mansfield Road instead of following SR 95 as it curved to the right. His vehicle collided with another automobile, driven by Pamela Riggleman (Ms. Riggleman), traveling northeast on SR 95 as she attempted to turn onto Mishey Road. Plaintiff was ejected from the vehicle and sustained serious injuries. At trial, Mr. Alexander testified he thought SR 95 went straight and realized too late that it curved to the right. Another motorist who stopped to render assistance, Freddie Okulich (Mr. Okulich), testified that Mr. Alexander "was in hysterics" immediately after the accident. Mr. Okulich testified Mr. Alexander was yelling, "[I]ook what I've done. I wasn't paying attention" and that Mr. Alexander also said "he was going too fast for the turn. He forgot about the turn."

{¶5} Plaintiff filed his complaint on September 10, 2015 asserting a claim of negligence based on, among others, allegations that ODOT breached its duty to place adequate signage at the accident location. The case proceeded to trial as to liability only on October 17, 2016. At trial, the parties agreed that ODOT had no duty to redesign the intersection. Thus, plaintiff's claims were solely based on ODOT's alleged failure to comply with the OMUTCD.

B. Law and Analysis

{¶6} A magistrate's decision "is not effective unless adopted by the court." Civ.R. 53(D)(4)(a). When considering objections, Civ.R. 53(D)(4)(d) provides, in pertinent part:

Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. (emphasis added).

Objections "shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii).

{¶7} In reviewing objections:

The trial court has the ultimate authority and responsibility over the magistrate's findings and rulings. The trial court must undertake an independent review of the magistrate's report to determine any errors.

When reviewing a magistrate's decision, the trial court does not sit in the position of an appellate court. Instead, the trial court must conduct a de novo review of the facts and conclusions in the magistrate's decision. As the ultimate finder of fact, the trial court must make its own factual determinations through an independent analysis and should not adopt the magistrate's findings unless the trial court fully agrees with them. It is the trial court's obligation to determine whether the magistrate properly determined the facts and applied the appropriate law. If the trial court

determines, in its judgment, the magistrate has failed to do so, the trial court must substitute its judgment for that of the magistrate.

Ramsey v. Ramsey, 10th Dist. No. 13AP-840, 2014-Ohio-1921, 2014 Ohio App. Lexis 1868, ¶¶ 16-17 (internal citations omitted).

{¶8} Turning to the law underlying plaintiff's claims, the OMUTCD determines ODOT's duty. ODOT may be liable where it fails to conform to mandatory requirements of the OMUTCD. *Pierce v. Ohio Dept. of Transp.*, 23 Ohio App.3d 124 (10th Dist. 1985); *Galay v. ODOT*, 10th Dist. No. 05AP-383, 2006 Ohio 4113. 2006 Ohio App. Lexis 4049, ¶ 42. Only the OMUTCD's mandatory requirements, normally using the word "shall," impose a duty on ODOT. Provisions which use the words "should" or "may" are not mandatory. As stated in *Gregory v. Ohio DOT*, 107 Ohio App.3d 30, 33-34 (10th Dist. 1995), "[t]he issue of whether an act constitutes a mandatory duty or a discretionary act determines the scope of the state's liability because ODOT is immune from liability for damages resulting from not performing a discretionary act." However, as stated in *Perkins v. ODOT*, 65 Ohio App.3d 487, 491-92 (10th Dist.1989), "where [ODOT] chooses to act, it is under a duty to conform with the requirement of its own manual." Even where ODOT acts negligently, it is not liable absent proximate cause. As stated in *Whiting v. Dept. of Mental Health*, 141 Ohio App.3d 198, 202 (10th Dist.2001), "negligence is without legal consequence unless it is a proximate cause of an injury."

- **ODOT did not violate any mandatory provisions of the OMUTCD.**

{¶9} Plaintiff's first objection asserts the magistrate erred in not finding ODOT negligent for its failure to comply with mandatory OMUTCD provisions. Plaintiff delineates two subparts to this objection and each subpart contains several specific assertions. Plaintiff first argues ODOT failed to comply with mandatory requirements regarding the placement of the optional large arrow and chevron signs present at the location.

{¶10} As to the large arrow sign, plaintiff asserts ODOT violated mandatory placement provisions set forth in Section 2C.09 of the OMUTCD which provides, “[i]f used, the One-Direction Large Arrow sign shall be installed on the outside of a turn or curve in line with and at approximately a right angle to approaching traffic.” The court notes this section does not specify a particular location “on the outside of a turn or curve” where the large arrow sign must be placed and uses the word “approximately” with regard to the right-angle requirement. The signs are visible in defendant’s exhibit A, D, G and H as well as plaintiff’s exhibit 42.

{¶11} Plaintiff relies on the testimony of his traffic-engineer expert, Kimberly Nystrom (Ms. Nystrom). Ms. Nystrom testified that the left-most sign in these photographs is not posted on the outside of the turn and is not at a right angle to approaching traffic. Plaintiff’s only criticism of the right-most sign is that it is not in “alignment with approaching traffic.”

{¶12} Based on its review of the photographs including exhibit D and plaintiff’s exhibit 42, the court disagrees with Ms. Nystrom’s assessment. Motorists traveling southwest on SR 95 must navigate the curve to the right. Both signs appear on the outside of this curve, i.e. outside the shoulder of the oncoming lane on the long side of the curve. They can be seen on the left side of the photographs. The manual does not require that arrow signs be placed at the apex of the outside curve, only that they be placed “outside of a turn or curve.” In contrast, the inside of the curve, on the right side of the photographs and outside the shoulder of the lane traveling southwest on the curve’s short side, contains no signs. The court also finds the two arrow boards face traffic traveling southwest on SR 95 are clearly visible and are placed, as required, at “approximately” a right angle to oncoming traffic. The court finds the large arrow signs’ placement complied with the OMUTCD.

{¶13} Plaintiff, again relying on Ms. Nystrom’s testimony, next asserts two criticisms of the chevron signs, which appear in defendant’s exhibits D and G and

plaintiff's exhibit 42. Section 2C.10 of the OMUTCD governs the chevrons. Plaintiff criticizes the spacing of the chevrons relying on Ms. Nystroms' testimony wherein she stated, "my biggest issue is they're not uniformly spaced delineating the turn you're trying to delineate. That's my main criticism." However, as noted, provisions of the manual which use the word "should" such as those related to the spacing of the chevrons in section 2C.10 are not mandatory obligations; they are discretionary guidelines. Therefore, ODOT breached no duty even if it failed to space the chevrons according to guidance provided by the OMUTCD.

{¶14} Plaintiff also asserts the chevrons are not in line with and at a right angle to approaching traffic. Section 2C.10 does state that chevrons "shall be installed on the outside of a turn or curve, in line with and at approximately a right angle to approaching traffic." The court again relies on the exhibits which show the chevrons clearly visible facing traffic, in line with and at an approximate right angle to oncoming traffic. The court finds the placement of the chevrons complied with the OMUTCD.

{¶15} The second subpart to plaintiff's first objection asserts "ODOT was negligent per se because it failed to post signs the OMUTCD provides were mandatory." Plaintiff asserts that sections 2D.27, 2D.28, and 2D.30 required ODOT to place a Route Sign, a Junction Assembly, and a Directional Assembly. Plaintiff also asserts that section 2D.29 required ODOT to place an Advance Route Turn Assembly (ARTA) at the location.

{¶16} Initially, the court notes plaintiff does not highlight any language in section 2D.30 that applies to the intersection where the accident occurred. Based on a review of section 2D.30, the court finds no language in this section which imposes a mandatory duty on ODOT with respect to the accident location.

{¶17} As for sections 2D.27 and 2D.28, they state Route Signs and Junction Assemblies "shall" be used only when "numbered routes" intersect. The term "numbered route" is not defined in the OMUTCD. As such, both parties presented

testimony of their traffic-engineering experts as to what constitutes a numbered route. Ms. Nystrom testified numbered routes include “county routes” but her testimony includes no explanation for this conclusion. ODOT’s expert, David Holstein (Mr. Holstein) testified numbered routes include only interstates, U.S. routes and state routes. Mr. Holstein testified county roads would be considered numbered routes “only in very odd situations, if they’re a very major road.” When asked whether a county road is considered a numbered route under the OMUTCD, Mr. Holstein testified:

No. If you look at the examples, every one of the signs in here, and I’m referring to figure 2D-6, all three pages, every sign on there is a U.S. or state route. Mishey Road may have a local number, apparently County Road 55, but it’s a very minor road. So the purpose of this type of signing, we would only consider if a county road was a very major road.

{¶18} The magistrate found the testimony of Mr. Holstein more credible and persuasive, a finding with which the court agrees. The magistrate’s credibility determination is entitled to some weight given her firsthand exposure to the witnesses. See *Sweeney v. Sweeney*, 10th Dist. No. 06AP 251, 2006-Ohio-6988, 2006 Ohio App. Lexis 6952, ¶15. Further, Mr. Holstein’s testimony explains the basis for his opinion that numbered routes do not include county routes whereas Ms. Nystrom’s testimony is conclusory.

{¶19} Further, the court finds Mr. Holstein more credible than Ms. Nystrom based on the differences in their background and experience. This is the first case in which Ms. Nystrom has testified in Ohio and the first case in which she has interpreted the OMUTCD. Though she worked for Caltrans, the California equivalent of ODOT, she testified that California did not finalize its version of the MUTCD until after she left Caltran’s employ. Mr. Holstein has been responsible for administering the OMUTCD for almost two decades and has been responsible for hundreds of sign projects in Ohio. The court agrees with the magistrate’s determination that “Mishey Road and Old

Mansfield Road were not 'other numbered routes' as contemplated in the manual" and, therefore, that Sections 2D.27 and 2D.28 did not apply to the intersection.

{¶20} Lastly, the court also finds that Section 2D.29 did not require an ARTA at the accident location. The court agrees with the magistrate's determination that "the photographs and video of the roadway clearly show that to remain on SR 95 southbound, a motorist would follow the curve in the roadway to the right. Although it is a sharp curve * * * no 'turn' must be made to remain on the indicated route as stated in Section 2D.29 of the OMUTCD." This conclusion is buttressed by the testimony of Mr. Holstein who indicated that an ARTA is only required where a motorist must turn onto a different road or change roads to stay on the same route. Here, SR 95 curves to the right and a motorist does not have to change roads to stay on SR 95.

{¶21} Given the above, the court finds that ODOT was not negligent *per se* for failing to place the signs outlined in sections 2D.27-2D.30. Plaintiff's first objection is OVERRULED.

- **Non-mandatory provisions of the OMUTCD impose no duty on ODOT.**

{¶22} Plaintiff's second objection asserts "[t]he magistrate ignored unrebutted testimony of ODOT's negligence." It contains five delineated subparts. However, each of these subparts asserts ODOT was negligent for failure to comply with non-mandatory provisions of the OMUTCD. These non-mandatory provisions, as the magistrate noted, are in the form of guidance provisions which use the word "should" and option provisions which use the word "may." As a matter of law, ODOT is immune for the non-performance of discretionary acts. Plaintiff's second objection is OVERRULED.

- **The magistrate did not err in the handling and consideration of the testimony of plaintiff's human factors expert.**

{¶23} At trial, plaintiff presented the testimony of William Vigilante, Ph.D. (Dr. Vigilante), an expert in human factors or ergonomics. Plaintiff's third objection asserts the magistrate erred in "disallowing and ignoring evidence regarding the science of human factors as it pertains to the related issues of negligence regarding the signage of the intersection and causation." Within the objection, plaintiff asserts five more specific objections relative to evidence plaintiff presented or proffered about human factors. Plaintiff first asserts the magistrate "erred in ignoring the concept of perception reaction (or 'PIEV') time in her Decision." Plaintiff also asserts the magistrate erred in excluding: 1) evidence of working memory; 2) evidence of positive guidance; 3) evidence of the telephone poles; and 4) Dr. Vigilante's opinion that ODOT failed to provide appropriate guidance. The court disagrees and finds no error in the magistrate's consideration of Dr. Vigilante's testimony, as explained below.

{¶24} Dr. Vigilante testified extensively which the magistrate summarized. The magistrate did not disallow or ignore Dr. Vigilante's testimony. Rather, she ruled on objections to certain aspects of Dr. Vigilante's trial testimony and ascribed the weight she felt appropriate to it as a whole.

{¶25} As to the five subpart objections, the magistrate properly determined that ODOT's duty flows from the OMUTCD; it is not determined by perception/reaction time, working memory, positive guidance, or the presence of telephone poles. Though testimony from the parties' experts indicated human factors concepts have influenced or are reflected in the manual's requirements, these concepts do not impose an independent legal duty on ODOT. The court agrees with the magistrate's ascribing little weight to Dr. Vigilante's testimony and with her rulings excluding evidence of working memory, positive guidance and the presence of telephone poles.¹

¹The court notes plaintiff did not proffer Dr. Vigilante's testimony related to the subjects upon which the magistrate sustained objections.

{¶26} The reasons underlying Mr. Alexander's inability to remember the signs or to heed them on the day of the accident does not determine ODOT's duty. Thus, Dr. Vigilante's opinions, explaining how a driver reacts to signs, how a driver's memory works, and positive guidance concepts related to signage are irrelevant to ODOT's legal duty as determined by the OMUTCD. Likewise, the location of telephone poles, over which ODOT lacks any control, has no bearing whatsoever on ODOT's duty under the OMUTCD.

{¶27} The court also agrees with the magistrate that Dr. Vigilante's testimony, particularly that related to positive guidance, was somewhat cumulative to Ms. Nystrom's testimony. In addition, plaintiff's objections related to Dr. Vigilante's opinion on positive guidance state only that the magistrate erred. Plaintiff does not provide any argument in support of either. These objections, therefore, also fail for lack of specificity.

{¶28} Lastly, a review of the record and Dr. Vigilante's testimony in their entirety buttresses the court's conclusion that the magistrate properly handled his testimony. The magistrate indicated numerous times that the OMUTCD determines ODOT's duty. Testimony regarding the mind's workings as it relates to the signs present on the day of the accident has no bearing on the OMUTCD's requirements and has no bearing on whether the signage complied with the manual. The magistrate heard substantial testimony from Dr. Vigilante and, as she stated at trial, gave "it the weight that it deserves * * * in [her] opinion" which is the finder of fact's role. The court finds the magistrate properly determined the facts and appropriately applied the law in handling Dr. Vigilante's testimony including sustaining objections to the testimony related to working memory, positive guidance, and the testimony related to telephone poles as well as the weight she placed on Dr. Vigilante's testimony related to perception/reaction time. Plaintiff's third objection, including its five sub-parts, is OVERRULED.

- **The magistrate properly excluded evidence of subsequent remedial measures.**

{¶29} Plaintiff's fourth objection asserts the magistrate erred in refusing to allow evidence of subsequent remedial measures, specifically an ARTA installed at the accident location after the accident. Evid.R. 407 provides such evidence is inadmissible to prove negligence or culpable conduct. However, exclusion is not required when the evidence is offered for another purpose such as impeachment. Here, plaintiff asserts that he sought to impeach the testimony of Mr. Holstein through evidence of post-accident installation of an ARTA.

{¶30} Having reviewed Mr. Holstein's testimony, the court agrees with the magistrate's exclusion of evidence of subsequent remedial measures. Mr. Holstein very clearly testified that the OMUTCD did not require the installation of an ARTA at the accident location *at the time of the accident*. As the magistrate correctly stated on the record, "[b]ut the fact that it's up now does not necessarily mean that it was a mandatory sign at [the time of the accident]." Thus, evidence of post-accident installation of an ARTA does not impeach Mr. Holstein's testimony that an ARTA was not required at the time of the accident. Plaintiff's fourth objection is OVERRULED.

- **The magistrate properly excluded evidence of the road's reputation.**

{¶31} Plaintiff's fifth objection asserts the magistrate erred in disallowing testimony of residents who lived near the accident location regarding the road's reputation. The magistrate sustained defendant's objection to questions posed to two witnesses, Ms. Auker and Ms. Lowry, regarding the road's reputation. The court agrees with the magistrate's determination for numerous reasons. Plaintiff offers no legal support for the admissibility of this testimony and, in fact, does not discuss the admissibility issues created when reputation testimony is sought including those related to relevance, hearsay, and the offering of a layman's opinion.

{¶32} Testimony of both witnesses as to the road's reputation would, in large degree, rely on inadmissible hearsay, i.e. what others have said about the road, the basis upon which the magistrate initially sustained the objection. Otherwise, testimony of the road's reputation would be the opinion of a lay witness which, here, the court finds does not meet either requirement of Evid.R. 701 and which offers an independent basis upon which the court would have disallowed the testimony. The court also finds the relevance of reputation testimony questionable under Evid.R. 401 as the road's reputation has no bearing on whether defendant complied with legal duties regarding the placement of signs at the location. As such, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and/or confusion of the issues and the testimony also could have been excluded under Evid.R. 403(A). Plaintiff's fifth objection is OVERRULED.

- **The magistrate's decision is not against the manifest weight of the evidence.**

{¶33} Plaintiff's sixth objection asserts "[t]he Magistrate's Decision is against the manifest weight of the evidence." This objection attacks the magistrate's decision as a whole and, to a large degree, simply summarizes arguments the court has already rejected relative to plaintiff's other objections. Further, the manifest weight standard, though applicable to civil cases, is normally applied to appellate review of verdicts. The law is clear that, when reviewing a magistrate's decision upon objection, the trial court does not sit as a court of appeals. Rather, as indicated, the court's duty is to conduct an independent, *de-novo* review as to the objected matters and to determine whether the magistrate properly determined the facts and appropriately applied the law.

{¶34} The magistrate's decision accurately set forth the evidence presented at trial. Further, the magistrate in a bench trial is the finder of fact, free to rely on facts he or she deems most relevant and material to the issues at hand and free to disregard some evidence and/or rely on other evidence, in part, in whole, or any deviation in-

between. The magistrate listened to and observed the evidence presented at trial and relied on the evidence she found most credible and persuasive. The magistrate cited evidence which she found credible, relevant and compelling. The fact that plaintiff disagrees with the magistrate's decision does not mean the magistrate's decision is against the manifest weight of the evidence.

{¶35} Based on its *de novo* review of the record, the court finds ample evidence which supports the magistrate's decision. The pictures and video of the accident location, as well as Mr. Holstein's testimony, demonstrated that ODOT placed optional signs which adequately warned oncoming motorist of the sharp curve on SR 95. As already noted, the court agrees that Mr. Holstein's testimony regarding the signage present and the requirements of the OMUTCD was more credible and persuasive than that of plaintiff's expert. Mr. Holstein unequivocally testified that no mandatory signage was absent from the accident location. Further, as discussed more below, the testimony of Mr. Alexander and other witnesses to the accident support the magistrate's decision relative to proximate cause. The court has reviewed the entire record and finds the magistrate properly determined the facts and appropriately applied the law in reaching her decision.

{¶36} Applying a manifest-weight standard, which is much more deferential, does not change the result. Manifest weight challenges require the challenging party "to demonstrate that the evidence could lead to only one conclusion and that conclusion is contrary to judgment." *Galay* at ¶ 14. Where a judgment is supported by some competent, credible evidence, it is not against the manifest weight of the evidence. *Id.* Plaintiff fails to demonstrate that the evidence in the case could lead to only one conclusion and the evidence, as recited throughout the present decision, is competent and credible and supports the magistrate's decision. The court OVERRULES plaintiff's sixth objection.

- **The magistrate did not err in her findings of fact or conclusions of law.**

{¶37} Plaintiff's seventh objection asserts "the magistrate erred in her findings of fact" and contains 15 individual subpart objections labeled a-o. Plaintiff's eighth objection asserts "the magistrate erred in her conclusions of law" and contains 14 individual subpart objections labeled a-n. In both cases, these subparts are largely one sentence statements and, in some cases, sentence fragments for which plaintiff offers little argument or explanation. In the court's view, the requirement of specificity of objections calls for more than unadorned one sentence disagreements and plaintiff's burden requires some explanation regarding the relevancy and materiality of the matters to which plaintiff objects. In some instances, the scant nature of the objections makes their basis unclear. Initially, the court finds that plaintiff's sixth and seventh objections including the 29 individual subparts fail for these reasons.

{¶38} In addition, many of the objections rehash issues the court has already considered and, therefore, fail for the same reasons as already explained. Others take issue with aspects of the magistrate's decision which are not findings of fact or conclusions of law and, in any case, are not material to the magistrate's decision. For instance, plaintiff asserts error in the magistrate's subjective description of certain facts and in her use of punctuation. Under this objection, plaintiff also offers assertions of fact without any reference to the transcript or any other specific basis. Analysis of plaintiff's various objections, in some cases, is difficult because plaintiff offers no argument or analysis.

{¶39} Regardless, the court, having reviewed the record, finds the magistrate properly determined the facts and appropriately applied the law in reaching her decision. The court finds no error in the magistrate's factual findings, in her conclusions of law, or in her analysis of and decision on the ultimate issues. Plaintiff's seventh and eighth objections are OVERRULED.

- **The magistrate properly declined to conduct a site visit.**

{¶40} Plaintiff's ninth and last objection asserts the magistrate erred in denying plaintiff's motion to conduct a site visit. Plaintiff offers no argument whatsoever in support of this objection and, therefore, it fails due to lack of specificity alone. Further, the magistrate issued her decision regarding the site visit, which did not dispose of any claim or defense, on October 24, 2016. Civ.R. 53(D)(2)(a-b) required plaintiff to seek to set aside the magistrate's decision within 10 days of its filing. Lastly, there is no entitlement to such a request. Rather, the court, in its discretion may allow a site visit where proper. See R.C. 2315.02; 2315.08. The magistrate properly applied the law and exercised proper discretion in finding that videos of the scene made plaintiff's request for a site visit moot. Plaintiff's ninth objection is OVERRULED.

- **Plaintiff failed to prove proximate cause.**

{¶41} Plaintiffs' objections do not challenge the magistrate's finding that, "[a]ssuming, arguendo, that ODOT was negligent * * * plaintiff * * * failed to prove that any breach by ODOT was the proximate cause of his injuries." The magistrate cited the following portion of *Whiting*:

While difficult to define, proximate cause is generally established where an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result that would not have taken place without the act. * * * Essentially, a plaintiff must present evidence upon which a trier of fact may reasonably determine that it is more likely than not that the negligence of a defendant was the direct or proximate cause of the plaintiff's injury. * * * It is also well-settled that because the issue of proximate cause is not open to speculation, conjecture as to whether the breach of duty caused the particular damage is not sufficient as a matter of law. * * * Further, a plaintiff must establish proximate cause by a preponderance of the evidence.

{¶42} The evidence established that the proximate cause of the accident and Mr. O'Brien's injuries was Mr. Alexander's failure to use reasonable care while driving. Mr. Alexander testified he was traveling "40-45 miles an hour" at the time of the accident. He testified he did not "remember the signs" and did not remember being

confused by the signs. He testified he was unaware of Old Mansfield Road and that when he came over the hill just before the curve he “thought the road went basically straight through.” He later stated, “[a]s I said, I came over the hill, and in my mind the road went straight, and I realized at some point that the road did curve and I knew I couldn’t make the curve, so I went straight.” Mr. Alexander testified that he glimpsed Ms. Riggleman’s car in his peripheral vision but thought that an impact could be avoided. He testified he did not break or otherwise slow down and, because it was too late to turn, he sped up and went straight. Mr. Okulich testified that, immediately after the accident Mr. Alexander exclaimed that he was going too fast for the curve and was not paying attention.

{¶43} As the magistrate noted, “[t]he common law of Ohio imposes a duty of reasonable care upon motorists, which includes the responsibility to observe the environment in which one is driven. *Hubner v. Sigall*, 47 Ohio App.3d 15, 17 (10th Dist.1998).” The court finds a reasonable driver would approach the intersection with caution and should readily discern that the road curves to the right. Mr. Alexander, who drove twice the advisory speed limit, who admitted his speed prevented him from negotiating the turn, and who admitted he was not paying attention failed to operate his vehicle with reasonable care and failed to observe the road and the environment in which he operated his vehicle. Further, Mr. Alexander’s negligence in failing to negotiate the curve and to operate his vehicle in a reasonable manner was the sole proximate cause of the accident and plaintiff’s injuries. The signage, which clearly indicated to drivers traveling southwest on SR 95 that the road curved sharply to the right, was not.

C. Conclusion

{¶44} For the foregoing reasons, the court OVERRULES plaintiff’s September 14, 2017 objections to the magistrate’s September 1, 2017 decision. The court finds the

magistrate properly determined the facts and appropriately applied the law in rendering her decision and agrees judgment for ODOT is appropriate.

PATRICK M. MCGRATH
Judge

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SEAN O'BRIEN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

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Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶45} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are **OVERRULED** and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. 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.

PATRICK M. MCGRATH
Judge

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