

**IN THE COURT OF CLAIMS OF OHIO**

DEAN WILLIAM TUNBERG, JR., Admr.

Plaintiff

v.

OHIO DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2023-00215JD

Judge David E. Cain

DECISION

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**I. Introduction**

{¶1} Dean William Tunberg, Jr. as Administrator of his father's estate (Plaintiff), brought this case alleging negligence and requesting damages for survivorship and wrongful death. Plaintiff's case stems from the death of his father Dean William Tunberg, Sr. (Decedent), who was 67 years old at the time of his death. On July 18, 2017, at approximately 4:00 p.m., Decedent died after striking a traffic attenuator while driving on United States Route (US) 224 in Summit County, Ohio.

{¶2} Plaintiff contends that Defendant, Ohio Department of Transportation (ODOT) breached mandatory provisions of the Ohio Manual of Uniform Traffic Control Devices (OMUTCD) regarding specifications for advance guidance signs required at lane drops and maintenance of channelizing lines on US 224. Further, Plaintiff argues that ODOT negligently failed to coordinate conflicting projects resulting in the obliteration of necessary channelizing lines. Plaintiff asserts that these negligent actions proximately caused Decedent's death. Finally, Plaintiff contends that Decedent suffered extreme physical and emotional distress in the minutes between the crash and his death. Therefore, Plaintiff requests monetary damages for the survivorship claim and wrongful death claims.

{¶3} Defendant argues that at the time of the accident the drop lane was a temporary condition and therefore, advanced signage was not mandatory under the

OMUTCD. As to the channelizing lines, Defendant argues that they were not obscured or obliterated and ODOT had no notice of a defective condition, therefore Plaintiff failed to prove ODOT was negligent. ODOT contends that Decedent's own reckless actions were the sole proximate cause of his death. If the Court finds ODOT liable, it argues that Plaintiff's requested damages are not supported by the testimony presented at trial.

{¶4} For the reasons below, the Court finds Defendant 60 percent liable and awards judgment for Plaintiff in the amount of \$504,000.

## **II. Factual Background**

{¶5} The Court makes the following findings of fact based on the testimony at trial, the video recording of the accident, and the parties' other exhibits that were admitted into evidence.

{¶6} On July 18, 2017, Decedent travelled a short distance in the right-hand lane on US 224 between the Kelly Avenue exit and exit 4B. This portion of roadway consisted of three lanes—left, middle, and right. After the Kelly Avenue exit and prior to the barrels and attenuator at exit 4B, there was no indication that the road was under construction. Black material covered portions of the white skip lines on this section of US 224; other portions of the lines appeared to be removed. Approaching exit 4B, two channelizing lines appeared between the middle and right lanes widening to create a gore and force the right lane to exit. No signage indicated that the right lane was an exit only lane at the time of the accident. The gore lines were also obscured in part by black material. In the gore, there were five orange barrels and three cones in short succession before, and slightly to the right of, a traffic attenuator. Weather conditions on the day of the accident appeared partly cloudy and dry; traffic was minimal.

{¶7} ODOT Project No. 150086 (the Modification Plan) and ODOT Project No. 100229 (the Micro-resurfacing Plan) both involved US 224 and exit 4B. Karvo won the bid to carry out the Modification Plan. The Modification Plan detailed specifications for various traffic control methods including channelizing lines, gore lines, and attenuators. The Modification Plan required maintenance of all existing roadway lines. Specifically at exit 4B, the Modification Plan called for a traffic attenuator in the gore between the middle and right lanes. Originally, the Modification Plan called for the attenuator to be placed

closer to the beginning of the gore; but Karvo and ODOT agreed to move the attenuator farther into the gore without modifying the channelizing lines or the gore. At some point prior to the accident, a contractor placed the barrels and cones in the gore despite the Modification Plan not including them. The Modification Plan did not include changes to the advanced signage to indicate that the right lane was now an exit only lane. In the weeks prior to the accident, the Micro-resurfacing Plan took place and obliterated or covered the road lines near exit 4B including the channelizing and gore lines. ODOT failed to inform Karvo employees involved in the management of the Modification Plan of the Micro-resurfacing Plan. At the time of the accident, the lanes existed in their permanent configuration.

{¶8} On July 18, 2017, prior to the crash, Decedent was travelling in the right lane and slightly slower than the flow of traffic. Before reaching the gore, Decedent's vehicle remained in the right lane with no signs of erratic or impaired driving. At the beginning of the gore, Decedent's vehicle continued in a straight path toward the barrels instead of exiting in the right lane or changing lanes to the middle lane. Shortly before the barrels, the brake lights on Decedent's vehicle lit up; Decedent's vehicle avoided the barrels and cones but hit the attenuator. Decedent's vehicle spun into oncoming traffic where a semi-truck with a car carrier struck it head on.

{¶9} Gary Mantowski witnessed the accident and went to Decedent immediately after. Mantowski spoke with Decedent from the passenger side of the vehicle. Mantowski attempted to keep Decedent awake while waiting for help to arrive; Decedent tried to talk to Mantowski, made eye contact with him, and had a look of doom in his eyes. After approximately five to six minutes, Decedent passed. At the time of the accident, Decedent wore a nasal cannula for oxygen and had a walker in his vehicle. Further, Decedent was not wearing a seatbelt.

{¶10} At the time of his death, Decedent had unique relationships with each of his four children and three of his grandchildren. His son, Michael G. Tunberg, lived in California at the time of his father's death and spoke with him on the phone several times a week about his life, work, and relationships. His daughter, Kristen Tunberg, spoke to her father at least twice a week. At the time of her father's death, he was helping to raise her three children, Austin Tunberg, Hailey Tunberg, and Gavin Tunberg, because she

had lost custody of them. During some of her hardest times, her dad was the only one there for her. Decedent's daughter, Kerri Tunberg, spoke to him on the phone every day. Decedent helped Kerri with her driving anxiety. Kerri saw her father as a protector, a goofy, funny man, and a loving grandfather to her sister's children. Kerri did not have children until 2024, over six years after her father's death. Dean Tunberg, Jr. was in the Navy at the time of his father's death. Because his father died, Dean left the Navy and came home to help his family; he had intended to stay in the Navy another nine years. Dean remembered that holidays were important family occasions with his father. Decedent was proud of Dean's military service. Although Dean frequently lacked regular access to a phone due to the nature of his job, Dean spoke to his father on the phone frequently whenever he was on shore duty or otherwise able. Dean has one adult son; Plaintiff presented no testimony regarding Decedent's relationship with that grandchild. Decedent's death caused mental anguish in all of his children.

{¶11} Decedent was not employed at the time of his death; he only worked odd jobs. Decedent suffered from diabetes, alcohol abuse, hip and knee issues, and various heart conditions. Decedent used supplemental oxygen; shortly before the accident Decedent spent time in the hospital for respiratory issues in April 2017.

### **III. Expert Testimony**

#### **A. Accident Reconstructionists**

{¶12} Henry Lipian, Plaintiff's accident reconstructionist, testified that he works for Introtech, Inc., and has performed accident reconstructions since 1989. Lipian served in the Coast Guard, worked for OSHP performing accident reconstructions, obtained training in accident reconstruction from Northwestern University, and is accredited through the Accreditation Commission for Traffic Accident Reconstruction (ACTAR). Lipian is familiar with the OMUTCD. Lipian regularly examines human factors in his reconstruction work. Lipian and Introtech analyzed the traffic control devices present at the time of the accident, the human factors involved in the accident, the vehicle Decedent was driving—including data recorded regarding the accident, photos of the scene, video of the accident, law enforcement reports related to the accident, aerial photographs of the

area, various reference materials, deposition testimony, and the physical space where the accident occurred to come to conclusions regarding the cause of the accident.

{¶13} Lipian opined that lack of advanced positive guidance was a significant proximate cause of the accident. Lipian explained that, when designing a roadway, it must be designed to accommodate the full range of traffic users. Lipian asserted that the faded, obliterated, and covered road lines were inadequate to warn Decedent of the lane closure and dropped lane. Lipian testified that the condition of the lines was discriminative, meaning that the lane changes were not readily discernible resulting in unexpected decisions. Lipian found no evidence that Decedent was distracted or impaired at the time of the accident. Lipian testified that the brake lights—Decedent hitting the brakes as an evasive action—indicate that Decedent was not experiencing a medical event at the time of the accident.

{¶14} On cross examination, Lipian stated that wearing a seatbelt is important. Lipian conceded that the full extent of the human factors could not be analyzed because Decedent died and there is no video footage of the interior of his car.

{¶15} Charles Veppert, an accident reconstructionist, testified on behalf of Defendant. Veppert noted on direct examination and cross examination that he is not a traffic engineer. Therefore, the Court will not consider any of his testimony on traffic engineering as expert testimony. Veppert worked for OSHP for approximately 28 years and retired in 2006; as part of his work for OSHP, he conducted accident reconstructions. Veppert then began working for Valley Technical Services, a traffic accident reconstruction business which he now owns. Veppert became accredited by the Accreditation Commission for Traffic Accident Reconstruction (ACTAR) in 1995. Further Veppert is familiar with Ohio traffic laws and has human factors training. In forming his opinion in this case, Veppert reviewed the crash data from Decedent's vehicle, the crash report, video of the accident, video from the sheriff's office, the constructions plans, expert report (including that of Lipian), depositions of several ODOT employees, Lipian's trial deposition, and other various case materials.

{¶16} Veppert testified that based on data from Decedent's vehicle, Decedent used cruise control while driving on US 224. Veppert then asserted that it is imprudent to use cruise control in a construction zone. Based on his experience, Veppert stated that a law

enforcement officer could stop a vehicle for crossing a white line without signaling because it can be a sign of impairment. Veppert testified that Decedent failed to use his turn signal when he attempted to merge left to avoid the barrels and attenuator. Veppert asserted that Decedent violated traffic laws by failing to control his vehicle, failing to keep an assured cleared distance ahead, and by not driving in a marked lane. Veppert opined that Decedent failed to observe and respond to a readily discernable hazard in the roadway which caused the accident. Based on Veppert's review of the materials and calculations, Decedent should have had plenty of time to avoid the hazard. On cross-examination, Veppert stated that he did not base his opinions on the attenuator being the hazard but on the barrels being the hazard. Further, Veppert admitted that information underload can cause human error.

### **B. Traffic Engineer**

{¶17} Keith Bergman, a professional engineer licensed in fourteen states including Ohio, testified on behalf of Plaintiff. Bergman specializes in traffic and transportation engineering. Bergman testified that he is familiar with the OMUTCD. In forming his opinion in this case, Bergman reviewed the Complaint, answers to interrogatories, depositions, photographs of the scene, the dash cam video of the incident, and crash reports among various other materials.

{¶18} Bergman stated that upon review of Defendant's traffic engineer's deposition and report, he agrees with that engineer's finding that the lane drop at exit 4B was permanent and complete at the time of Decedent's accident.<sup>1</sup> Further, Bergman testified that that engineer's assertion that OMUTCD Chapter 6 did not apply to the lane drop at the time of the accident is accurate. Bergman stated that under Chapter 2 of the OMUTCD, which applies to the lane drop in this case, a drop lane on a highway must be adequately signed with an overhead "exit only" sign. Bergman testified that the signage present at the time of the accident did not comply with the OMUTCD's mandatory provisions relating to drop lanes. Specifically, Bergman noted that none of the signs

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<sup>1</sup> Defendant did not call a traffic engineer to testify at trial; however, it did seek the opinion of one and had him on its potential witness list.

approaching exit 4B indicated that the right lane was a drop lane. Further, Bergman opined that channelizing lines forming a gore do not give a driver adequate notice of a drop lane pursuant to the OMUTCD.

{¶19} Bergman explained that under Chapter 6 of the OMUTCD, temporary traffic control devices such as concrete barriers or barrels cannot be the sole channelizing device in a temporary traffic control area. Further, Bergman testified that channelizing lines, particularly in the condition they were in at the time of the accident, should not be the sole indication of an upcoming concrete barrier. Bergman stated that in this case, not only were the channelizing lines inadequate, but also, the barrels were tapered and that could cause a driver to drive into the attenuator instead of around it. Bergman opined that a traffic engineer regularly inspecting this area of the roadway would have seen these deficiencies. The Court finds Mr. Bergman's testimony credible and, in light of Defendant not providing expert testimony on traffic engineering, the Court will defer to Bergman's expert opinions related to traffic engineering.

### **C. Medical Experts**

{¶20} Dr. John Michael Miller, a cardiologist, testified on behalf of Plaintiff. Dr. Miller obtained his medical degree at Pennsylvania State University, completed a three-year residency in internal medicine, and then studied cardiology. Dr. Miller is board certified in internal medicine, cardiovascular diseases, and clinical cardiac electrophysiology. Indiana University Health employs Dr. Miller where he sees approximately 40-50 patients a week. Dr. Miller reviewed the accident video, Decedent's medical records, life expectancy tables, and the autopsy to inform his expert opinion. Based on that review, Dr. Miller opined that it was very unlikely that Decedent suffered a medical event leading to his accident. Dr. Miller asserted that someone who was impaired by a sudden medical event would not have been able to operate the vehicle in the way that Decedent did. Dr. Miller opined that, based on his experience with patients similar to Decedent and based on life expectancy tables, Decedent would have lived another 12-15 years had the accident not occurred.

{¶21} Dr. Hugh Calkins testified on behalf of Defendant. Dr. Calkins obtained his medical degree from Harvard Medical School, trained in internal medicine at

Massachusetts General Hospital, and trained in cardiology and electrophysiology at Johns Hopkins. After working in the faculty at the University of Michigan, Dr. Calkins returned to Johns Hopkins where he has been working as a cardiologist and electrophysiologist for 32 years. At the time of trial, Dr. Calkins estimated that he sees 2,000 patients a year. In forming his opinions in this case, Dr. Calkins reviewed Decedent's medical records, the video of the accident, and the autopsy report. Reviewing the autopsy, Dr. Calkins noted that Decedent was in multi-organ failure at the time of his death, he experienced prior heart attacks and at least one stroke, and his heart was severely diseased. Dr. Calkins opined that based on Decedent's medical records and autopsy, Decedent was one of the sickest patients he has ever reviewed. Based on Decedent's coronary disease, heart failure, lung disease, atrial fibrillation, diabetes, high cholesterol, and other health conditions, Dr. Calkins opined that Decedent would have lived only another two to three years had the accident not occurred.

{¶22} Dr. Calkins also gave opinions on Decedent's ability to drive and the cause of the accident. Dr. Calkins asserted that if he treated Decedent he would have advised him not to drive based on his medical condition. Dr. Calkins explained that, Decedent's medical records indicated he needed a BiPAP machine to help him breathe. Dr. Calkins stated that this machine forces air into the lungs and that standard nasal cannula oxygen cannot provide the same level of assistance. Dr. Calkins hypothesized that Decedent was not receiving enough oxygen through his nasal cannula in the vehicle causing him to have delayed reactions while driving. Dr. Calkins opined that the life expectancy tables did not apply to Decedent because of his medical conditions.

{¶23} On the cross-examination, Dr. Calkins admitted that while he has treated approximately 50 patients with the same combination of comorbidities as Decedent, he has not collected any life expectancy data on such patients. Dr. Calkins conceded that although he would have advised Decedent not to drive, it was still within the medical standard of care if another physician did not advise as such. Finally, Dr. Calkins stated that in order for Decedent to avoid all of the barrels he had to be conscious, even if he was impaired.

{¶24} The Court finds that the doctors possess comparable experience and expertise in the field of cardiology. Despite this, the doctors come to very different

estimates of Decedent's life expectancy. The Court sees value in both doctors' opinions. Therefore, the Court finds that Decedent's life expectancy at the time of his death was 7-8 years.

#### IV. Law and Analysis

{¶25} To establish a wrongful death cause of action based on a theory of negligence, a plaintiff "must show: '(1) the existence of a duty owing to plaintiff's decedent, i.e., the duty to exercise ordinary care, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death.'" *Meola v. Ohio State Univ.*, 2023-Ohio-3805, ¶ 11 (10th Dist.), quoting *Estate of Mehrer v. Walgreens Specialty Pharmacy*, 2023-Ohio-2070, ¶ 18 (10th Dist.).

##### A. Duty

{¶26} Defendant has a general duty to maintain its highways in a reasonably safe condition. *Knickel v. Ohio Dept. of Transp.*, 49 Ohio App.2d 335 (10th Dist. 1976). The duty of ODOT to maintain the state system of highways is statutory and not delegable to an independent contractor involved in roadway construction. See R.C. 5501.11. Pursuant to R.C. 5501.11, ODOT has the responsibility to construct and maintain state highways in a reasonably safe condition. *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 729-730 (10th Dist. 1990). The duty to render the highways free from unreasonable risk of harm is the precise duty owed by ODOT to the traveling public under both normal traffic conditions and during highway construction projects. *Id.*; see also *White v. Ohio Dept. of Transp.*, 56 Ohio St.3d 39, 42 (1990); *Feichtner v. Ohio Dept. of Transp.*, 114 Ohio App.3d 346, 354 (10th Dist. 1995). ODOT's duty to maintain the system of highways free from unreasonable risk of harm includes supervision of a highway construction project, inspection of the work performed by the construction contractor, and remedying defects discovered during the course of inspections. See *Roadway Express, Inc. v. Ohio Dept. of Transp.*, 2001 Ohio App. LEXIS 2854, \*11 (10th Dist. June 28, 2001). However, Defendant is not an insurer of the safety of its highways. *Rhodus* at 729-730.

{¶27} ODOT is only liable for accidents that are proximately caused by its failure to conform to the requirements of the OMUTCD. *Pierce v. Ohio Dept. of Transp.*, 23 Ohio App.3d 124 (10th Dist.1985); *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp.*, 49 Ohio App. 3d 129 (10th Dist.1988). Not all portions of the OMUTCD are mandatory, and, therefore, some areas are within the discretion and engineering judgment of ODOT. *Perkins v. Ohio Dept. of Transp.*, 65 Ohio App.3d 487, 495 (10th Dist. 1989); *Cunningham v. Ohio Dept. of Transp.*, 2008-Ohio-6911, ¶ 24 (10th Dist.). “The 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.” *Gregory v. Ohio Dept. of Transp.*, 107 Ohio App.3d 30, 33-34, (10th Dist.1995), citing *Winwood v. Dayton*, 37 Ohio St.3d 282 (1988). Even as to discretionary acts, after ODOT “chooses to act, it is under a duty to conform with the requirements of its own manual.” *Perkins*, 491-492. In this instance, ODOT breached two mandatory duty provisions of the OMUTCD which led to Decedent’s accident.

### **B. Breach of Duty**

{¶28} First, ODOT violated Chapter 2 of the OMUTCD which addresses signage. Section 2E.24 specifically addresses signing for interchange lane drops and requires that “[m]ajor guide signs for all lane drops at interchanges shall be mounted overhead [and an] EXIT ONLY sign panel shall be used for all interchange lane drops at which the through route is carried on the mainline.” As the OMUTCD uses “shall” in this section, the exit only sign panel is mandatory. In the case at hand, Defendant made the right lane of US 224 at exit 4B an exit only drop lane. At the time of Decedent’s accident, the conversion of the right lane to a drop lane was complete and the roadway existed in its permanent configuration. However, there was no overhead signage or advanced guidance indicating that the right lane was an exit only lane. Therefore, Defendant failed to conform to a mandatory provision of the OMUTCD in breach of its duty.

{¶29} Next, ODOT violated Chapter 6 of the OMUTCD which applies to roadways subject to temporary traffic control. Section 6F.70 states: “If [temporary traffic barriers are] used to channelize vehicular traffic, the temporary traffic barrier shall be supplemented with delineation, pavement markings, or channelizing devices for improved

daytime and nighttime visibility.” Section 6F.70 also states: “[t]emporary traffic barriers should not be used for a merging taper except in low-speed urban areas.” Here, ODOT used barrels and a concrete barrier with an attenuator to channelize traffic at exit 4B where drivers could either exit right or merge left. The concrete barrier constitutes a temporary traffic barrier. The barrels at exit 4B were improperly tapered to direct traffic into the concrete barrier. Due to the obliteration of the channelizing lines, the barrels and concrete barrier were the only methods of channelization at the time of Decedent’s accident. Under the circumstances, the OMUTCD required adequate pavement markings and/or proper barrel placement. Therefore, ODOT failed to provide such channelizing in violation of the OMUTCD and in breach of its duty.

### **C. Causation and Contributory Negligence**

{¶30} Based on lay testimony, expert testimony, and the facts at hand, the Court finds that these breaches were a proximate cause of Decedent’s accident. Decedent was not properly warned that the right lane was an exit only lane; if Decedent had known the right lane was an exit only lane, he would not have continued into the gore area. Further, while Decedent managed to avoid all of the barrels, the Court finds that if the barrels were properly tapered, Decedent would have also avoided the attenuator. The Court finds that but for ODOT’s noncompliance with the OMUTCD’s Chapter 2 and Chapter 6 requirements, Decedent would not have hit the attenuator causing his accident.

{¶31} However, Decedent also “has a duty to exercise ordinary care” for his own safety. *Monaco v. Ohio Expositions Comm’n*, 74 Ohio Misc. 2d 103, 109, (Ct. of Cl. 1995). Contributory negligence or contributory fault is an act or omission of an injured party that amounts to a “want of ordinary care” and that combines and concurs with a defendant’s negligence to proximately cause a person’s injuries. *May v. Dept of Rehab. & Corr.*, 2001 Ohio App. Lexis 2859, \*5-6 (10th Dist. June 28, 2001). Contributory fault does not prevent a plaintiff from recovering unless his or her fault was “greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery.” R.C. 2315.33. But a plaintiff’s compensatory damages shall be diminished “by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined pursuant to section 2315.34 of the Revised Code.” R.C. 2315.33;

R.C. 2315.35. Pursuant to R.C. 2315.34, “the court in a nonjury action shall make findings of fact” specifying the total amount of compensatory damages to which plaintiff is entitled but for an injured party’s contributory fault, the portions of compensatory damages that represent economic loss and noneconomic loss, and the “percentage of tortious conduct attributable to all persons as determined pursuant to R.C. 2307.23 of the Revised Code.” See *also* R.C. 2315.18(D).

{¶32} ODOT contends that Decedent was driving erratically at the time of his accident, that because of his medical conditions he should not have been driving at all, and, consequently, that Decedent’s actions were the sole cause of his accident. While Decedent failed to exercise ordinary care in several ways, his driving was far from erratic. Further, based on the evidence before the Court, Decedent was not advised by a medical provider that it was unsafe for him to continue driving. However, the Court finds that, based on testimony from Defendant’s medical expert, an ordinary person with Decedent’s health conditions would not have driven on the highway. Decedent also failed to exercise ordinary care when he used cruise control and failed to exercise heightened awareness in a construction area. Even so, the Court finds that ODOT’s negligence outweighed Decedent’s negligence; therefore, the Court attributes 60 percent of tortious conduct to ODOT’s negligence and 40 percent to Decedent’s negligence. Therefore, Plaintiff is still entitled to damages, which are diminished by his contributory negligence.

## **V. Damages**

### **A. Survivorship Damages**

{¶33} Under the general survival statute, R.C. 2305.21, a decedent’s claim for personal injuries survives and passes to the personal representative, who may bring an action for the estate’s benefit. *Shinaver v. Szymanski*, 14 Ohio St.3d 51, 55, (1984). “Human pain and suffering” is the most difficult portion of compensatory damages to determine because the determination is “susceptible of no mathematical or rule of thumb computation, and no substitute for simple human evaluation has been authoritatively suggested.” *McCombs v. Ohio Dep’t. of Dev. Disabilities*, 2022-Ohio-1035, ¶ 28, quoting *Flory v. New York RR. Co.*, 170 Ohio St. 185, 190 (1959). “Rather, the finder of fact

makes a ‘human evaluation’ of all the facts and circumstances involved.” *Id.* ¶ 29, quoting *Kelly v. Northeastern Ohio Univ. College*, 2008-Ohio-4893, ¶ 8 (10th Dist.).

{¶34} Here, testimony of an eyewitness at the scene shows that Decedent suffered for approximately five to six minutes. Decedent responded to the witness’s voice, attempted to speak, and had a look of doom in his face. While the Court recognizes that Decedent clearly suffered in that time, five to six minutes is a generally short period of time. Therefore, in light of the facts in evidence and the time Decedent suffered, the Court finds that \$100,000, diminished by 40 percent to \$60,000, shall be awarded for the survivorship claim.

### **B. Wrongful Death Damages**

{¶35} A wrongful death claim “belongs exclusively to the decedent’s beneficiaries and is meant to cover pecuniary and emotional loss suffered by those beneficiaries as a result of the death.” *In re Estate of Shackelford*, 2016-Ohio-1431, ¶ 13 (12th Dist.), citing *Peters v. Columbus Steel Castings Co.*, 2007-Ohio-4787, ¶ 10; *In re Estate of Craig*, 89 Ohio App.3d 80, 84 (12th Dist.1993). “In an action for wrongful death, the personal representative is a nominal party and the statutory beneficiaries are the real parties in interest.” *Perry v. Eagle-Picher Industries*, 52 Ohio St.3d 168, 170 (1990), quoting *Burwell v. Maynard*, 21 Ohio St.2d 108, 110 (1970). Here, the Court finds that the real parties in interest for this claim are Decedent’s four children, Dean Tunberg, Jr., Michael Tunberg, Kerri Tunberg, and Kristen Tunberg, and the three grandchildren he helped to raise, Austin Tunberg, Hailey Tunberg, and Gavin Tunberg. While the Court recognizes that other members of Decedent’s family have suffered a loss from his death, Plaintiff only presented testimony regarding the relationships he sustained with the above-named children and grandchildren.

{¶36} Damages for wrongful death “are awarded to the decedent’s family to compensate for the injury they suffered as a result of the decedent’s untimely death.” *Perry* at 170, citing *Jones v. Wittenberg Univ.*, 534 F.2d 1203, 1213 (6th Cir. 1976). Pursuant to R.C. 2125.02(A), a surviving spouse, children, and the parents of a decedent are rebuttably presumed to have suffered damages by reason of a wrongful death. Under R.C. 2125.02(C)(1) this Court may award damages authorized by

R.C. 2125.02(D), as it determines are proportioned to the injury and loss resulting to the beneficiaries described in R.C. 2125.02(A) by reason of the wrongful death and may award reasonable funeral and burial expenses incurred as a result of the wrongful death. The Court is required to set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death. R.C. 2125.02(C)(1). No funeral or burial expenses are awarded in this case. In determining the amount of damages to be awarded, the Court may consider all factors existing at the time of a decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death. R.C. 2125.02(C)(2)(b)(i).

{¶37} R.C. 2125.02(D) pertains to compensatory damages. It provides, in pertinent part:

Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

. . .

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

. . .

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

{¶38} Decedent's four children testified to the loss of society and mental anguish they experienced due to their father's death. The four children sought protection, advice, guidance, companionship, and care from Decedent weekly, if not daily. Plaintiff suggests that this Court award each of the four children \$250,000 and each of the four grandchildren who were alive at the time of his death \$100,000. However, Plaintiff based these figures upon a life expectancy of 12-15 years, not 7-8 years. Therefore, upon review of the testimony presented at trial, the Court awards wrongful death damages, subject to 40 percent diminishment, to Dean Tunberg, Jr., Kerri Tunberg, Michael Tunberg, and Kristen Tunberg the amount of \$140,000 (\$84,000 diminished) each; and

to Austin Tunberg, Hailey Tunberg, and Gavin Tunberg in the amount of \$60,000 (\$36,000 diminished) each for a total of \$740,000 (\$444,000 diminished).

### **C. Total Damages**

{¶39} Based upon all the evidence before the Court and the arguments of counsel, and having spent a considerable amount of time to reach a just and proper award of damages for survivorship, loss of society, and mental anguish, the Court finds that, after a 40 percent diminishment for contributory negligence, Plaintiff is entitled damages as follows:

1. \$60,000 (non-economic survivorship damages for the estate);
2. \$84,000 (non-economic damages for Dean Tunberg, Jr.);
3. \$84,000 (non-economic damages for Michael Tunberg);
4. \$84,000 (non-economic damages for Kerri Tunberg);
5. \$84,000 (non-economic damages for Kristen Tunberg);
6. \$36,000 (non-economic damages for Austin Tunberg);
7. \$36,000 (non-economic damages for Hailey Tunberg);
8. \$36,000 (non-economic damages for Gavin Tunberg);

TOTAL: \$504,000.00 (plus twenty-five dollars (\$25.00) (for the filing fee) plus post-judgment interest).

### **VI. Conclusion**

{¶40} For reasons set forth above, the Court finds ODOT 60 percent liable for Decedent's death. Therefore, the Court holds that Plaintiff is entitled to a judgment in his favor in the amount of \$504,000.00, plus the twenty-five dollar filing fee and post judgment interest.

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DAVID E. CAIN  
Judge

[Cite as *Tunberg v. Ohio Dept. of Transp.*, 2025-Ohio-2513.]

DEAN WILLIAM TUNBERG, JR., Admr.

Plaintiff

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OHIO DEPARTMENT OF  
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Defendant

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Judge David E. Cain

JUDGMENT ENTRY

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**IN THE COURT OF CLAIMS OF OHIO**

{¶41} This case was tried to the Court on the issue of liability and damages. The Court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of Plaintiff in the amount of \$504,000, plus the twenty-five dollar filing fee and post judgment interest. Court costs are assessed against Defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DAVID E. CAIN  
Judge

Filed June 11, 2025  
Sent to S.C. Reporter 7/17/25