

[Cite as *Wax v. Ohio Dept. of Transp.*, 2001-Ohio-1856.]
IN THE COURT OF CLAIMS OF OHIO

LISA WAX :

Plaintiff : CASE NO. 2000-02232

v. : DECISION

DEPARTMENT OF TRANSPORTATION : Judge J. Warren Bettis

Defendant :

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This matter came to trial on the sole issue of liability. Plaintiff alleges that defendant's negligent failure to post warning signs proximately caused her injuries. Defendant denies liability.

The accident underlying plaintiff's claims occurred near the intersection of Miamisburg-Springboro Road and Byers Road, in Montgomery County. On April 21, 1998, at approximately 11:30 p.m., plaintiff drove to the Third Base Tavern where she consumed three twelve-ounce beers before leaving for home at approximately 2:00 a.m. It was raining as plaintiff traveled north on Wood Road to the intersection of Miamisburg-Springboro Road where she turned right or east. Plaintiff had traveled approximately three-tenths of a mile from Wood Road toward the Byers Road intersection when she encountered a barricade with two large signs in the eastbound lane which read "ROAD CLOSED TO THRU TRAFFIC; DETOUR." The barricade stood one hundred twenty-six feet east of the intersection with Byers Road. The Miamisburg-Springboro Road was barricaded in both directions for a short distance beyond the signs due to repair work on a bridge that crossed Interstate 75.

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When plaintiff became aware of the warning signs and applied her brakes, she lost control of her vehicle. It skidded left across the centerline and came to rest in a culvert. Although she was seriously injured, plaintiff extricated herself from the vehicle and walked to a nearby house for assistance. She was later flown to the Miami Valley Hospital for treatment.

While plaintiff was being treated at the hospital, a police officer arrived to investigate the accident. Plaintiff refused the officer's request to submit to a blood test to measure the concentration of alcohol in her body. However, on April 22, at 4:45 a.m., plaintiff's blood was drawn during the course of her medical treatment. Laboratory results revealed that her blood alcohol level was 0.084 mg. Although plaintiff was charged with driving under the influence of alcohol, the charges were subsequently dismissed. Plaintiff was eventually convicted for failure to control her vehicle.

Plaintiff claims that defendant was negligent *per se* for failing to comply with mandatory standards contained in the Ohio Manual of Uniform Traffic Control Devices (Manual). Specifically, plaintiff alleges that defendant failed to post advance warning signs on Wood Road as required by the Manual and that, as a result, the barricade near the intersection of Miamisburg-Springboro Road and Byers Road became a hazard to motorists.

In order for plaintiff to prevail upon her claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. ODOT has the duty to

exercise ordinary care to keep highways free from unreasonable risk of harm. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42. However, ODOT is not an insurer of the safety of its highways. *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 730. Possible ways in which ODOT may meet its duty to the motoring public in construction zones include utilizing traffic control barrels, reducing the applicable speed limit and erecting construction warning signs. *Id.* A court must consider the totality of the circumstances for it to be able to determine whether defendant acted in a manner that would maintain the highway free from unreasonable risk of harm to the traveling public. *Id.*

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 ODOT 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 deviation from the mandatory standards of the Manual renders ODOT negligent *per se* and liable in damages if proximate causation is established. *Madunicky v. Ohio Dept. of Transp.* (1996), 109 Ohio App.3d 418; *Perkins v. Ohio Dept. of*

Transp. (1989), 65 Ohio App.3d 487, 494. When the duty, or standard of care, is not detailed in defendant's Manual, "the proper standard should be that of a reasonable engineer using accepted practices at the time." *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App.3d 143, 147, 572 N.E.2d 208.

The sections of the Manual that address the design and application of traffic control devices use the words "shall," "should," and "may" to describe specific conditions concerning these devices. "The use of the word 'shall' indicates a mandatory requirement, whereas the use of the word 'should' is merely advisory but not mandatory, and 'may' indicates a permissive condition." *Kocur v. Ohio Dept. of Transp.* (1993), 63 Ohio Misc.2d 342.

Plaintiff's negligence *per se* claim concerns the standards set forth in Sections 7D-4 and 7D-8 of the Manual. 7D-4 provides:

The Road Closed Ahead sign is intended for use in advance of a point at which a roadway is closed to all traffic. It carries the legend ROAD CLOSED AHEAD. A distance plate *** may be added. It will normally be used in conjunction with other Construction Approach Warning signs, but where a local road is closed without provisions of a detour it may be repeated. (See Figure C-28.)

Section 7D-8 provides:

The Detour Ahead sign *shall* be used in advance of a point at which traffic is diverted over an alternate roadway due to a closure of the regular street or road. It carries the legend of DETOUR AHEAD. *** It may be used in

repetition or in combination with other appropriate Construction Approach Warning signs. A typical use of the Detour Ahead sign is illustrated in Figure C-25.
(Emphasis added.)

Defendant maintains that it did not violate any provisions of the Manual since Sections 7D-4 and 7D-8 are not specific with regard to sign placement. The court disagrees.

Defendant placed two warning signs on Miamisburg-Springboro Road in a manner that was consistent with the diagram of "typical application of traffic control devices for closed street and detour" that is referenced in 7D-4 and depicted in figure C-28 in the Manual. However, no warning signs were posted on Wood Road.

Defendant's engineering expert, Paul Box, opined that it was within defendant's discretion not to place warning signs on Wood Road. Box based his opinion on his analysis of the construction plan and his calculations regarding the distance at which the barricade signs would be visible to motorists traveling east on Miamisburg-Springboro Road. Box concluded that, even in a heavy rain, plaintiff should have been able to see the barricade signs from a distance of at least seven hundred feet. According to Box, the signs were adequate to warn plaintiff of the road closure in sufficient time to allow her to react and stop her vehicle.

Plaintiff's engineering expert, William Jackman, testified that defendant failed to comply with the Manual's minimum safety specifications by failing to place any "road closed ahead" and "detour" signs on Wood Road. According to Jackman, defendant was required by its own Manual to perform an engineering study, prior

to finalizing its construction plans, in order to determine the proper placement of warning signs in the construction zone.

Section 1D of the Manual provides:

ENGINEERING STUDY REQUIRED

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. ***

Section 7D-3 provides:

Construction Approach Warning signs are for the purpose of alerting traffic, well in advance, to serious obstructions or restrictions due to road work. Various circumstances will occur which will require extra advance warning because of limited sight distance or the nature of the obstruction may require a motorist to bring his vehicle to a stop. Therefore, specified standards or a set sequence of signs are not noted. The determination of the sign or signs to be used *shall* be on the basis of an engineering study using the following sections as guidelines. (Sections 7D-4 through 7D-10.) (Emphasis added.)

Although the standards set forth in the Manual give defendant discretion to determine the proper placement of advance warning signs, the Manual directs that these decisions shall be based on an engineering study. Defendant's assertion that plaintiff has the burden to prove that an engineering study was not performed is not well taken. Daniel Christiansen, defendant's project manager, testified that he was the sole

person to review the construction plans for defendant and that he was not aware of any engineering study that may have been conducted for the project.

"ROAD CLOSED AHEAD" and "DETOUR" signs were posted 0.4 and 0.1 mile west of Wood Road, respectively. Consequently, any motorist traveling north on Wood Road who turned east onto Miamisburg-Springboro Road would not encounter any advance warning signs prior to the barricade which stood one hundred twenty-six feet beyond the Byers Road intersection. There was no warning sign at the Byers Road intersection.

The court finds that, even if the failure to post advance warning signs on Wood Road was the result of a decision based upon an engineering study, defendant failed to comply with the mandatory language of Section 7D-8 which requires a "detour ahead" sign to alert motorists about a road closure. Consequently, the court finds that defendant was negligent for its failure to erect proper advance warning signs on Wood Road. The court further finds that defendant's negligence was a proximate cause of plaintiff's injuries.

In addition to defendant's negligence, the court finds that plaintiff was also negligent. Ohio's comparative negligence statute, R.C. 2315.19, bars plaintiff from recovery if her contributory negligence is greater (more than fifty percent) than defendant's. In this case, plaintiff failed to exercise a reasonable degree of care for her own safety. Just prior to the accident, plaintiff consumed enough alcohol to result in her blood alcohol level measuring 0.084 mg. approximately three hours after the incident. The westbound lane of Miamisburg-Springboro

Road was open and could have been used by plaintiff to stop her vehicle. Nevertheless, plaintiff lost control of her vehicle and traveled into a ditch prior to reaching the barricade. The court concludes that plaintiff's alcohol use contributed to her inability to control her vehicle. The court finds that plaintiff's own negligence was equal to that of defendant. Therefore, the court apportions plaintiff's fault at fifty percent.

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Judgment shall be rendered accordingly in favor of
plaintiff.

J. WARREN BETTIS
Judge

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IN THE COURT OF CLAIMS OF OHIO

LISA WAX :
Plaintiff : CASE NO. 2000-02232
v. : JUDGMENT ENTRY
DEPARTMENT OF TRANSPORTATION : Judge J. Warren Bettis
Defendant :
: : : : : : : : : : : : : : : :

This case was tried to the court on the sole issue of liability. 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 an amount to be determined after the second phase of the trial dealing with the issue of damages. As stated in the court's decision, any compensatory damages recoverable by plaintiff shall be reduced by fifty percent, to account for plaintiff's contributory negligence. The court shall issue an entry in the near future scheduling a date for trial on the issue of damages.

J. WARREN BETTIS
Judge

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