

struck the walls and pipe, it flipped over and the undercarriage was sheared away. Constance was trapped inside the vehicle and sustained massive injuries that later proved to be fatal. Natalie was ejected from the vehicle and sustained serious injuries to her right leg, ribs and collar bone. Gabriel's injuries were minor.

The driveway bridge struck by the Hurier vehicle was built in 1973, the same time that the landowners, Paul and Lillie Gumm, constructed their residence on the property. The structure was situated perpendicular to S.R. 125, above a culvert at the end of the landowners' driveway. There is no dispute that the landowners obtained a valid state building permit to construct the bridge. Nevertheless, plaintiffs assert that the structure was illegally built and maintained on the property because the permit contains no reference to the decorative brick walls. Plaintiffs maintain that defendant had a duty pursuant to R.C. 5515.03 to order that the structure be removed. In addition, plaintiffs contend that defendant negligently maintained S.R. 125 by allowing the decorative walls and exposed drainage pipe to exist within the "clear zone" of the roadway. Finally, plaintiffs claim that the decorative walls constituted an absolute nuisance or, in the alternative, a qualified nuisance.

Plaintiffs also asserted virtually identical claims in a connected action that was filed against the landowners in the Clermont County Court of Common Pleas. The decision rendered by the court of common pleas and by the Twelfth District Court of Appeals in a subsequent appeal narrowed the issues to be determined here.

The common pleas court granted summary judgment in favor of defendant landowners, holding that the landowners had not been

put on notice that the decorative walls posed any danger to travelers and because that had not been shown that Gabriel's deviation from the roadway was foreseeable. On appeal, plaintiffs argued that the trial court erred in granting summary judgment because it failed to rule on the issue whether the walls constituted an illegally constructed nuisance.

In affirming summary judgment, the Twelfth District Court of Appeals addressed the issue whether the decorative walls were illegally constructed and whether they constituted any form of nuisance, public or private, absolute or qualified. *Hurrier v. Gumm* (Nov. 1, 1999), Clermont App. No. CA99-01-055, unreported. The court began by characterizing plaintiffs' suit as one seeking recovery only for a public nuisance because it asserted the right of travelers generally rather than any private right to the use and enjoyment of property. The court then turned to the issue of whether the walls were illegally constructed since they were not specifically mentioned in the language of the permit. **The court noted that the permit required only a general description of the structure to be erected and, by its own terms, required that any approved plan could be carried out only upon inspection.** The court opined that, because plaintiffs had failed to show that any objection had ever been raised by the state inspector, the walls were a "properly permitted part of the driveway bridge." Having so held, the court went on to find that the decorative walls could not constitute an absolute public nuisance because illegality is an essential element of such nuisances as defined in *Taylor v. Cincinnati* (1944), 143 Ohio St. 426 and *Metzger v. Pennsylvania, Ohio and Detroit RR. Co.* (1946), 146 Ohio St. 406.

With respect to the issue of a qualified public nuisance,

plaintiffs argued that the decorative bridge constituted an unreasonable hazard to the public because there had been a prior accident involving the brick walls and because the structure was built within the clear zone of the roadway. The Court of Appeals disagreed and, pursuant to R.C. 5515.01 and 5515.02, held that "once a permit has been issued and a structure lawfully erected, the burden is upon the director of transportation, not the landowner, to determine whether, at a later date, the structure has become an impediment to travel upon the road or highway." The court found no evidence of such a determination having been made by the director and, thus, held that the landowners were under no duty to remove the permitted structure. The court also held that, under R.C. 5515.02, the question whether the decorative walls violated the clear zone requirements was a matter for the director to address with the landowner. The court concluded by finding that one prior accident involving the decorative walls, in the twenty years of their existence, could not be said to put the landowners on notice that the walls were a hazard to the traveling public. Thus, because the walls were lawfully permitted and because plaintiffs had failed to prove that Gabriel's deviation was foreseeable, the Court of Appeals upheld the decision granting summary judgment in favor of the landowners.

Based upon the above-referenced decisions, and the evidence presented at the trial before this court, it is clear that the walls in question were not illegally constructed and did not constitute either an absolute or qualified public nuisance. No evidence was presented in this case that would persuade this

court to reach a different conclusion. Additionally, having found that the decorative walls were lawfully constructed, this court must also find that plaintiffs' argument concerning R.C. 5515.03 is without merit. That code section, captioned: "occupants of land to remove all obstructions" clearly indicates there is no duty to remove structures that were placed there "under a franchise or permit legally granted." Therefore, these issues will not be addressed further. Rather, the issue before this court is what duty, if any, defendant had that would require it to order the removal of the driveway bridge.

The law is well-settled that defendant has a 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, it is not an insurer of the safety of its highways. *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 730. The scope of defendant's duty to ensure the safety of state highways is defined by its construction and design manuals that mandate certain minimum safety measures. *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App.3d 22, 27, 593 N.E.2d 9. Certain portions of defendant's design manuals are permissive, meaning some decisions are within its discretion and engineering judgment. *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App.3d 487, 584 N.E.2d 794. Engineering judgment is necessary to properly locate and design roads and highways that defendant is responsible for building and maintaining. *Id.* "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.

Plaintiffs have asserted that, by allowing the decorative bridge structure to remain in the clear zone of S.R. 125, defendant violated both its own Location and Design Manual (LDM) standards, as well as those of the American Association of State Highway Transportation Officials (AASHTO). While it is undisputed that the clear zone concept did not exist at the time that the driveway structure was built in 1973, the evidence is clear that according to both the ODOT and AASHTO standards in effect at the time of the accident in 1993, the drainage pipe and decorative walls were located within the area that would be considered the "clear zone." The purpose of the clear zone, as defined in Section 601 of defendant's Location and Design Manual Vol. 1, is to provide an unobstructed area within which the driver of an errant vehicle may regain control and re-enter the roadway. The required width for a clear zone is determined by the volume of traffic, design speed and geometry of the roadway.

In the area where the accident occurred, the ODOT recommended clear zone was twenty-nine feet. AASHTO standards required twenty-six to thirty-two feet. The bridge structure was located within this area, approximately seventeen feet from the roadway.

Plaintiffs' expert, Thomas R. Huston, PhD, PE, stated in his investigation report that the concept of a recovery area in roadside design was specifically developed for circumstances such as those encountered by Gabriel. According to Dr. Huston, falling asleep at the wheel is one cause of an errant vehicle on the roadway. He stated that errant vehicles are a foreseeable

occurrence on the roadway, otherwise, recovery areas would not exist. In Dr. Huston's opinion, the decorative walls constituted a roadside hazard because they were obstacles within the clear zone and, therefore, operated to deprive a motorist of an unobstructed recovery area. Dr. Huston further opined that the exposed end of the drainage pipe constituted a roadside hazard because it too was located within the clear zone, also in contravention of ODOT standards.

Dr. Huston's opinion notwithstanding, culverts and clear zones are addressed in Section 307.27 of defendant's 1990 Location and Design Manual (LDM), which was in effect at the time of plaintiffs' accident. That section states: "Requirements for pipe location should be applied to all new construction, reconstruction, widening and resurfacing projects, *if regrading of the roadside to safety or clear zone grading is included in the work.*" (Emphasis added.) According to defendant's expert, Paul C. Box, a traffic engineering consultant, a search of ODOT records revealed that no such work had been performed at or near the subject location on S.R. 125 between 1990 and the date of plaintiffs' accident in 1993. It was Mr. Box's opinion that ODOT had no duty to reconstruct S.R. 125 simply to incorporate clear zones. Moreover, Mr. Box noted that, in this particular case, Gabriel did, in fact, have an unobstructed recovery zone of approximately twenty-six feet because he fell asleep in the left lane of the roadway, then traveled across the right lane and the shoulder before striking the decorative walls.

After consideration of all the evidence offered on this issue, this court finds that defendant was not negligent in

allowing the driveway structure to exist in the clear zone of the roadway. First, no duty to remove the bridge or pipe from the clear zone arose since there were no reconstruction projects undertaken in this area after the bridge and pipe were constructed. Second, the court is simply not persuaded that the requirements of a clear zone are mandatory. Rather, the clear zone requirements appear to be intended as a guide, and merely advisory in nature, with respect to existing roadway design.

With respect to the applicable AASHTO guidelines, Ohio courts have consistently rejected the position that such standards are mandatory or binding upon defendant. See *Neiderbrach v. Dayton Power & Light Co.* (1994), 94 Ohio App.3d 334; *Pittenger v. Commissioners of Richland County, Ohio* (Mar. 14, 1996), Richland App. No. 95-CA32-2, unreported; *Mingus v. Ohio Dept. of Transp.* (Mar. 29, 1994), Franklin App. No. 93API11-1543, unreported (finding the AASHTO manual does not establish a duty of care upon defendant). Accordingly, the court concludes that defendant had discretion to exercise its engineering judgment in this case, and did not breach any duty owed to plaintiffs by failing to order the landowners to conform their property to the clear zone requirements.

The next issue is whether defendant had a duty pursuant to R.C. 5515.02 to order that the driveway structure be removed. That code section, captioned: "Removal of structures constituting obstructions or interferences" provides, in pertinent part:

All individuals, firms, and corporations using or occupying any part of a road or highway on the state highway system * shall remove from the bounds of the road or highway, *** objects or structures, when in the opinion of the director of transportation they constitute**

obstructions, or they interfere or may interfere with *** use by the traveling public of the roads or highways.

*If, in the opinion of the director, such individuals, firms, or corporations have obstructed any road or highway on the state highway system, or if any of their properties are so located that they do or may interfere with *** use of the road or highway, the director shall notify such individual, firm, or corporation directing the removal of the obstruction or properties, or the relocation of the properties.*

If, in the director's opinion, the obstruction or properties present an immediate and serious threat to the safety of the traveling public, the director may remove or relocate the obstruction or properties without prior notice.
*** (Emphasis added.)

The language of the statute clearly reveals that defendant has discretion to determine what constitutes an obstruction or interference to highway users. In this case, the preponderance of the evidence fails to establish that the decorative bridge constituted an obstruction or interference or that it posed an immediate and/or serious threat to the safety of the traveling public. The structure was lawfully constructed with a valid state permit; it did not violate the clear zone requirements at the time it was built; defendant had no mandatory duty under the terms of its LDM to order subsequent conformity with the clear zone requirements; and there is no evidence that either defendant

or the landowners were ever put on notice that the structure constituted an unreasonable hazard, much less a serious or immediate threat to the traveling public. As stated in the decision of the Twelfth District Court of Appeals, one accident involving the decorative walls in an almost twenty-year time span does not amount to notice of an unreasonable hazard or serious and immediate threat.

In order to prevail on their negligence claims, plaintiffs must prove, by a preponderance of the evidence, that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. It is the court's view that the greater weight of the evidence in this case supports the conclusion that Gabriel's own negligence was the sole proximate cause of the accident.

For the foregoing reasons, judgment shall be entered in favor of defendant.

J. WARREN BETTIS
Judge

[Cite as *Hurier, Admr. v. Ohio Dept. of Transp.*, 2001-Ohio-1862.]
IN THE COURT OF CLAIMS OF OHIO

PAUL Y. HURIER, Admr., etc., :
et al. :
 : CASE NO. 95-01450
 :
 Plaintiffs : JUDGMENT ENTRY
 :
 v. : Judge J. Warren Bettis
 :
 OHIO DEPARTMENT OF :
 TRANSPORTATION :
 :
 Defendant :

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This action was tried before the court on the sole issue of liability. The court has considered the evidence and rendered a decision filed concurrently herewith. Judgment is rendered for 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.

J. WARREN BETTIS
Judge

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