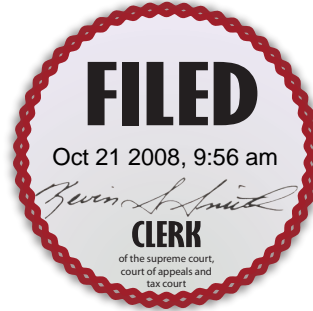


**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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THE ESTATE OF KARL BINNINGER and )  
MARLETA BINNINGER, )

Appellants-Plaintiffs, )

vs. )

No. 41A01-0802-CV-73 )

JOHNSON COUNTY, )

Appellee-Defendant. )

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APPEAL FROM THE JOHNSON SUPERIOR COURT  
The Honorable Kevin M. Barton, Judge  
Cause No. 41D01-0406-CT-68

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**October 21, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

The Estate of Karl Binninger (“Estate”) and Marleta Binninger (“Binninger”) (collectively “Plaintiffs”) appeal a jury’s verdict in favor of Johnson County (“County”). We affirm.

## **Issues**

The Plaintiffs raise three issues on appeal, which we consolidate and restate as follows:

- I. Whether the trial court erred in denying the Plaintiffs’ motion for summary judgment; and
- II. Whether the trial court abused its discretion in denying the Plaintiffs’ motion for judgment on the evidence.

## **Facts and Procedural History**

On a clear, dry afternoon in June 2002, Karl Binninger (“Karl”) was driving a motorcycle with his wife Binninger as a passenger. As they traveled northbound on Old State Road 37, a two-lane road controlled by Johnson County, they approached a curve. At one time, Old State Road 37 had continued straight at this location. With construction of State Road 37, however, northbound traffic on Old State Road 37 had been required to turn east onto County Road 700 North. For northbound traffic, 440 feet south of the curve was a yellow, diamond-shaped sign with a black border and a black, curved arrow indicating a curve to the right. Also, a few feet north of the curve was at least one visible, yellow sign with a black chevron or “V” shape, pointing to the right. At this location, Old State Road 37 was marked with two yellow lines in the center and white lines on each shoulder.

At the same time, Terry Bayless (“Bayless”) and his co-worker Christie Menze

(“Menze”) were in a pickup truck, inspecting a series of residences. They stopped at a parking lot near the same curve and then pulled out west, toward the curve, onto County Road 700 North. Bayless was driving five to ten miles per hour, as Menze looked for an address. Menze saw Binninger’s motorcycle, in the middle of the wrong lane, speeding toward the curve. Menze yelled, and Bayless stopped the pickup.

The motorcycle hit the right front corner of the pickup truck. Karl and Binninger were thrown off the motorcycle and landed in and near the abandoned portion of Old State Road 37. Karl and Binninger were injured.<sup>1</sup>

Neither vehicle left any skid marks.<sup>2</sup> The Standard Crash Report and the photographs included in it (“Report”) indicated that there were at least two chevron signs facing northbound traffic. The Report suggested that Karl or Binninger struck one of the signs, but that it stood relatively upright. The other was splattered with blood and bent backwards, but had not been struck by either of the motorcycle passengers.

Binninger and Karl sued the County for its alleged negligence in warning northbound traffic of the curve.<sup>3</sup> The trial court denied the parties’ cross-motions for summary judgment. A four-day jury trial ensued. At the conclusion of the County’s case-in-chief, the Plaintiffs moved for judgment on the evidence as to the issue of negligence. The trial court heard argument and denied the Plaintiffs’ motion. The jury returned a verdict in favor of the County. The Plaintiffs now appeal the trial court’s denial of their motions for summary

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<sup>1</sup> The parties stipulated before trial as to the Plaintiffs’ damages.

<sup>2</sup> Karl and Binninger had no memory of the accident.

judgment and judgment on the evidence.

## **Discussion and Decision**

### **I. Motion for Summary Judgment**

The parties filed cross-motions for summary judgment and designated evidence to support their arguments. The Plaintiffs argue that the trial court erred in denying their motion for summary judgment.

In considering a trial court order denying summary judgment, we apply the same standard of review used by the trial court. Hartman v. Keri, 883 N.E.2d 774, 777 (Ind. 2008).

Summary judgment is appropriate only “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C). “All inferences from the designated evidence are drawn in favor of the nonmoving party.” Hartman, 883 N.E.2d at 777. The standard of review is not altered by the filing of cross-motions for summary judgment. Metro. Sch. Dist. of Lawrence Twp. v. M.S., 818 N.E.2d 978, 985 (Ind. Ct. App. 2004).

The tort of negligence is injury caused by the breach of a duty. Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004). “Indiana law has held for some time that governmental bodies have a common law duty to exercise reasonable care and diligence to keep streets in a reasonably safe condition for travelers.” Hochstetler v. Elkhart County Highway Dep’t, 868 N.E.2d 425, 426 (Ind. 2007). The Plaintiffs’ designated evidence and appellate argument rely significantly upon the Indiana Manual on Uniform Traffic Control Devices (“Manual”).

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<sup>3</sup> The Plaintiffs sued Terry Bayless, but the parties later stipulated to his dismissal. Karl died before trial, but not as a result of this accident.

As the Plaintiffs accurately note, governmental agencies must follow the Manual. See Ind. Code § 9-21-4-1. However, the Manual’s introduction states that it “shall not be construed as an instrument to mandate the use of any of the control devices or procedures at a particular location.” Plaintiff’s Exhibit 7, page 3. This Court has held that the Manual may be relevant evidence in a tort action, but is neither prima facie evidence of negligence nor the basis for a statutory negligence action. Chandradat v. Ind. Dep’t of Transp., 830 N.E.2d 904, 909 (Ind. Ct. App. 2005), trans. denied; Ind. State Highway Comm’n v. Daily Express, Inc., 503 N.E.2d 1237, 1240 (Ind. Ct. App. 1987). The Manual provides no basis upon which to conclude that the Plaintiffs were entitled to judgment as a matter of law.

Here, the County’s designated evidence supported the inference that two signs, a right-curve sign and a right-pointing chevron sign, warned northbound traffic of the curve. On a clear, dry afternoon, Karl sped toward the curve in the middle of the wrong lane. The motorcycle left no skid marks. It was therefore, at best, an issue of fact whether the County was negligent and, if so, whether its negligence was a proximate cause of the Plaintiffs’ injuries. Viewing the evidence most favorable to the County, the trial court did not err in denying the Plaintiffs’ motion for summary judgment.

## II. Motion for Judgment on the Evidence

After presentation of the County’s case-in-chief, the Plaintiffs moved orally for judgment on the evidence “on the issue of whether the County was negligent in [its] placement of signage at the site.” Transcript at 608. They now argue that the trial court abused its discretion in denying their motion.

In a jury trial, where an issue is not supported by sufficient evidence, “the court shall

withdraw such issue[] from the jury and enter judgment thereon.” Ind. Trial Rule 50(A). We review for an abuse of discretion the grant or denial of a motion for judgment on the evidence. Stowers v. Clinton Cent. Sch. Corp., 855 N.E.2d 739, 747 (Ind. Ct. App. 2006), trans. denied. We consider the evidence in the light most favorable to the nonmovant and do not substitute our judgment for that of the jury on questions of fact. Id.

As noted above, “governmental bodies have a common law duty to exercise reasonable care and diligence to keep streets in a reasonably safe condition,” Hochstetler, 868 N.E.2d at 426, and the Manual is merely relevant evidence in a tort action. Chandradat, 830 N.E.2d at 909. Whether the County breached its duty is a question of fact for the jury. Estate of Cullop v. State, 821 N.E.2d 403, 407 (Ind. Ct. App. 2005).

At trial, the County presented the testimony of Bayless, Menze, John Price (“Price”), and Indiana State Police Sergeant William Utterback (“Sgt. Utterback”), as well as several photographs and a to-scale diagram prepared by Sgt. Utterback. The evidence at trial supported all of the facts and inferences described above. Furthermore, Sgt. Utterback, the first law enforcement officer to arrive at the scene, testified as follows:

Q: When you completed your report did you take notes at the scene of the accident?

A: I took some, yes.

Q: And in completing your report did you give what you determined to be the primary cause of the accident?

A: Yes.

Q: What was that found to be?

A: I believe it was just the driver of the motorcycle going left of center and not engaging the curve like he should have.

Tr. at 462.

Finally, regarding the signs for northbound traffic, a witness called by the Plaintiffs acknowledged that there was a curve sign posted between 400 and 450 feet south of the curve. In addition, Price testified that even after the accident, two chevron signs were visible as far south of the curve as one hundred yards. Based upon the evidence, the trial court did not abuse its discretion in denying the Plaintiffs' motion for judgment on the evidence.

Affirmed.

RILEY, J., and BRADFORD, J., concur.