



adjacent to the roadway. Plaintiff<sup>2</sup> alleges that when he landed in the grass, his left hand came into contact with a wooden pallet that had been used to cover a broken drainage grate over a catch basin. Plaintiff sustained severe injuries to the back of his hand, causing the tendons and bones to become exposed.

{¶4} Plaintiff seeks recovery solely for the injuries to his hand. Plaintiff alleges that defendant's negligence in placing the pallet over the broken drainage grate created a hazard that caused his injuries. Plaintiff further asserts that defendant breached its duty to maintain the "clear zone" of the roadway free from obstructions. Defendant denies that it placed the pallet over the grate and asserts that plaintiff's negligence in trying to negotiate the curve at an unsafe speed was the sole cause of his injuries. Defendant also disputes whether plaintiff's hand came into contact with the pallet.

{¶5} John Paetznick, a witness to the accident, was driving northbound on SR 4 behind both motorcycles. He explained that there was an "S" curve on northbound SR 4 which first curved to the right and then curved to the left. He observed that both the Hopkins' and plaintiff's motorcycles negotiated the first curve without incident, but noticed that plaintiff's motorcycle gave off a "spurt of dust" on the second curve and that it went off the road to the right. Paetznick stopped after the accident and saw that plaintiff was lying against a wooden pallet and that his left hand was very badly injured.

{¶6} Betty Hopkins testified that she saw gravel on the roadway near the second curve and that her husband slowed down to traverse the gravel. She also testified that she was a trauma nurse and that she saw blood and skin on the edge of the pallet after the accident.

{¶7} Marieta Steele testified that before she and her husband approached the curves, they were traveling at approximately 50 mph; that Tommy lost control on

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<sup>2</sup>"Plaintiff" shall be used to refer to Tommy Steele throughout this decision.

the second curve; and that when they came to rest in the grassy area his hand was against the pallet.

{¶8} Tommy Steele testified that he was traveling at or under 50 mph most of the ride; that he did not see any gravel on the traveled portion of the roadway; that he felt the rear end of the motorcycle slide out from under him on the second curve; and that he knew the curve was coming up because he had traveled the roadway before.

{¶9} Randy Baker, Bernice Baker's son, testified that he lived with his mother at her residence on SR 161 near the scene of the accident and that he mowed the grass in the area where the drainage grate was located; that in the summer of 1999, he discovered that the drainage grate was broken and called defendant at the Marysville post to report it; and that either that same day or the following day there was a pallet over the broken grate. According to Baker, at a later date, he inspected the catch basin while he was mowing the grass and noticed that the broken grate had been removed but that the pallet was still in place over the catch basin. After the pallet had remained there for at least two weeks, he called defendant again to see when the grate would be repaired and he was told that a work order had been issued. Baker testified that he mowed the grass four times before a new grate was installed. Baker also testified that he had contacted defendant numerous times before the accident to complain that the "S" curve was dangerous.

{¶10} Bernice Baker testified that she routinely picked up litter in the area before Randy mowed the grass; that she discovered that the grate was broken in early June 1999; that she asked Randy to contact defendant because she was concerned that a child might fall through the grate; and that a wooden pallet appeared over the grate after Randy reported it.

{¶11} R. Michael Clark, an attorney, testified that in the fall of 1999, plaintiffs contacted him and he agreed to represent them and investigate whether they had an actionable claim to pursue. He stated that a person at defendant's Marysville

post informed him that defendant had placed a pallet over the drainage grate for a couple of weeks until a new grate was received from Delaware County. However, he did not remember the name of the person he spoke to and did not take any notes during the conversation.

{¶12} Thomas Lyden was a county manager for defendant in 1999; his duties included maintaining and overseeing state and US routes within Union County. He testified that Michael Lang, Transportation Administrator, contacted him to evaluate the intersection at SR 4 and SR 161 to see if any improvements could be made; that he went to the intersection on March 31, 1999, and recommended that additional chevrons be placed before the second curve; and that the accident photos show that the additional chevrons were present. He further testified that the information regarding clear zones in the ODOT design manual (Plaintiff's Exhibit 11) did not apply to roadway maintenance and had no application at this intersection. Lyden acknowledged that it would be careless to put a pallet over a catch basin.

{¶13} Michael Lang testified that defendant does not stock pallets; that using a pallet as a temporary repair for a broken grate would not be reasonable; and that covering a drain with a pallet was not standard procedure.

{¶14} Virgil Reisinger was a transportation manager who assigned road-work crews. He testified that on August 5, 1999, he received a telephone call from the property owners who reported the broken grate and told him that they had placed a pallet over the drain. Reisinger further stated that he advised Leroy Hudson, a mechanic, to repair the grate and that it was repaired on August 6, 1999. He also testified that he did not take any notes regarding the phone call and that he has never used a wooden pallet to cover a catch basin.

{¶15} Leroy Hudson testified via deposition that he was a mechanic for defendant at its Marysville post; that Virgil Reisinger asked him to repair the grate and that in order to do so, he welded the existing broken rods; that the daily time report for August 6, 1999, showed that he had done that repair in that area

(Defendant's Exhibit G); and that he could not remember whether a pallet was covering the drain before he repaired it.

{¶16} Defendant's expert, James B. Crawford, testified that he was an accident reconstructionist. He opined that the recommended speed at the curve was 25 mph and that plaintiff's unreasonable driving tactics caused the accident.

{¶17} In order for plaintiffs to prevail upon their claims of negligence, they 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. Defendant has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335; *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. Therefore, the question before the court is whether defendant breached the duty of care owed to plaintiffs under the circumstances of this case.

{¶18} The Supreme Court of Ohio has determined that a landowner may be liable for damages proximately caused by maintenance of an off-roadway condition that interferes with the usual and ordinary course of travel on the roadway. See *Manufacturer's Nat'l Bank of Detroit v. Erie Cty. Road Comm.* (1992), 63 Ohio St.3d 318. However, the state may be liable only if the off-roadway condition directly jeopardizes the safety of the traffic on the roadway. *Id.* at 322.

{¶19} There was conflicting testimony regarding how and when the pallet appeared over the catch basin. The accident photos show that the pallet was covering the grate on the day of the accident. The court finds that plaintiff's testimony

that he injured his hand on the pallet was credible. However, the court cannot conclude that defendant placed the pallet over the grate. Even if defendant had placed the pallet there, the court finds that the existence of the pallet over the catch basin did not render the roadway unreasonably dangerous for usual and ordinary traffic on the roadway. See *Harris v. Ohio Dept. of Transp.* (1992), 83 Ohio App.3d 125. Moreover, the court recognizes that "the traveling public has no right to drive upon that portion of a public highway which is not dedicated, improved and made passable for vehicular use." *Ohio Postal Telegraph-Cable Co. v. Yant* (1940), 64 Ohio App. 189, 193. The catch basin was located adjacent to the shoulder of the roadway in a grassy area. Plaintiff drove through the grassy area to try to recover after losing control of his motorcycle on the roadway. Accordingly, the court finds that defendant did not breach its duty to maintain the roadway in a reasonably safe condition.

{¶20} Section 600 of defendant's manual, entitled "Roadside Design," states the following:

{¶21} "Clear Zone refers to the desirable unobstructed area along a roadway, outside the edge of pavement, available for the safe recovery of vehicles that have left the traveled way. Within this area, most motorists will be able to safely regain control of their vehicle. Ideally, there should be no obstructions within the clear zone; however, if an obstruction cannot be removed, then engineering judgment must be used to determine how to treat it." (Plaintiff's Exhibit 11.)

{¶22} While plaintiffs argue that defendant breached its duty to maintain the clear zone of the roadway free from obstructions, the court finds that defendant's policy pertains to roadway design, not maintenance. Furthermore, even assuming that defendant breached its duty, the court finds that plaintiffs have failed to prove that any lack of required maintenance was the proximate cause of the accident.

{¶23} Drivers upon Ohio's highways have a duty to maintain control of their vehicles on the traveled portion of the roadway. Pursuant to R.C. 4511.20.2: "[n]o person shall operate a motor vehicle, \*\*\* on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle." The court finds that under the circumstances of this case, plaintiff's failure to maintain reasonable control of his motorcycle was the sole and proximate cause of the accident.

{¶24} Upon review, the court finds that plaintiffs failed to prove by a preponderance of the evidence that defendant's actions or inactions under the circumstances of this case give rise to liability for the injuries sustained by plaintiff.

{¶25} Marieta Steele also asserts a claim for loss of consortium. "[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93. Since plaintiffs have failed to prove their claims of negligence, the loss of consortium claim must also be denied.

{¶26} For the foregoing reasons, the court finds that plaintiffs have failed to prove any of their claims by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of defendant.

**IN THE COURT OF CLAIMS OF OHIO**

TOMMY D. STEELE, et al. :  
Plaintiffs : CASE NO. 2003-02721  
Judge Joseph T. Clark

v. :  
DEPARTMENT OF TRANSPORTATION : JUDGMENT ENTRY  
Defendant :  
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This case was tried to the court on the 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 defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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JOSEPH T. CLARK  
Judge

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Filed June 18, 2004  
To S.C. reporter July 19, 2004