

[Cite as *O'Brien v. Dept. of Transp.*, 2017-Ohio-8096.]

SEAN O'BRIEN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2015-00785

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} This case arises from an automobile collision that occurred on August 3, 2010, in Knox County, Ohio. Plaintiff was riding as a backseat passenger in a vehicle driven by the father of his girlfriend, Jody Alexander. The previous day, plaintiff had gone camping with Jody and her parents, Joseph and Judith, at a campground in Butler, Ohio. After spending the night at the campground, the group began traveling to the airport in Columbus, Ohio, so that plaintiff could return to San Francisco.

{¶3} Alexander was driving southwest on State Route (SR) 95, a two-lane, rural highway. The stretch of roadway had a posted speed limit of 55 miles per hour (mph). Alexander was not particularly familiar with the roadway; however, the group decided to take SR 95 so that plaintiff could see the countryside.

{¶4} The weather conditions were cloudy and the accident occurred during daylight hours, at approximately 12:50 p.m., near an intersection with SR 95, Mishey Road, and Old Mansfield Road. Mishey Road runs east and west, and intersects SR 95 from the east. Old Mansfield Road runs north and south, and intersects SR 95 from the south. Stop signs control the traffic entering SR 95 from both Mishey and Old Mansfield Roads, but SR 95 is a through highway with a sharp curve. Northeast SR 95 motorists may either continue on SR 95 by following the curve to the left, or turn slightly to the

right onto Mishey Road. Southwest SR 95 motorists must navigate the curve to the right if they intend to stay on SR 95. Old Mansfield Road leads to a boat marina and ultimately a dead end, but a driver traveling southwest on SR 95 can see Old Mansfield Road in the horizon as it intersects with SR 95 and continues up a hill to the south.

{¶5} The roadway had the following signs and pavement markings in place on the day of the accident for southbound motorists on SR 95 in advance of the intersection. First, a yellow, diamond-shaped intersection warning sign, with the black symbol of a side intersection approaching from the left, and the words “Mishey Road” was located to the right of SR 95. (W2-2.)<sup>1</sup> Then, two, yellow, diamond-shaped horizontal alignment signs with a black symbol of a right turn arrow, and an advisory speed of 20 mph, were on both the left and right sides of southbound SR 95 (W1-1.) Those two signs were parallel to one another and preceded a hill that obscured the intersection. Next, a brown, rectangular directional sign with white letters that stated “Knox Lake” and “Boat Ramps, Marina” with white, vertical arrows pointing upward to indicate that the lake and marina were straight ahead was on the right side of SR 95. Then, two chevrons that point to the right, were located on the left side of SR 95. (W1-8.) Two large, yellow, rectangular, horizontal alignment signs with arrows that point to the right were placed adjacent to both Mishey Road and Old Mansfield Road, facing southbound motorists on SR 95 (W1-6.) Additional chevrons pointing right were located through the curve southwest of the large arrow boards. A double yellow center line separated the two lanes of traffic on SR 95 and curved to the right for southwest motorists, but the center lines ended at the intersection to allow for vehicles to travel onto either Mishey Road or Old Mansfield Road. Just west of the intersection, the double yellow lines began again heading southwest on SR 95. The white edge line on the right side of southbound 95 also curved to the right. South of the break in the

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<sup>1</sup>The signs are identified as they appear in the Ohio Manual of Uniform Traffic Control Devices (OMUTCD or “manual”), 2005 Revision 1.

double yellow centerline on SR 95, a double yellow center line was also visible on Old Mansfield Road. A yellow, diamond shaped “Dead End” sign was located on the right side of Old Mansfield Road south of the intersection. (Defendant’s Exhibits A-J.)

{¶6} Instead of following the curve to the right on SR 95, Alexander’s vehicle continued to travel south onto Old Mansfield Road. At the same time, another motorist, Pamela Riggleman, who was traveling northeast on SR 95, turned onto Mishey Road. The vehicles collided, and Alexander’s vehicle came to rest adjacent to Old Mansfield Road, upside down. Plaintiff was ejected from the vehicle onto a nearby field, sustaining major injuries.

{¶7} Plaintiff asserts that defendant, Ohio Department of Transportation (ODOT), was negligent in its placement of signs in advance of the intersection, such that it failed to adequately warn Alexander that SR 95 southbound curved to the right, as opposed to continuing south onto Old Mansfield Road. Plaintiff also asserts that the topography of the road, including the hill that obscured the intersection, the slope of the roadway, and the fact that Old Mansfield Road was visible in the distance, prevented Alexander from understanding that SR 95 curved to the right. Plaintiff alleges that defendant’s negligence was the proximate cause of plaintiff’s injuries.

{¶8} Joseph Alexander estimated that the accident occurred approximately 10 minutes after they left the campsite. Alexander remembered going up a hill but did not remember any signage on the roadway. Alexander testified that after he crested the hill, he thought the road went straight. Then he realized the road curved. He continued straight, and caught a glimpse of another vehicle in his peripheral vision. Alexander thought the car was far enough away from him that it would not make impact, and he accelerated to try to avoid the other car. Alexander was not using a navigation system, but knew that SR 95 would take him to Columbus. After the accident, Alexander’s vehicle landed on its roof, in a grassy area adjacent to Old Mansfield Road.

{¶9} Judy Alexander testified that the day of the accident was the first time that she had traveled through the intersection; that she remembered seeing a curve sign before the hill but did not realize that the road they were traveling on would curve; and that she did not see the curve until they were hit.

{¶10} Ruth Auker testified that she has lived 500 yards away from the intersection since the 1990s and that she has seen at least 10 instances where a vehicle traveled into a field near the intersection because it missed the curve. Auker has witnessed two crashes in the area. One was in the early 1980's, when a car continued through the intersection, in a path similar to the accident in this case, resulting in a fatality. The other accident she witnessed was in the late 1990s or early 2000s, when a car continued south onto Old Mansfield Road and caused a collision that did not involve serious injuries. Auker came upon the accident in this case after it had happened and stayed with Riggleman until paramedics arrived.

{¶11} Jim Singrey testified that he has lived near the intersection for nearly 40 years and has witnessed 7 to 10 accidents. Singrey testified that he has seen multiple instances of road signs near the intersection having been knocked down, skid marks in the intersection, and that he has helped put up a sign that had been knocked down. He testified that he has rendered aid to motorists in the intersection more than 20 times in the 40 years that he has lived there. Singrey testified that he contacted ODOT about improving the intersection, although he could not remember the timeframe, and that two ODOT workers, Tye Thompson and Troy Dunlap, came to his house to speak with him about the intersection for over an hour. According to Singrey, the ODOT employees indicated to him that they did not know what could be done about the intersection. Singrey added that in his opinion, the Mishey Road intersection sign indicates to motorists that SR 95 continues straight ahead.<sup>2</sup>

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<sup>2</sup>Although Allison Lowry, another resident who lives near the intersection, testified at trial, she moved to the area after the accident occurred and did not witness the accident. Accordingly, the magistrate finds that her testimony was not particularly relevant.

{¶12} Officer Matthew Whims of the Ohio State Highway Patrol (OSHP) testified that he has investigated thousands of vehicle crashes, and that he completed the crash report in this matter. (Plaintiff's Exhibit 1.) Whims explained that the collision left gouge marks in the pavement where the impact occurred. Whims stated that there was no evidence that Alexander's vehicle attempted to continue through the curve to the right. One of the photos of the accident scene that Whims took was marked as Defendant's Exhibit B.

{¶13} Sgt. James Adam Burkhart, with OSHP, testified that he took witness statements at the Knox County Hospital from both Pamela Riggelman and Judy Alexander. Riggelman explained that she intended to turn right onto Mishey Road, and that she had the right-of-way, but Alexander's vehicle failed to follow the curve and struck her vehicle. Burkhart testified that he sprayed the gauge marks in the pavement from the accident with white paint. (Defendant's Exhibits A and B). The white paint spots represent the measurements on point "V" of Trooper Whims' sketch of the accident scene. Burkhart and Whims worked together on the accident report, with Burkhart taking measurements with a laser and Whims writing down the measurements.

{¶14} Freddie Okulich testified that he has lived in Butler, Ohio since 2002. On the day of the accident, he was traveling northeast on SR 95 from Fredericktown, approaching the intersection, when he saw a vehicle overturned in the grass. He stopped and approached the overturned vehicle and observed Judy Alexander, who was still inside the vehicle. He then discovered that another person was lying in a field near the intersection and that Judy's husband was still in the car. According to Okulich, Alexander was in hysterics, yelling, "Look what I've done! I wasn't paying attention!" Okulich also testified that Alexander was saying that he was "going too fast for the turn" and that he "forgot about the turn." Okulich then noticed Jody Alexander who was walking around holding her back.

{¶15} Henry Lipian, plaintiff's accident reconstructionist, testified that he works for Introtech, Inc., and has performed traffic crash reconstruction since 1989. Lipian has served in the Coast Guard, worked for the OSHP performing accident reconstruction, obtained training in accident reconstruction from Northwestern University, and is accredited through the Accreditation Commission for Traffic Accident Reconstruction (ACTAR), the only international accreditation for this line of work. Lipian is familiar with the OMUTCD. Lipian's Introtech staff went to the scene of the accident and measured the topography, using a total station method, which involves the use of a prism pole, the same type of equipment that surveyors use. In addition to laser measurements, the total station method shows the elevation of the roadway. Lipian documented the signage and pavement markings that were in place on the day of the accident, and his staff made a video of the intersection, traveling both southbound on SR 95 as Alexander had been driving, and northbound as well.

{¶16} Lipian opined that the existing signage, coupled with the topography of the roadway prior to the intersection, were contributing factors to the accident. Lipian testified that due to the two hills immediately prior to the intersection, the curve on SR 95 is not visible until a driver is 600 feet north of the intersection. Lipian testified that the signs in place gave a driver either insufficient or contradictory information regarding the geography of the intersection, which resulted in insufficient time to detect, perceive, and react to the curve in the roadway. Lipian calculated Alexander's speed at 42 mph and Riggleman's speed at 53 mph. Lipian testified that there was no evidence of pre-impact evasive action, such as applying the brakes.

{¶17} Lipian testified that the Mishey Road intersection sign, which was located 921 feet north of the intersection, depicted a "T" intersection, instead of a 4-way intersection. According to Lipian, the Mishey Road intersection sign indicates to a driver that the main roadway, SR 95, goes straight through the intersection with Mishey Road. Lipian opined that the intersection contained a "false visual cue" of the main roadway

appearing to go straight through to Old Mansfield Road. Lipian also criticized the pavement striping in the intersection. According to Lipian, the break in the double yellow line gave the impression to a driver that SR 95 continues south, not to the right. Lipian also opined that the 55 mph speed limit was too high for the roadway. Lipian testified that the gauge marks in the pavement do not signify where the impact occurred, but, rather, they appear once vehicles have made contact and move through the process of maximum engagement.

{¶18} On cross-examination, Lipian agreed that the human error of Alexander was also a cause of the crash, and if Alexander intended to follow the curve, he was driving too fast for that condition of the roadway. Lipian agreed that the photos from the day of the accident depict a curved, double yellow line, as well as a solid white fog line for southbound traffic. Lipian also testified that there were some dashed white stripes on the pavement to indicate to northbound traffic to continue through the curve, although the dashes did not go all the way through the intersection. Lipian conceded that he was not aware of any mandatory signs per the OMUTCD that were not posted. Lipian agreed that all of the signs in place at the intersection were optional per the manual.

{¶19} Timothy Tuttle, defendant's accident reconstructionist, testified that he has been in private practice since 2001, and prior to that he worked for OSHP, where he was the commander in chief of the traffic reconstruction post. He has investigated thousands of crashes with OSHP and approximately 370 since he left the patrol. He has testified in court approximately 75 times about accident reconstruction.

{¶20} Tuttle performed an accident reconstruction in this case, which included driving through the intersection, taking photographs, measurements, video, and preparing drawings. Tuttle determined that the vehicle that Alexander was driving was traveling 34 mph at the time of impact, and that Riggleman's vehicle was traveling 33 to 36 mph. Tuttle stated that the gouge marks signify where the impact occurred. Tuttle

explained that gouge marks are created when vehicles collide, in that the vehicle parts that come into contact with each other are forced down on the roadway.

{¶21} On cross-examination, Tuttle agreed that this was an “aggressive” curve. Tuttle testified that the site distance from the hill crest to the intersection was 500 feet. Although perception reaction time is different for every driver, he estimated that one and one half seconds was enough time for a driver to realize that the roadway curved to the right.

{¶22} Plaintiff’s expert, Kim Nystrom, P.E., testified that she has a master’s degree in civil engineering and has worked as the state traffic engineer for CalTrans, which is California’s equivalent to ODOT. In 2001, Nystrom left CalTrans and has been an expert witness since that time. Nystrom has been certified as an expert in California, is familiar with the national Manual of Uniform Traffic Control Devices (MUTCD), and has served on a national strategic highway safety committee. Nystrom explained that the MUTCD is a federal manual that can be adopted in its entirety or modified on a state level. The OMUTCD is Ohio’s manual and the version that was in effect at the time of the accident was 2005, Revision 1.

{¶23} Nystrom conducted a site visit to the intersection in March 2016, where she took measurements and observed the signs and striping. She also reviewed the accident reports in this matter. According to Nystrom, traffic engineers use positive guidance through signage to warn drivers when something is not foreseeable or visible on the roadway. Nystrom had many criticisms of the sight distance ahead of the intersection, especially because of the two hills that immediately precede the intersection. Nystrom testified that the signs that were in place on the day of the accident were misleading, and that they confused the decision-making process for motorists. Nystrom made the following specific criticisms. With regard to the Mishey Road intersection warning sign (W2-2), Nystrom testified that this sign did not accurately depict the physical layout of intersection. According to Nystrom, the W2-2



sign signals to a driver that the roadway goes straight through the intersection with Mishey Road. Next, Nystrom criticized the use of the two W1-1 signs because they do not accurately depict what the intersection looks like. Specifically, Nystrom testified that the right turn arrow does not alert a driver that there are four “legs” in the intersection: Mishey Road, Old Mansfield Road, SR 95 southbound, and SR 95 northbound. Nystrom also criticized the W1-6 signs as being placed incorrectly per the OMUTCD. Specifically, Nystrom testified that the W1-6 sign adjacent to Mishey Road was not placed in accordance with the manual because it was not on the outside of the turn, and it was not at an approximate right angle to the approaching traffic. Nystrom noted that the W1-6 sign near Old Mansfield Road was placed behind the curve as it should have been, but she argued that it was not correctly aligned. According to Nystrom, a southbound driver could not see that SR 95 curved to the right. Nystrom also criticized the fact that the chevrons were not uniformly spaced.

{¶24} With regard to any required signs that were not present at the intersection, Nystrom testified that ODOT failed to install an Advance Route Turn Assembly, which would have shown southbound motorists that SR 95 turned to the right. Nystrom also testified that a Route Sign Assembly was required because SR 95, a numbered route, intersected with both Mishey Road and Old Mansfield Road, also known as County Road 55 and County Road 5, respectively. She added that a Junction Assembly was required at the intersection. Nystrom opined that defendant should have used one, W1-10 sign, as shown in “Figure 2C-1. Horizontal Alignment Signs” on Page 2C-6 of the manual, modified to show a turn symbol instead of a curve symbol, and with the addition of a secondary side road, plus the 20 mph advisory speed limit. Nystrom opined that use of that modified sign would have been adequate to alert a motorist of the physical layout of the intersection. She also testified that the centerline striping was confusing to motorists, such that the double yellow line should have continued through the

intersection so a motorist would have to pause before crossing it to continue onto Old Mansfield Road.

{¶25} On cross-examination, Nystrom testified that this is the first time that she has testified as an expert in Ohio, and the first case in which she has examined the OMUTCD. With regard to the signage in place on the day of the accident, Nystrom conceded that the Mishey Road sign, and both of the W1-1 horizontal alignment signs were optional pursuant to the OMUTCD. She also conceded that the chevron and large rectangular arrow signs were optional, and testified that she would have not used any chevrons or large arrow warning signs for the curve. If Nystrom had signed the roadway, she would have eliminated the Mishey Road sign; modified one, W1-10 sign with a turn symbol and two intersecting side roads to accurately reflect the appearance of the intersection, including a 20 mph advisory speed sign. Then, instead of the chevrons and two large arrow boards, Nystrom would have used an enlarged W1-1a turn sign where the large arrow boards had been, and she would have added a directional route sign with the advance route assembly. Nystrom agreed that the 20 mph advisory speed limit was appropriate for the curve radius of the intersection. Nystrom described the intersection as a “turn” instead of a “curve” on SR 95 because the manual includes a chart on advisory speed with regard to the angle of the roadway, and since the angle of the curve required an advisory speed limit of 20 mph, the sign to use is a turn sign, not a curve sign. (See Table 2C-5. Horizontal Alignment Sign Usage.)<sup>3</sup>

{¶26} Plaintiff's other expert, William Vigilante, Ph.D., testified that he has worked as a forensics consultant in the field of human factors for the past 15 years. Vigilante testified that human factors is the science that studies how people interact with the use

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<sup>3</sup>Table 2C-5, Horizontal Alignment Sign Usage states that if there is one alignment change and the advisory speed is less than 30 mph, a Turn (W1-1) sign should be used. (Plaintiff's Exhibit 18, p. 2C-7.) In addition, that section of the manual states that engineering judgment should be used to determine whether the Turn or Curve sign should be used. (*Id.*)

of vehicles and roadway systems; how people capture, store, and interpret information, and make decisions. He testified that issues related to sight distance, perception reaction time, and expectancy are used to develop traffic control devices. Vigilante testified that human factors concepts are found throughout the OMUTCD, in examples of consistency of signage and traffic control devices.

{¶27} Vigilante testified that there were multiple visual cues for Alexander to continue straight instead of curving to the right through the intersection. One example was the physical configuration of the intersection, where Old Mansfield Road continued straight south of the intersection. Another example was the Mishey Road sign, which Vigilante stated gave Alexander an expectancy that there was a “T” intersection. He added that the two right turn arrow signs placed after the Mishey Road sign gave a driver the impression that the road would turn to the right after the “T” intersection. He also testified that photos from the accident scene show that the advisory turn signs could signal to a driver that the curve was for Old Mansfield Road, and that since the double yellow line breaks but is also visible on Old Mansfield Road, a driver could assume that he was required to go straight instead of turning right. He opined that had the appropriate signage been in place, Alexander would have had the right positive guidance to make the turn.

{¶28} On cross-examination, Vigilante acknowledged that Alexander did not testify that he was confused by the signs on the roadway, but Vigilante believes that the signs were “misleading” to a driver. According to Vigilante, the “T” intersection sign tells a driver that there is a “T” intersection and then a turn, not that those two conditions would happen simultaneously. He also testified that the five chevrons and two large arrow boards pointing right were confusing, and that Alexander was not responsible for the accident due to the confusing signage.

{¶29} David Holstein testified that he has worked for ODOT for 26 years and currently serves as the administrator of the Office of Roadway Engineering. Holstein

has been responsible for revising the OMUTCD for the past 18 years. He is a licensed engineer in the state of Ohio and has served on the AASHTO traffic committee, a national group of state traffic engineers. Holstein testified that SR 95 became a state route in the 1930s. Because the accident occurred in 2010, the manual in effect at the time was the 2005 version, Revision 1. Holstein testified about each sign that was in place on the day of the accident.

{¶30} According to Holstein, all of the signage in place in advance of the intersection was optional per the manual in effect at the time. Holstein explained that the Mishey Road sign is an intersection warning sign that provides notice to motorists that there is an impending intersection and vehicles might be entering from the left. (Defendant's Exhibit C; section 2C.37 of the manual.) With regard to the two right turn signs (W1-1), Holstein stated that they are known as horizontal alignment signs, and their purpose is to warn that there is a change in the direction of the road that the motorist is traveling on. Although "turn" signs were in place, Holstein testified that SR 95 has a curve, not a turn. In addition, the chevrons and the two large arrow boards are additional horizontal alignment warning signs to notify motorists to follow the curve in the roadway. Holstein stated that the manual is based on national best practices, however, there are times that ODOT makes a variation due to its discretionary engineering judgment.

{¶31} On cross-examination, Holstein testified that the 20 mph advisory speed was determined by driving around the curve multiple times with a ball bank indicator, which calculates the speed in which a motorist should be able to comfortably traverse the curve. Although he did not conduct the test himself, he testified that he believed the advisory speed of 20 mph was reasonable for the curve. Holstein disagreed with Nystrom's opinion that an advance route turn assembly and/or junction assembly was required at the intersection.

{¶32} Section 2D.27 of the OMUTCD states that: “Route Sign assemblies shall be installed on all approaches to numbered routes that intersect with other numbered routes.” Section 2D.28 states that: “The Junction assembly shall be installed in advance of every intersection where a numbered route is intersected or joined by another numbered route.” Section 2D.29 states that: “[An Advance Route Turn assembly] shall be installed in advance of an intersection where a turn must be made to remain on the indicated route.”

{¶33} In Holstein’s experience, Section 2D.29 does not pertain to this intersection, because a southbound motorist on SR 95 would simply navigate the curve to stay on the indicated route. A southbound driver does not need to turn onto a different road to remain on SR 95. According to Holstein, use of an advanced route turn sign is required when a motorist must turn onto a different road to remain on the indicated route. Moreover, although two other roads intersect with SR 95, Holstein testified that the side roads are not “numbered routes” as stated in the manual, so Section 2D.27 would not pertain to this intersection. Specifically, Holstein testified that in this case, any signs as set forth in Sections 2D.27 through 2D.29 were not called for at this intersection. Holstein explained: “Southbound 95 is going through a curve. That’s why we had numerous chevrons, numerous – we had multiple large arrows. So the proper application is to give drivers of southbound 95 information that their horizontal alignment is about to change.” (Transcript, p. 51.)

## LAW

{¶34} In order for plaintiff to prevail on his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). 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). However, defendant is not an insurer of the safety of its highways. *Rhodus*

*v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723 (10th Dist.1990). Initially, both parties agree that ODOT did not have a duty to redesign the intersection. See *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 09AP-388, 2010-Ohio-3324, citing *Lunar v. Ohio Dept. of Transp.*, 61 Ohio App.3d 143, 149 (10th Dist.1989); see also *Risner v. Ohio Dept. of Transp.*, 145 Ohio St.3d 55, 63, 2015-Ohio-4443, “The Ohio Department of Transportation’s decision to improve a specific portion of highway does not trigger a duty to improve surrounding sections of the highway.” Accordingly, plaintiff’s claim is solely based upon any failure of ODOT to comply with the OMUTCD.

{¶35} ODOT may be held liable for damages 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 manual 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.*, 10th Dist. Franklin No. 08AP-330, 2008-Ohio-6911, ¶ 24. “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).

{¶36} The OMUTCD contains the following language to explain certain terms used therein:

“When used in this Manual, the text headings shall be defined as follows:

“1. Standard – a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold type. The verb ‘shall’ is typically used. Standards are sometimes modified by Options.

- “2. Guidance – a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb ‘should’ is typically used. Guidance statements are sometimes modified by Options.
- “3. Option – a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. All Option statements are labeled, and the text appears in unbold type. The verb ‘may’ is typically used.
- “4. Support – an informal statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs ‘shall,’ ‘should,’ and ‘may’ are not used in Support statements.” (Defendant’s Exhibit O.)

{¶37} After a review of the testimony and evidence presented, the magistrate finds that the testimony of Holstein was more credible and persuasive than that of Nystrom. Although there was much testimony regarding the use of the words “turn” and “curve,” the photographs and video of the roadway clearly show that to remain on SR 95 southbound, a motorist would follow the curve in the roadway to the right. Although it is a sharp curve, the magistrate finds that no “turn” must be made to remain on the indicated route as stated in Section 2D.29 of the OMUTCD. A motorist must navigate a curve in the existing roadway to remain on the indicated route. Accordingly, the magistrate finds that defendant was not required to place an Advance Route Turn Assembly in advance of this intersection because a motorist did not need to turn onto a different roadway to remain on the indicated route. In addition, the magistrate finds that a route junction assembly was not required, in that Mishey Road and Old Mansfield

Road were not “other numbered routes” as contemplated in the manual. Thus, the magistrate finds that plaintiff has failed to prove by a preponderance of the evidence that ODOT breached any mandatory duty as set forth in the OMUTCD. (See Sections 2D.27-29 of the OMUTCD.)

{¶38} With regard to the signs that were in place at the time of the accident, the greater weight of the evidence shows that all of the signs were optional pursuant to the manual. (See Sections 2C.37; 2C.06; 2C.09; 2C.10 of the OMUTCD.) Although plaintiff’s experts criticized the Mishey Road intersection sign because it did not accurately depict the physical appearance of the intersection, the magistrate finds that the manual did not require an exact depiction of the appearance of the intersection. Rather, the purpose of this optional sign was to “indicate the presence of an intersection and the possibility of turning or entering traffic,” and that it should illustrate and depict the general configuration of the intersecting roadway, such as Mishey Road. (Section 2C.37 of the OMUTCD.) In addition, all experts agreed that the advisory speed limit of 20 mph was reasonable for the curve. The magistrate further finds that ODOT had discretion to use its engineering judgment to place advisory speed signs with a right turn arrow in advance of the hill that obscured the curve to warn motorists to reduce their speed. The greater weight of the evidence shows that the signage in place adequately warned motorists of a curve ahead in the roadway. Furthermore, the magistrate finds that defendant complied with Table 2C-5 of the manual when it used “turn” signs instead of “curve” signs to warn of the curve based upon the results of a ball bank test, in that engineering judgment was used to determine a safe speed for the curve. Finally, with regard to Nystrom’s criticisms of the existing signage, the modified advisory warning signs that she suggested are also in the optional category of signs. Although Nystrom would have used different signage herself, her preference of other optional signs does not prove that defendant’s use of optional signage was negligent. Plaintiff has failed to



prove that the existing signage did not adequately warn motorists of a change of alignment in the roadway.

{¶39} Assuming, arguendo, that ODOT was negligent in its use of signage or in its failure to place an advanced route turn assembly, plaintiff has failed to prove that any breach by ODOT was the proximate cause of his injuries. “While difficult to define, ‘proximate cause’ is generally established where an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result that would not have taken place without the act. \* \* \* Essentially, a plaintiff must present evidence upon which a trier of fact may reasonably determine that it is more likely than not that the negligence of a defendant was the direct or proximate cause of the plaintiff’s injury. \* \* \* Further, a plaintiff must establish proximate cause by a preponderance of the evidence.” (Citations omitted.) *Whiting v. Dept. of Mental Health*, 141 Ohio App.3d 198, 202-203 (10th Dist.2001). Alexander testified that he did not remember seeing any signs, including the four arrow signs, three chevrons, and two advisory speed signs that were posted. Alexander did not testify that any signs misled him into thinking to continue south. At most, he testified that he thought SR 95 continued south because he could see Old Mansfield Road in the distance. Furthermore, although Old Mansfield Road is visible in the distance, a “Dead End” sign is also visible in the accident photos, and the white edge line on SR 95 southbound clearly curves to the right.

{¶40} Although Alexander was not traveling over the 55 mph speed limit, whether the magistrate accepts Lipian’s or Tuttle’s speed calculations, the evidence shows that Alexander was traveling both greater than the 20 mph advisory speed and too fast for the condition of the roadway. “[G]iven the circumstances of any individual case, the operation of a motor vehicle, even if being driven below the posted speed limit, may be unreasonable given the circumstances which exist.” *Stonerock v. Miller Bros. Paving*, 72 Ohio App.3d 123, 136 (10th Dist.1991). Even plaintiff’s expert, Lipian, conceded that if Alexander had reduced his speed to the advisory speed, he would have been able to

observe that the route he was traveling on curved to the right. The common law of Ohio imposes a duty of reasonable care upon motorists, which includes the responsibility to observe the environment in which one is driving. *Hubner v. Sigall*, 47 Ohio App.3d 15, 17 (10th Dist.1988). The magistrate finds that Alexander did not use reasonable care to observe the roadway, and that his failure to use reasonable care was the sole proximate cause of plaintiff's injuries. Accordingly, judgment is recommended in favor of defendant.

{¶41} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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HOLLY TRUE SHAVER  
Magistrate

cc:

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Case No. 2015-00785

-19-

DECISION

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