

[Cite as *Estate of Morgan v. Ohio Dept. of Transp.*, 2010-Ohio-5969.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Estate of Marlee Grace Morgan,	:	
Plaintiff-Appellant,	:	No. 10AP-362 (C.C. No. 2006-3869)
v.	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
Defendant-Appellee.	:	
The Estate of Shane Morgan,	:	
Plaintiff-Appellant,	:	No. 10AP-382 (C.C. No. 2006-3991)
v.	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 7, 2010

Cassity Law Offices, Michael E. Cassity and Robin J. Levine,
for appellant The Estate of Marlee Grace Morgan.

David E. Grimes, for appellant The Estate of Shane Morgan.

Richard Cordray, Attorney General, John P. Reichley and Peter E. DeMarco, for appellee.

APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶1} Plaintiffs-appellants, the Estates of Shane and Marlee Grace Morgan, appeal from a judgment of the Court of Claims of Ohio finding defendant-appellee, the Ohio Department of Transportation ("ODOT"), not liable for the automobile accident that caused Shane and Marlee Morgan's deaths. For the following reasons, we affirm.

{¶2} On June 10, 2005, at approximately 7:30 p.m., Shane Morgan ("Shane") was driving his mother, Roberta Morgan ("Roberta"), and his daughter, Marlee Morgan ("Marlee") from his house to Roberta's house. Both Shane and Roberta lived in Adams County, which is located in southwestern Ohio and borders the Ohio River. To get to Roberta's house, Shane drove south on State Route 41 ("S.R. 41"), a two-lane road. As Shane approached the intersection with Ripley Pike, he lost control of his 2005 Toyota Corolla.

{¶3} Immediately before it intersects with Ripley Pike, S.R. 41 South curves slightly to the left. Ripley Pike and S.R. 41 meet at a T-shaped intersection, with Ripley Pike forming the base of the "T." If a motorist traveling south on S.R. 41 wishes to turn onto Ripley Pike, he must make a right-hand turn.

{¶4} A creek known as Bradysville Run flows parallel to Ripley Pike within feet of the road. Bradysville Run is on the right side of a motorist traveling along Ripley Pike towards S.R. 41. Immediately before Ripley Pike intersects with S.R. 41, Bradysville Run makes a 90-degree turn so that it runs parallel to the right side of S.R. 41 South. Bradysville Run flows alongside S.R. 41 for a few feet before making another 90-degree turn and entering into a culvert that runs underneath S.R. 41. The culvert consists of two large side-by-side corrugated metal pipes. When Bradysville Run emerges on the other

side of the culvert, it merges with a larger creek that parallels S.R. 41 on the east side of the road.

{¶5} When Shane lost control of his Corolla, he failed to steer the car to the left to continue driving on S.R. 41. Instead, he drove straight ahead, crossing Ripley Pike and driving into the grass between Ripley Pike and Bradysville Run. The car then entered Bradysville Run. Although Bradysville Run is generally dry, it fills rapidly after a hard rain. Unfortunately, earlier that day, Adams County had experienced heavy rain for an extended length of time. Bradysville Run was full and flowing forcefully when Shane's car hit the creek. The force of the water carried the car, floating upside down, into one of the culvert pipes.

{¶6} When the Corolla impacted with Bradysville Run, both Shane and Roberta were thrown from the car, swept through the culvert, and washed into the larger creek. Shane suffered a broken neck, and he died from this injury. Roberta survived largely unharmed. Marlee, only 20-months old, remained strapped in her car seat throughout the ordeal. Emergency first responders removed the car from the culvert quickly, but Marlee had already drowned.

{¶7} The administrators of Shane's and Marlee's estates each filed suit against ODOT, asserting that ODOT was negligent in the design, construction, and maintenance of S.R. 41 at and near the intersection with Ripley Pike. The trial court consolidated the actions for a joint trial, bifurcated the issues of liability and damages, and proceeded with a bench trial as to ODOT's liability. After a four-day trial, the trial court issued a decision finding that appellants had failed to prove that ODOT acted negligently, and alternatively,

that ODOT was entitled to immunity. In accordance with this decision, the trial court rendered judgment in ODOT's favor in a judgment entry dated March 22, 2010.

{¶8} Appellants now appeal from the March 22, 2010 judgment, and they assign the following errors:

[1.] The Trial Court erred in holding Defendant/Appellee was not negligent.

[2.] The Trial Court erred in finding the totality of the evidence failed to establish this particular stretch of State Route 41 (the accident area) was unreasonably dangerous.

[3.] The Trial Court erred in finding Defendant/Appellee is entitled to discretionary immunity.

{¶9} Because they are related, we will consider appellants' first two assignments of error together. By these assignments of error, appellants argue that the trial court erred in failing to find ODOT negligent in its maintenance of the stretch of S.R. 41 where the accident occurred. Specifically, appellants contend that the manifest weight of the evidence establishes that ODOT breached its duty to maintain S.R. 41 in a reasonably safe condition and that the breach proximately caused Shane's and Marlee's deaths. We disagree.

{¶10} To recover on a negligence claim, a plaintiff must prove that: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) the breach of the duty proximately caused the plaintiff's injury. *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22; *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. The duty element of a negligence claim may be established by common law, legislative enactment, or the particular circumstances of a given case. *Wallace* at ¶23; *Chambers* at 565.

{¶11} Multiple statutes impose upon ODOT a general duty to maintain the state highways. R.C. 5501.11(A)(1) mandates that ODOT "shall * * * maintain * * * the state system of highways and the bridges and culverts thereon." R.C. 5535.08(A) requires ODOT to "maintain [state] roads." As used in R.C. 5501.11(A)(1) and 5535.08(A), "roads" and "highways" include "all appurtenances to the road or highway, including but not limited to, bridges, viaducts, grade separations, culverts, lighting, signalization, and approaches on or to such road or highway." R.C. 5501.01(C). Consequently, from R.C. 5501.11(A)(1) and 5535.08(A) arises ODOT's legal duty to maintain the state highways, as well as all appurtenances thereto, in a reasonably safe condition. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42; *Galay v. Dept. of Transp.*, 10th Dist. No. 05AP-383, 2006-Ohio-4113, ¶52; *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶29; *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App.3d 30, 33; *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App.3d 22, 26-27; *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 729. ODOT, however, is not an insurer of safety for travelers of its highways. *Galay* at ¶52; *Rahman* at ¶29; *Gregory* at ¶33; *Rhodus* at 729-30.

{¶12} The duty to maintain the highways does not encompass a duty to redesign or reconstruct the highways. *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324, ¶7; *Galay* at ¶29, 52, 58; *Wiebelt v. Ohio Dept. of Transp.* (June 24, 1993), 10th Dist. No. 93AP-117. " 'Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements.' " *Sobczak* at ¶7 (quoting *Wiebelt*). See also *Galay* at ¶29, 52, 58; *Rahman* at ¶29; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499, ¶29; *Treese v. Delaware* (1994), 95

Ohio App.3d 536, 543. Accordingly, ODOT does not have a duty to upgrade highways to current design standards when acting in the course of maintenance. *Sobczak* at ¶7; *Galay* at ¶29; *Rahman* at ¶29; *Hurier* at ¶29; *Treese* at 543; *Wiebelt*.

{¶13} In the case at bar, appellants contend that ODOT breached its duty to maintain S.R. 41 by allowing three dangerous conditions to persist: (1) the absence of a guardrail to protect motorists from Bradysville Run, (2) the periodic flooding of S.R. 41 when water exceeded the banks of Bradysville Run, and (3) the lack of an adequate "clear zone" to allow motorists a location to recover after driving off S.R. 41. We will address each alleged breach in turn.

{¶14} According to the evidence adduced at trial, the culvert at issue, as well as the bridge over the culvert, were built in 1939. ODOT did not install guardrails shielding the approach to the bridge until immediately after the Morgans' accident. Appellants assert that, without an approach guardrail, the section of S.R. 41 South immediately before the bridge was unreasonably dangerous. Appellants thus contend that ODOT breached its duty to maintain S.R. 41 in a reasonably safe condition. We find this argument unavailing. The duty to maintain only requires the preservation, and if necessary, the replacement of existing structures. The duty to maintain does not include a duty to institute improvements. In this case, where no guardrails existed previously, the installation of new guardrails constituted an improvement, and thus, exceeded the scope of ODOT's duty.

{¶15} Appellants next argue that ODOT's Bridge Inspection Manual ("Manual") made the construction of approach guardrails necessary. Pursuant to R.C. 5501.47(B)(2)(a), the director of ODOT has prepared and regularly updates a Bridge

Inspection Manual to provide standards applicable to the annual inspection of all bridges on, above, and below highways. In the 1998 and 2001 versions of the Manual, bridge inspectors are informed how to complete the portion of the inspection form used to gather information on the traffic safety features of each bridge. The Manual instructs bridge inspectors to use one of three codes to grade each safety feature: (1) code "0" if the inspected feature does not meet "currently acceptable standards," (2) code "1" if the inspected feature meets "currently acceptable standards," and (3) code "N" if not applicable.

{¶16} One of the safety features that bridge inspectors must grade is the approach guardrail. Both the 1998 and 2001 versions of the Manual state:

The structural adequacy and compatibility of approach guardrail with transition designs should be determined. A barrier stop at the end of a bridge is rarely needed. Thus an approach guardrail with adequate length and structural qualities to shield motorists from the hazards at a bridge site needs to be installed. In addition to being capable of safely redirecting an impacting vehicle, the approach rail must also facilitate a transition to the bridge railing that will not cause snagging or pocketing of an impacted vehicle. Acceptable guardrail design suggestions are contained in the AASHTO Guide for Selecting, Locating, and Designing Traffic Barriers.

{¶17} Appellants interpret the above-quoted section as a mandatory directive that ODOT install approach guardrails before each bridge in Ohio. We interpret this section differently. Read in context, the quoted section merely sets forth the "currently acceptable standard" for the design of approach guardrails. Bridge inspectors must judge whether a bridge satisfies that standard. Nowhere in the Manual does ODOT require the upgrading of each bridge that fails to meet the currently acceptable standard. The Manual serves as

a guide to bridge inspections, not a policy mandate that each bridge, no matter when originally constructed, meet current design standards.

{¶18} Moreover, even crediting appellants' argument that ODOT instituted a policy requiring approach guardrails before every bridge, appellants fail to establish the existence of a legal duty based on that policy. As we stated above, the duty element of a negligence claim can arise from common law, legislative enactment, or the particular circumstances of a given case. *Wallace* at ¶23; *Chambers* at 565. Here, citing *Semadeni v. Ohio Dept. of Transp.*, 75 Ohio St.3d 128, 1996-Ohio-199, appellants assert that ODOT has a legal duty to follow its own policies and deviation from a policy gives rise to a negligence action. Appellants misread *Semadeni*. That case arose out of ODOT's adoption of a policy addressing the installation of protective fencing on existing bridges. Nearly five years after ODOT adopted the policy, Pietro Semadeni died after an unidentified individual dropped a chunk of concrete from an overpass bridge, striking Semadeni in the head. The executor of Semadeni's estate sued ODOT for negligently failing to fence the overpass bridge. The Supreme Court of Ohio found that ODOT owed a duty to Semadeni, and all other foreseeable motorists, based on an already existing common-law duty. *Id.* at 131. Previous Supreme Court precedent had established that persons who exercise control over real property and who are aware that the property is subject to third-party vandalism owe a special duty to parties whose injuries are reasonably foreseeable to take adequate measures to prevent future vandalism. *Id.* (quoting *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171). The Supreme Court applied this common-law duty to ODOT. Thus, contrary to appellants'

contention, the *Semadeni* decision did not impose on ODOT a legal duty to follow each and every policy it adopts.

{¶19} Of course, ODOT cannot ignore its written policies when designing, redesigning, constructing, or reconstructing a highway project. "ODOT's engineers, when undertaking and constructing a highway project, must adhere to current written standards in order to fulfill their duty of care." *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App.3d 143, 146. See also *Longfellow v. Dept. of Transp.* (Dec. 24, 1992), 10th Dist. No. 92AP-549. Thus, if ODOT had designed, redesigned, constructed, or reconstructed the bridge at issue in 1998 or 2001, the versions of the Manual introduced at trial could have provided evidence of the "currently acceptable standard" for bridge design and construction as determined by ODOT. Because the bridge here was originally constructed in 1939 and ODOT did not redesign or reconstruct it in 1998 or 2001, the Manual has no applicability.

{¶20} In sum, we conclude that the trial court did not err in finding that ODOT owed no a duty to install approach guardrails. Consequently, we turn to appellants' next argument: ODOT breached its duty to maintain S.R. 41 in a reasonably safe condition because it did not prevent or otherwise address the periodic flooding of the highway by storm water that overflowed the banks of Bradysville Run.

{¶21} With regard to this argument, ODOT concedes that it has a duty to keep the culvert unobstructed so that storm water can drain freely and not flood S.R. 41. From the yearly bridge inspection reports, ODOT knew that Bradysville Run regularly flooded S.R. 41 after heavy rainfall. However, ODOT contends that, on the day of the Morgans' accident, it satisfied its duty to maintain the unimpeded flow of water through the culvert.

After considering the evidence, the trial court agreed, finding that Bradysville Run had not breached its boundaries on the day of the Morgans' accident.

{¶22} Judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In reviewing a trial court's factual findings, an appellate court must presume that the findings are correct because the trial court is best able to observe the witnesses and use those observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. If the evidence is susceptible to more than one interpretation, an appellate court must construe it consistently with the trial court's judgment. *Central Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d. 581, 584.

{¶23} Here, James Skaggs, who lives approximately one and one-half miles from the intersection of Ripley Pike and S.R. 41, testified that he was driving on Ripley Pike towards S.R. 41 on the evening of June 10, 2005. As Skaggs slowed for the stop sign at the intersection of Ripley Pike and S.R. 41, Shane's Corolla skidded across his path, through the grassy area alongside the intersection, and into Bradysville Run. According to Skaggs, although Bradysville Run was full at that time, the water had not escaped the banks.

{¶24} Randy Walters, Jr., who serves as both the chief of police and a firefighter for the Village of Manchester, testified that he was fighting a fire less than five miles from the intersection of Ripley Pike and S.R. 41 when he was alerted about the Morgans' accident. When Walters arrived at the accident scene, Bradysville Run was "rushing and pretty fast." (Tr. 429.) However, Walters did not see any flooding.

{¶25} Finally, Richard C. Gable, a trooper for the Ohio State Highway Patrol, testified that he was the first trooper to arrive at the accident scene. Gable stated that when he arrived at the scene, Bradysville Run was only feet away from exceeding the capacity of the two metal culvert pipes. While the water level was high, Gable did not see the creek overflow.

{¶26} The testimony of these three witnesses provided the trial court with competent, credible evidence to find that S.R. 41 was not flooded on the evening of June 10, 2005. Consequently, the evidence establishes that ODOT did not breach its duty to maintain S.R. 41 in a reasonably safe condition.

{¶27} In arguing to the contrary, appellants point to Roberta's testimony that she heard water splashing underneath and on the sides of the Corolla when the car began to skid. Rain inevitably causes puddles of water to form on roads. Roberta testified that it had rained heavily earlier that day, and that it was still raining, albeit moderately, at the time of the accident. Absent any evidence connecting the water on the road to a known hazard, such as flooding caused by a blocked culvert, we cannot conclude that the water on the road resulted from ODOT's failure to maintain the road.

{¶28} Finally, we turn to appellants' argument that ODOT breached its duty to maintain S.R. 41 because it failed to provide an adequate "clear zone." According to Lester C. Auble, Jr., appellants' expert witness, a "clear zone" is an area adjacent to the road that allows a motorist who leaves the road an opportunity to safely recover. ODOT's Location and Design Manual, which sets forth design standards for Ohio roads, includes calculations for determining the appropriate clear zone widths. Using those calculations, Auble concluded that the clear zone alongside S.R. 41 at the intersection with Ripley Pike

did not provide a sufficient area for a motorist to stop or slow down to avoid Bradysville Run.¹

{¶29} Like the installation of a new guardrail in a location where none previously existed, the creation or enlargement of clear zone does not fall within the ambit of ODOT's duty to maintain the highways. *Hurier* at ¶29. As we stated above, the duty to maintain only requires ODOT to preserve existing facilities. *Id.*; *Sobczak* at ¶7; *Galay* at ¶¶29, 52, 58; *Rahman* at ¶29; *Treese* at 543; *Wiebelt*. Thus, the construction of a clear zone in accordance with current standards surpasses the scope of the duty to maintain. Moreover, ODOT has no duty to upgrade a previously constructed safety feature as technology develops. *Kniskern v. Twp. of Somerford* (1996), 112 Ohio App.3d 189, 195. Consequently, ODOT had no duty to redesign and broaden a clear zone originally constructed in 1939 to meet ODOT's 2004 standards.

{¶30} As each of appellants' bases for asserting negligence fail, we conclude that the trial court did not err in finding that appellants did not prove ODOT negligent. Accordingly, we overrule appellants' first and second assignments of error.

{¶31} Appellants' third assignment of error challenges the trial court's determination that ODOT was immune from liability. ODOT's immunity constituted a second, distinct reason for the trial court to render judgment in ODOT's favor. Given our ruling that the trial court did not err in finding that appellants failed to prove their claims, the immunity issue is moot. Accordingly, we need not consider appellants' third assignment of error.

¹ Auble's opinion relied on a section of the Location and Design Manual that ODOT published in October 2004.

{¶32} For the foregoing reasons, we overrule appellants' first and second assignments of error, and render as moot appellants' third assignment of error. We affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
