

she and her husband had just left their hotel and they were traveling to eat dinner at a restaurant. Plaintiff recalled that her husband was driving cautiously and that he was able to maintain control of the car. Plaintiff specifically denied feeling the car slip or slide on the roadway. Plaintiff stated that she did not see the SUV until immediately prior to impact.

{¶4} Plaintiff alleges that ODOT is responsible for the accident because the resurfacing project changed the grade, width, and surface of the median, which increased the danger of head-on collisions from vehicles crossing the median which had no barrier or other impediment. According to plaintiff, the ODOT project resulted in the grass-covered, v-shaped median being replaced with a narrower, paved, essentially flat area between the eastbound and the westbound lanes of travel. Plaintiff also claims that removal of the grassy median caused increased rainwater to be funneled into the old drainage system which had deteriorated and had not been replaced during the project. Plaintiff further asserts that such reconfiguration of the median decreased the capacity of the terrain to absorb rainwater and allowed excess water to flow back onto the traveled portion of the roadway.

{¶5} Defendant denies liability and insists that Baker's failure to maintain control of his SUV was the sole proximate cause of the accident. Defendant contends that rainwater did not accumulate on the roadway and that there is insufficient evidence to substantiate that standing water contributed to the accident. Further, defendant maintains that it did not receive any notice of a drainage problem in the area prior to the accident. Finally, defendant contends that installation of a barrier in the median was discretionary.

{¶6} Walter Markowski, former police chief of Copley, Ohio and a former township trustee, testified that prior to the resurfacing project, the eastbound and westbound lanes of SR 18 were separated by a wide, grassy median which sloped into a v-shape at the center. Markowski stated that in his opinion, the contour of the median impeded vehicle crossovers and the grassy terrain offered some resistance to help reduce the speed of errant vehicles. Markowski recalled that during the ODOT project, the shoulders adjacent to the traveled portions of the roadway were paved, the travel lanes were widened, and turn lanes were added. In addition, the median width was narrowed,

the grass was removed from the median, and the edges of the median closest to the travel lanes were paved. Markowski testified that the township trustees were concerned about the increased danger of crossovers and head-on collisions. According to Markowski, the trustees sent a letter to ODOT requesting that a median barrier or guardrail be installed; however, the request was denied. (Plaintiff's Exhibits 3, 4.)

{¶7} Terry Heard, a state highway patrol trooper who investigated the accident, also testified. Trooper Heard stated that his was the first unit to arrive on the scene, that it was raining heavily, and that visibility was impaired. Trooper Heard further recalled that the rain was coming down in sheets and that the volume of water overwhelmed the drainage system in place for the highway. On cross-examination, Trooper Heard acknowledged that the area where the accident occurred was near the bottom of a hill and that the SUV driver had traveled over a long downward grade before reaching the location on the roadway where the SUV veered into the median. Finally, the trooper stated that, in his opinion, a guardrail in the median would have altered the outcome of this accident.

{¶8} David Dreger testified that he was the Deputy Director of District 4 from 1997 to 1998 when the resurfacing project in question took place. Dreger explained that, prior to the project, the grassy median was 18-feet wide. Upon completion of the project, the median was reduced to 14 feet. When turn lanes were added at some intersections, they consumed the entire median space. Due to right-of-way considerations, ODOT was able to take only three feet of land to the north and south to expand the outside shoulder from three feet to six feet; the remainder of the space needed for widening of the lanes and of the inside shoulders was taken from the median. He related that the inside shoulder was widened to six feet, of which two feet was pavement and four feet was loose stone adjacent to the median. Each of the two eastbound and westbound lanes was widened by one foot, from 11 feet to 12 feet.

{¶9} As a result of the resurfacing project, the width, grade, and surface of the median were changed. According to Dreger, calculations were performed and the drainage system was deemed to be adequate. Dreger admitted that the original design specifications called for a six-foot, v-shaped, grassy median to be retained. At some later

date, it was determined that the narrow grassy strip would be difficult to maintain; consequently, Dreger authorized a change order to remove the existing grass, to pave the remainder of the median, and to fill in the v-shaped contour with asphalt grindings. Dreger testified that the modifications were based on recommendations that he received from ODOT engineers. Dreger denied that these changes affected the flow of water on the roadway and insisted that asphalt grindings were absorbent, inasmuch as they were loosely packed and placed over a dirt base. Dreger acknowledged that in 1999 ODOT became aware of a drainage problem in the area where plaintiff's accident had occurred. Dreger stated that surface water was re-entering the roadway from the median due, at least in part, to a deteriorated drainage system that needed to be replaced.

{¶10} Plaintiff's expert, Carmen Daecher, testified that the ODOT project reduced the drainage capacity of the median when the state eliminated two-thirds of the drainage area. He explained that removing the grass and decreasing the amount of porous surface increased the sheet flow of water. According to Daecher, the Baker vehicle hydroplaned and began spinning out of control. He based his opinion on the dynamics of the crash, the general path of the vehicles as they interacted, the damage depicted in photographs, and the place where the vehicles came to rest relative to each other. Daecher opined that the drainage system was inadequate to handle the rainwater, and that ODOT should have reevaluated the drainage system and its capacity to handle the increased burden. Nevertheless, Daecher acknowledged he had not performed calculations that would quantify either the amount of increased sheet flow or the reduced capacity for drainage.

{¶11} Plaintiff's expert further opined that the reduced width of the median created a greater need for a median barrier. He stated that the most appropriate choice would have been the double-faced single-post median barrier, a wooden-post design with steel beams on either side. Daecher also opined that the ODOT project was not merely a maintenance project but was actually a highway improvement project since the lanes were widened, turn lanes were added and the median was reconfigured. Thus, according to Daecher, ODOT was required to upgrade the median to include a median barrier. Daecher

referenced ODOT's Location and Design Manual, Section 601.3 Median Barrier Warrants which states, in part:

{¶12} "A median barrier is a longitudinal barrier used to separate opposing traffic on a divided highway. It is used only if striking the barrier is less severe than the consequences had no barrier existed. Figure 601.4 *maybe* used to determine the need for median barriers." (Emphasis added.) Figure 601.4 depicts a graph plotting the use of median barriers as either optional or warranted based on the width of the median and the number of vehicles traveling on opposing roadways. (Plaintiff's Exhibits 7A and B.)

{¶13} In the instant case, Daecher opined that the use of a median barrier was warranted once the median width was reduced; however, he conceded that the barrier could be omitted if having the guardrail in place were more dangerous than foregoing it. According to Daecher, in the instant matter, the consequences would have been less severe for the SUV to collide with a barrier rather than to cross over the median into oncoming traffic. However, on cross-examination, Daecher admitted that he had not determined either the speed or the angle at which the errant SUV would have hit the barrier had one been in place, nor could he state with certainty whether upon impact, the SUV would cease forward motion, transect the barrier, vault over it, or bounce back into the lanes of travel.

{¶14} Defendant's engineering expert, Kathy King, opined that ODOT did not violate reasonable engineering standards and practices by reconfiguring the median without adding a median barrier of some type. King stated that there were no regulations in place mandating that a guardrail be installed in the median, but rather, that the decision involved discretion on the part of ODOT. King contended that ODOT could have eliminated the median entirely and placed the eastbound and westbound lanes adjacent to each other, separated only by a painted yellow line. According to King, placement of a guardrail in the median would create a hazard to motorists attempting lefthand turns into driveways and at intersections because the guardrail would create an obstruction both blocking the view of oncoming traffic and resulting in reduced visibility along site lines. In addition, she explained that the guardrail must be interrupted at numerous intersections

and crossovers and that each guardrail edge must be tapered or truncated with absorbent materials so as not to create more damage if an errant vehicle were to strike a guardrail.

{¶15} King also testified that a slope in the median could deter or slow the speed of a vehicle but that anything less than a 4:1 slope would be traversable. Further, King stated that once it is determined that a median barrier is warranted for a particular area, the decision to place a median barrier remains subject to ODOT's discretion. Thus, she clarified that a barrier *may* be used but it is not mandatory. Finally, King stated that the SR 18 resurfacing project was rehabilitative, and did not rise to the level of roadway reconstruction.

{¶16} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. Plaintiff's negligence claim also encompasses an allegation that defendant created a qualified nuisance. The court notes that "a civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition, which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St.2d 176, 180. Nevertheless, under a claim of qualified nuisance, the allegations of nuisance and negligence merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St.3d 274.

{¶17} Upon review of all the testimony and evidence presented, the court makes the following determination. The court finds that plaintiff failed to prove that defendant breached any duty owed to her. ODOT has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App.2d 335. However, ODOT is not an insurer of the

safety of its highways. *Id.* The court finds that ODOT acted reasonably when it removed the grass and reconfigured the median. The court is not persuaded that grassy terrain provides a deterrent to errant vehicles. In addition, the court notes that no witness was able to testify as to the precise depth or dimensions of the v-shaped slope as it existed prior to the resurfacing project. Thus, the court concludes that insufficient credible evidence was presented to show that either the v-shaped contour or the covering of grass was integral to the function of the median.

{¶18} It is undisputed that prior to the resurfacing project, there was no guardrail in the median. In addition, the court notes that defendant has no duty to upgrade highways to current design standards in the course of maintenance. *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App.3d 143, 149. Maintenance involves the preservation of existing current highway facilities, rather than the construction of major improvements. *Weibelt v. Ohio Dept. of Transp.* (June 24, 1993), Franklin App. No. 93AP-117. The court finds that the project in question was a maintenance operation. The major portion of the project concerned widening and paving the lanes, shoulders, and berms. The addition of turn lanes and the removal of grass from the median did not result in substantial reconstruction nor did it cause this to become a roadway construction project. Thus, the court finds that ODOT was not required to install a guardrail in the median. The court further finds that sufficient credible evidence was presented to support ODOT's argument that installation of the guardrail in the median posed a hazard to the motoring public.

{¶19} In order to prove a breach of the duty to maintain the highways, plaintiff must prove by a preponderance of the evidence that defendant had actual or constructive notice of the exact condition or defect alleged to have caused the accident. *McLellan*

v. Ohio Dept. of Transp. (1986), 34 Ohio App.3d 247. For there to be constructive notice of a nuisance or defect in the highway, the condition must have existed for a sufficient period of time so as to impute knowledge or notice. *Bello v. Cleveland* (1922), 106 Ohio St. 94. Plaintiff failed to establish that defendant received complaints or warnings of high water or ponding during heavy rains in the vicinity of the accident prior to the collision.

{¶20} The court notes that Baker's SUV was traveling downhill and, thus, the court finds it unlikely that water was pooling upon the roadway such that it caused Baker to lose control and swerve into the median. Accordingly, the court finds that plaintiff failed to prove by a preponderance of the evidence that rainwater accumulated in the area of the accident or that rainwater contributed to Baker's loss of control. The court further finds that plaintiff failed to prove by a preponderance of the evidence that defendant negligently designed or maintained a dangerous condition on SR 18 in the vicinity of the accident.

{¶21} R.C. 4511.21(A) states as follows:

{¶22} "(A) No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, ***." The common law of Ohio imposes a duty of reasonable care upon motorists that includes the responsibility to observe the environment in which one is driving. See, e.g., *Hubner v. Sigall* (1988), 47 Ohio App.3d 15, at 17. The evidence establishes that Baker was driving his automobile at a greater speed than permitted him to operate his vehicle in a reasonable and proper manner. The court concludes that Baker's negligence was the sole proximate cause of the accident. Accordingly, judgment shall be rendered in favor of defendants.

IN THE COURT OF CLAIMS OF OHIO

LINDA M. RAHMAN, et al. :

Plaintiffs : CASE NO. 2002-03473
Judge Fred J. Shoemaker

:

JUDGMENT ENTRY

OHIO DEPARTMENT OF :
TRANSPORTATION, et al.

:

Defendants

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{¶23} 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 defendants. 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.

FRED J. SHOEMAKER
Judge

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