

was traveling north on I-71, a four-lane highway with paved shoulders on either side, a grass median dividing the northbound and southbound lanes, and a posted speed limit of 65. Plaintiff contends that he was traveling at 65 miles per hour (mph), with his cruise control engaged, when he momentarily diverted his attention, causing him to veer off the road and into the grass median. Upon realizing what had happened, plaintiff attempted to steer to the right, but overcorrected, causing his vehicle to slide across the two traffic lanes, rotate clockwise, and strike a guardrail. The left front bumper of the vehicle struck the guardrail, slid under it, and snagged on the rail post, causing the car to roll over the guardrail and come to rest on its top, with the guardrail penetrating the passenger compartment. Plaintiff sustained serious physical injuries as a result.

{¶ 3} Plaintiff's contentions begin with the premise that the guardrail where his collision occurred was installed as part of the "forgiving highway" concept that was formulated more than 40 years ago by the American Association of Highway and Transportation Officials (AASHTO). As set forth in the AASHTO Roadside Design Guide (Plaintiffs' Exhibit 20) and the Guide For Selecting, Locating and Designing Traffic Barriers (Plaintiffs' Exhibit 22), the concept was developed to ensure that motorists who left the highway for any reason would be protected from hazards beyond the edges of the pavement. Plaintiff maintains that ODOT is bound by all of the AASHTO standards and guidelines that were introduced as evidence at trial.

{¶ 4} The Type 5, or W-Beam, guardrail at issue in this case (the guardrail) was included as an integral part of the forgiving highway concept. The guardrail was designed to have a certain

degree of flexibility, permitting a vehicle to gradually decelerate after striking it and then be deflected away. The height of the guardrail and the distance between its bottom edge and the ground were designed under strict specifications. Plaintiff maintains that the guardrail was defective in that it failed to comport with either the forgiving highway concept or with ODOT's own standards and specifications. Specifically, the guardrail was installed in accordance with ODOT Standard Construction Drawing GR-2B ODOT (Plaintiffs' Exhibit 18) and ODOT Guardrail Details GR-1 (Plaintiffs' Exhibit 19) which were prepared in 1982 and 1985.

{¶ 5} The ODOT standards provided that the guardrail was to be no more than 27 inches high, and that the distance between the bottom of the guardrail and the ground should be no more than 14-3/4 inches. According to plaintiffs' expert witness, Herman A. Hill, a traffic engineer and accident re-constructionist with 15 years of experience in the state of Georgia's Department of Transportation, the guardrail was more than 30 inches high and the distance between the bottom of the guardrail and the ground was over 18 inches. As a result of that height variation, plaintiff contends that the guardrail failed to serve its intended purpose of flexing and redirecting his vehicle in a smooth manner.

{¶ 6} Defendant contends that the height of the guardrail complied with all applicable standards and specifications. Further, defendant maintains that even if ODOT were negligent, plaintiff's own negligence in losing control of the vehicle was far greater than any negligence on the part of ODOT. Defendant also maintains that the guardrail did perform its intended function. Specifically, defendant argues that, if plaintiff's vehicle had not snagged on the guardrail, it would have continued to roll down the

50-foot embankment along the road's edge, potentially killing plaintiff or inflicting much more serious injuries than were sustained.

{¶ 7} Upon review of the evidence and argument presented, this court makes the following determination.

{¶ 8} In order to prevail upon a claim of negligence, a plaintiff 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* (1981), 67 Ohio St.2d 282, 285. As a general rule, defendant has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transportation* (1976), 49 Ohio App.2d 335. See, also, *Rhodus v. Ohio Dept. of Transportation* (1990), 67 Ohio App.3d 723. However, defendant is not an insurer of the safety of state highways. *Rhodus*, supra, at 730.

{¶ 9} In the instant case, plaintiff's only theory of liability is that the guardrail was too high to comport with the applicable ODOT standards and the underlying AASHTO concept of the forgiving highway.

{¶ 10} At the outset, the court does not accept plaintiff's contention that ODOT is bound by AASHTO standards for the forgiving highway concept. It is well-settled law that "the standard of care to be applied to ODOT in such [guardrail] cases is that of the current written standards in effect at the time of the planning, approval or construction of the site and that, absent such written standards, the standard is that of a reasonable engineer using accepted practices at the time of construction." *Longfellow v. Ohio Dept. of Transp.* (Dec. 24, 1992), Franklin App. No. 92AP-549,

at 23-24. Thus, the court finds that the standards to be applied in this case are those which were in effect for ODOT in 1982 and 1985 or, in the alternative, reasonable engineering standards based upon accepted practices at that time.

{¶ 11} The ODOT standards in effect at the time of the construction of the subject guardrail do, in fact, call for the height of the guardrail to be no more than 27 inches high, and the distance between the bottom of the guardrail and the ground no more than 14 and 3/4 inches. However, the method used to measure those heights is a critical consideration.

{¶ 12} Plaintiffs' expert testified that he used police photographs of the accident scene to determine his measurements "proportionally" from the ground level depicted therein. However, the photographs identified by expert witness Hill as the basis for his opinion did not, in the court's view, depict a clear, readily discernible ground level. As such, the court is not persuaded by Hill's use of the photographs and/or his proportional measuring system to make his calculations. Moreover, defendant's expert, Dean Focke, an ODOT Standards Engineer, testified that the ODOT standard in effect at the time of the construction required that measurements be taken from the extended shoulder of the roadway to the top of the rail portion of the guardrail. In addition to researching the applicable standards, Focke visited the scene of plaintiff's accident. Based upon that data, Focke testified that the guardrail measured 27 inches, the appropriate standard height. Focke further related that it was "widely known" that construction tolerances allow a one-inch plus-or-minus deviation during initial construction. He stated that after construction, during the roadway maintenance period, a three-inch plus-or-minus deviation

from the nominal height (27 inches) would be acceptable. Thus, the court is persuaded that the guardrail height would have complied with ODOT's standards even if plaintiff's measurements were accepted.

{¶ 13} Based upon the totality of the evidence presented at trial, and assessing the credibility of the witnesses, the court concludes that plaintiffs failed to prove that defendant breached any duty owed to them by reason of its installation, design, manufacture, and/or maintenance of the guardrail in question. In short, the court finds that plaintiffs failed even to establish what the height of the guardrail was at the time of plaintiff's accident, much less that it violated the applicable ODOT standards and specifications.

{¶ 14} In reaching this determination, the court has necessarily weighed the credibility of expert witnesses. In that regard, the court found that defendant's expert had specific training and experience that bolstered his credibility and that his testimony was otherwise reasonable and persuasive. In contrast, the court found that Hill's professional experience was lacking for this particular type of case and that his testimony in general lacked trustworthiness.

{¶ 15} For these reasons, the court concludes that plaintiffs have failed to prove their claims by a preponderance of the evidence.

{¶ 16} As an additional matter, the court further finds that, even assuming that plaintiffs had established actionable negligence, they still could not prevail. Pursuant to Ohio's Comparative Negligence statute, R.C. 2315.19,² recovery is barred

where plaintiff's own negligence is greater than defendant's. In the present case, the evidence establishes that plaintiff took his eyes off the roadway to reach for a pack of cigarettes just prior to his vehicle veering into the median. While the evidence is conflicting as to what plaintiff's speed was at the time, the court is persuaded that he was, at least, traveling at the maximum limit of 65 mph and that he was in the lefthand lane because he was passing other traffic. The court finds that plaintiff breached his duty of care under these conditions by diverting his attention long enough to grope for cigarettes, thereby allowing his vehicle to veer into the median. After that point, the course of the vehicle and its ultimate collision with the guardrail were the direct result of plaintiff's negligent loss of control and overcorrection.

Based upon the totality of the evidence, the court finds that plaintiff's negligence was clearly greater than 50 percent and that, therefore, his recovery is also precluded on such basis. Accordingly, judgment shall be rendered in favor of defendant.

{¶ 17} With respect to defendant's counterclaim for the cost of repairing the guardrail, the parties did not address that issue at trial or in their post-trial briefs. Consequently, the court has taken no position on the counterclaim in this decision.

IN THE COURT OF CLAIMS OF OHIO

BRUCE M. LANCE, et al. :

Case No. 2003-07391

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JUDGMENT ENTRY

LH/cmd

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To S.C. reporter February 23, 2005