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IN THE COURT OF CLAIMS OF OHIO

DARLENE LANE FERRARO,	)	CASE NO. 2011-10371
Plaintiff,	)	JUDGE PATRICK McGRATH
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
THE OHIO STATE UNIVERSITY MEDICAL CENTER	)	
Defendant.	)	

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BRIEF

Plaintiff, Darlene Lane Ferraro, individually and as the fiduciary of the Estate of Junior Lee Lane, Deceased, submits this post-trial Brief in accordance with this Court's Order of August 6, 2014. Based upon the evidence that was presented during the trial and for the additional reasons stated herein, this Court should enter a verdict as to liability against Defendant, The Ohio State University Medical Center ("OSUMC").

I. BACKGROUND

This wrongful death/survivorship action was originally filed in the Cuyahoga County Court of Common Pleas on August 4, 2010. *Case No. CV-10-733430.* The Complaint alleged that Junior Lee Lane, Deceased ("Decedent") had been killed on September 10, 2009 when he was struck on Interstate 71 by a 2004 Mercedes C-240 that was being operated by Defendant, Rolf Barth, M.D. ("Dr. Barth"). The Decedent had been riding as a passenger in a 1997 Dodge Ram that was being driven by Defendant, Gary Fury. Gary Fury had stopped his truck on the highway after difficulties were experienced with a trailer he had been towing. The Decedent had exited the vehicle and was working on the trailer while Gary Fury's son, Jessie Fury, attempted to alert oncoming motorists by waving his shirt. Defendant Barth nevertheless collided

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into the trailer, fatally injuring the Decedent in the process.

Defendants submitted Answers denying liability and leveling cross-claims against each other. Notably, Dr. Barth never once suggested in the pleading he filed on September 13, 2010 that he had been driving his Mercedes in furtherance of any state business or that proper subject matter jurisdiction was lacking. The parties then proceeded with discovery.

On February 7, 2011, Dr. Barth submitted a Motion to Dismiss for Lack of Subject Matter Jurisdiction. For the first time in the proceedings, he argued that he had been acting in the course and scope of his employment with the State of Ohio at the time of the fatal collision. Plaintiff timely opposed this application and the request was "denied at this time" on March 21, 2011.

Dr. Barth filed a Motion to Reconsider on April 4, 2011. Plaintiff opposed this application on April 11, 2011. In a ruling that was issued seven days later, the Common Pleas Court stayed the lawsuit "pending a determination by the court of claims of Ohio as to whether Defendant Rolf Barth was engaged in the course of his employment at the time of the subject accident. ***" *See Cuyahoga C.P. Journal Entry dated July 18, 2011.*

Plaintiff proceeded to file the instant action in the Ohio Court of Claims on August 17, 2011 against Dr. Barth's reputed employer, Defendant OSUMC. *Case No. 2011-10371.* Dr. Barth was deposed on December 6, 2011, during which he acknowledged that he had been driving his personal Mercedes Benz C240 at the time of the accident. *Deposition of Rolf F. Barth ("Barth Depo."), p. 13.* He claimed he had been heading toward a meeting of physicians at the Cleveland Clinic. *Id., pp.16-17.* Dr. Barth was adamant that he had be driving at 65 m.p.h. while heading northbound on the highway. *Id., pp. 22-24 & 56.* According to the Brook Park Police Department Report, the posted speed limit was just 60 m.p.h.

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After jurisdictional briefs were submitted by the parties, Judge Alan C. Travis issued an order on July 31, 2012 that held:

> It is undisputed that this case concerns injuries sustained as a result of the operation of a motor vehicle. Consequently, Dr. Barth is not entitled to personal immunity pursuant to R.C. 9.86 and 2743.02(F) and there is no need for this court to conduct an immunity hearing. [emphasis added]

The remainder of the decision expressed that the Court would proceed determine whether Defendant Barth was acting in the course and scope of his employment, thereby rendering OSUMC derivatively liable for his negligence. *Id.*

Defendant OSUMC's counsel arranged for a report to be prepared by Timothy J. Tuttle ("Tuttle"), which was dated April 11, 2013. Even though Dr. Barth had admitted that he had been driving in excess of the posted speed limit, the defense reconstructionist managed to find that he was "operating his vehicle in a safe and prudent manner prior to the crash occurring." *Id., p. 6.* The fatal accident was blamed instead on Gary Fury. *Id., pp. 6-7.*

This Court set a dispositive motion deadline of September 3, 2013 and scheduled the liability phase of the trial for December 9, 2013. *See Order dated October 30, 2012.* On April 30, 2013, Plaintiff submitted a Motion for Extension of Time in which to submit their expert reports. Defendant opposed this request on May 8, 2013, which was limited to berating Plaintiff for her purported "lack of diligence[.]" *Id., p. 1.* Four days later, Plaintiff forwarded the report of accident reconstructionist James D. Crawford ("Crawford") to defense counsel. In his detailed analysis, the eminently qualified accident reconstructionist established that Dr. Barth had caused the fatal accident by failing to maintain a reasonable look-out in front of his speeding vehicle. *Id., pp. 9-10.* This Court then granted the extension in an order dated June 6, 2013.

The discovery cut-off date of August 19, 2013 came and went without any attempt

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being made to depose Plaintiff's accident reconstructionist. No dispositive motions were filed, moreover, before that deadline expired on September 3, 2013 Following a pretrial conference, this Court issued an order on November 22, 2013 confirming that the parties were prepared to proceed with the jury trial.

Plaintiff's expert then prepared a Supplemental Reconstruction Report dated December 9, 2013, that was promptly forwarded to defense counsel. Crawford indicated that he had "visited the scene of the crash on the night of December 4, 2013 where [he] took lighting measurements and performed rudimentary testing." *Id., p. 1.* He then "reviewed the deposition transcript of Detective Walentak and visited [the] Brook Park Police station where [he] inspected the light bulbs from the dolly trailer involved in this crash." *Id.* After explaining his analysis of this additional information, Crawford confirmed that the "opinions expressed in [his] original report remain valid[.]" *Id., p. 3.* In other words, his professional opinion was still that Defendant Barth negligently caused the crash by failing to maintain a proper look-out while speeding on the highway. *Id.*

Plaintiff and her counsel appeared for the trial in Columbus on December 9, 2013. Defendant's counsel arrived and announced for the first time that a "standing" objection was being asserted since the Decedent's estate had been closed on June 4, 2013. *Cuyahoga Prob. Ct. Case No. 2009 Est. 152813.* No explanation was offered for why Defendant waited until the morning of trial before raising this issue. This Court proceeded to cancel the proceeding and schedule a status conference for January 16, 2014 to discuss the matter. The Decedent's Estate was reopened by Court Order on December 30, 2013.

On December 23, 2013, Defendant Filed a Motion for Leave to Depose Plaintiff's Expert or, in the Alternative, Motion in Limine, Regarding Same. The state requested

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that this Court re-open discovery so that Plaintiff's liability expert could be deposed upon all aspects of his professional opinion, including those that had been disclosed months before the discovery cut-off date of August 9, 2013 expired. Plaintiff opposed this Motion on January 8, 2014, and observed that if the additional discovery was going to be permitted then his counsel required an opportunity to question the defense expert as well. The defense motion was nevertheless granted on January 29, 2014.

The trial upon liability finally commenced on July 28, 2014 before Judge Patrick M. McGrath In lieu of closing arguments, the parties were directed to submit post-trail briefs. *See Order dated Aug. 6, 2014.*

II. LEGAL STANDARDS

In Ohio, motorists are required to obey posted speed limits on the roadways. *R.C. 4511.21(D)(5).* An assured cleared distance must also be maintained, as R.C. 4511.21(A) has long directed that:

> 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, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway <u>at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead</u>. [emphasis added].

Dr. Barth was obligated to "keep a lookout, not only in front of his vehicle, but to the sides and rear as the circumstances warranted." *Bell v. Giamarco*, 50 Ohio App.3d 61, 64, 553 N.E.2d 694, 698-699 (10th Dist. 1988) (citations omitted). Ohio courts have recognized that:

> It is an obligation of a driver of an automobile to watch everything and everybody, not only in front of him but on the sides and in the rear of him so far as possible. [citations omitted]

State v. Ward, 105 Ohio App. 1, 10, 150 N.E.2d 465, 471 (3rd Dist. 1957); see also *Hubner*

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v. Sigall, 47 Ohio App.3d 15, 17, 546 N.E.2d 1337, 1339 (10th Dist. 1988). This fundamental responsibility is owed even when the motorist possesses the right-of-way. *Reschke v. Merola Ents., Inc.*, 8th Dist. No. 60957, 1992 W.L. 213458, *3 (Sept. 3, 1992).

Accordingly, one who is operating a vehicle in Ohio is obligated to avoid injuring even "jay-walking" pedestrians. *Mansperger v. Ehrnfield*, 59 Ohio App. 74, 80-81, 17 N.E.2d 271 (5th Dist.1937). The operator "must keep his machine constantly under control, and must continue on alert for pedestrians or others on streets." *Id.*, 59 Ohio App. at 81 (citation omitted). In *Smith v. Zone Cabs*, 135 Ohio St. 415, 421, 21 N.E.2d 336 (1939), the court observed that duty does not rest upon the pedestrian to avoid the automobile.

> Knowing that the automobile could swerve out of its course, [plaintiff] had the right to assume that it would not continue in its path and deliberately run him down. <u>It is negligence for a driver of an automobile, having ample space to pass a pedestrian on the highway, so to guide his vehicle as to strike the pedestrian in passing.</u> [citation omitted; emphasis added].

Id., 135 Ohio St. at 421-422. see also, *Trentman v. Cox*, 118 Ohio St. 247, 256, 160 N.E. 715, 717 (1928) (deceased pedestrian's failure to anticipate negligence of vehicle driver did not preclude recovery and presented a question of fact for the jury). As explained in *Humphrey v. Dent*, 62 Ohio St.2d 273, 276-277, 405 N.E.2d 284 (1980):

> In *Knapp v. Barrett, supra ((1915) 216 N.Y. 226, 110 N.E. 428)*, Judge Cardozo, later justice of the Supreme Court of the United States, said the law does not even say that because a pedestrian 'sees a wagon approaching, he must stop till it has passed. He may go forward unless it is close upon him; and whether he is negligent in going forward will be a question for the jury. If he has used his eyes, and has miscalculated the danger, he may still be free from fault.'
> ****

As a general rule, a violation of a statute or ordinance that is designed to promote

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public safety will result in negligence *per se*. *Schell v. DuBois*, 94 Ohio St. 93, 97-98, 113 N.E. 664 (1916); *Zehe v. Falkner*, 26 Ohio St. 2d 258, 261-262, 271 N.E. 2d 276, 278 (1971); *Spalding v. Waxler*, 2 Ohio St. 2d 1, 4, 205 N.E. 2d 890, 893 (1965); *Hite v. Brown*, 100 Ohio App. 3d 606, 612, 654 N.E. 2d 452, 456 (8th Dist. 1995). The Supreme Court has explained that:

> Application of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff.

Chambers v. St. Mary's School, 82 Ohio St. 3d 563, 565, 1998-Ohio-184, 697 N.E. 2d 198, 201. The plaintiff's burden of proof is eased significantly, as the Court reasoned in *Svoboda v. Brown*, 129 Ohio St. 512, 522, 196 N.E. 274, 278-279, that:

> Where a specific requirement is made by statute and an absolute duty thereby imposed, no inquiry is to be made whether the defendant acted as a reasonably prudent man, or was in the exercise of ordinary care. In such a situation, the obligation and requirement has been fixed and established by law, and the conduct of any person which is violative of such specific statutory requirement is illegal, and, if it proximately results in injury to one to whom a legal duty is owed, the transgressor is liable for the resulting damage. In such case, the jury is not called upon to determine whether the conduct constituted negligence; it determines only whether the act prohibited was committed or the act required by law was omitted, as the case may be.

Ohio law is well settled that principals of negligence *per se* will apply when a motorist injures one who is lawfully in the street. *Buckeye Stages v. Bowers*, 129 Ohio St. 412, 414-415, 195 N.E. 859, 860 (1935); *Jones v. Butler*, 72 Ohio App. 335, 345-346, 52 N.E. 2d 347, 353 (7th Dist. 1942). The doctrine is often invoked when the operator is unable to establish a valid justification for striking a pedestrian. *Woods v. Brown's Bakery*, 171 Ohio St. 383, 385-386, 171 N.E. 2d 496 (1960); *Pond v. Leslein*, 72 Ohio St. 3d 50, 53, 1995-Ohio-193, 647 N.E. 2d 477. Quite some time ago in another automobile/pedestrian accident case, the Seventh District reasoned that:

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> While both motorist and pedestrian have the right to use the highway, the right of the motorist is subject to the mandatory requirement of the statute, failure to comply with which, in the absence of legal excuse therefor, constitutes negligence per se, while the right of the pedestrian is limited only by his duty to exercise ordinary care for his own safety under all the circumstances, including his right to assume, in the absence of notice or knowledge to the contrary, that the motorist will operate his vehicle at such speed as will enable him to stop the same within the assured clear distance as required by the statute. It should be readily seen that if each has the right to the assumption referred to, the duty of each is that of ordinary care, which is not true as to the motorist. [emphasis added].

Jones, 72 Ohio App. at 345-346.

In cases involving far stronger claims of comparative negligence, Ohio courts have had no trouble recognizing the liability of a motorist who injured or killed a pedestrian. In *Glasco v. Mendelman*, 143 Ohio St. 649, 56 N.E.2d 210 (1944), for instance, a 70-year old woman had attempted to cross an ice and snow covered street in Columbus between two intersections. *Id.*, 143 Ohio St. at 650. She was struck by a motorist, who claimed that he had been traveling in low gear but did not see her until she was 10-12 feet away. *Id.* "It was admitted that [the] plaintiff was guilty of negligence in crossing the street at the place of the accident." *Id.* at 651. The plaintiff nevertheless recovered a judgment at trial, but the appellate court reversed on the grounds that the assured clear distance rule could not apply. *Id.* at 649.

In reinstating the pedestrian's verdict, the unanimous Supreme Court examined the assured clear distance statute (Section 12603, General Code) and observed that:

> That provision was passed in the interest of the public safety and prescribed an absolute rule of conduct. It is well settled that a failure to conform thereto is negligence per se.

Glasco, 143 Ohio St. at 653. The Court then held that the burden rested upon the operator of the motor vehicle to establish that an exception to the rule had been satisfied. *Id.* at 653. Since the jury had been properly charged and a valid excuse had not been conclusively

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demonstrated, the motorist could be found liable under the assured clear distance statute notwithstanding the pedestrian's own negligence. *Id.* at 654-655.

Similar circumstances were examined more recently by the Franklin County Court of Appeals in *McQueen v. Ferry*, 10th Dist. No. 12AP-237, 2012-Ohio-5522. In that case, a pedestrian was struck by a car while she was walking across West Broad Street in Columbus outside of the marked crosswalk. *Id., ¶3.* It was raining and the sun had not yet risen that morning. *Id., ¶15.* The Court observed that the pedestrian had violated R.C. 4511.46(B) by walking into the path of the vehicle outside of the marked crosswalk. *Id., ¶8 & 11.* The motorist thus possessed the right-of-way. *Id., ¶11.* In reversing the trial judge's entry of summary judgment against the pedestrian, the Tenth District acknowledged that: "The operator of a motor vehicle nonetheless must exercise due care to avoid colliding with a pedestrian in his right-of-way upon discovering a dangerous or perilous situation." *Id., ¶12*, citing R.C. 4511.48(E) and *Deming v. Osinski*, 24 Ohio St. 2d 179, 180-181, 265 N.E. 2d 554 (1970). Even though the motorist claimed that he hit the brakes as soon as he observed the pedestrian, genuine issues of material fact were found to exist over whether he had maintained an assured clear distance as required by R.C. 4511.21. *Id., ¶13-15.*

III. THE TRIAL EVIDENCE

A. Rolf Frederick Barth, M.D.

The evidence that was presented during the trial convincingly establishes that Dr. Barth was primarily – if not entirely – at fault for the motor vehicle accident that took the Decedent's life. He acknowledged that he had been heading to the Cleveland Clinic in his Mercedes to attend a conference. *Tr. 42.* It was dark outside and he was traveling at a speed of 65 m.p.h. in the second lane from the left on I-71. *Id., pp. 42-45.* The freeway was dry, visibility was good, and he was proceeding along a level straightaway. *Id., pp. 43-44* The Mercedes's headlights were functioning properly. *Id.,*

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p. 43. He recalled that he was behind another vehicle travelling at the same speed, which was roughly 90 feet ahead of him. *Id., p. 45.*

Dr. Barth claimed that he was first aware that something was amiss when he felt the impact of the collision. *Tr., p,. 48.* He never saw anyone waiving a white t-shirt on the highway. *Id., p. 54.* Nor did he observe the Decedent directly in front of him. *Id., p. 54.* Dr. Barth later confirmed to the police investigator that he never noticed even the white pickup truck or trailer before impact. *Id., p. 58.*

B. Jessie Fury

Jessie Fury also testified and explained that he had been riding as a passenger with his father, Gary Fury, and the Decedent northbound on Interstate 71. *Tr., p. 236.* While they were traveling at about 50 to 55 M.P.H., they observed that the trailer they were towing was swinging back and forth into the adjacent lanes. *Id., p,. 236.* His father brought the truck to a stop and he and the Decedent exited. *Id.* Fury began waiving a white t-shirt in the air while the Decedent started to reattached the trailer. *Id., p. 237.* Fury was standing about ten feet behind the trailer in third ("slow") lane. *Id., p. 237.* Approximately 20 to 30 vehicles either went around them or stopped behind them. *Id., p. 240.* Those that were passing had significantly reduced their speed. *Id., p. 241.*

Jessie Fury then saw the gray Mercedes approaching and could tell that it was not slowing down like the other cars. *Tr., pp. 241-242.* It was proceeding through the middle lane. *Id., p. 242.* Jessie Fury yelled a warning to the Decedent and then dove out of the way. *Id. p. 243.* He watched as the Mercedes passed multiple cars and shot by him. *Id., p. 242.* The Decedent had been trying to connect the trailer hitch and attempted to move out of the way. *Id., pp. 244-245.* There was nothing that would have impeded Dr. Barth's view of the Decedent or the stationary pickup and trailer. *Id., p.*

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249. The Mercedes nevertheless collided straight into the rear of the trailer. *Id., p. 247.* The Decedent was caught in the impact. *Id.*

C. Chad Meeks

The testimony of Chad Meeks ("Meeks") was introduced, by agreement, through his deposition transcript. *Tr., p. 8.* At the time of the fatal accident, he had been heading southbound on Interstate 71. *Deposition of Chad Meeks taken April 13, 2012 ("Meeks Depo."), pp. 6-7.* He was driving a Chevy pick-up truck at about 60 and 65 m.p.h. in the "speeding lane." *Id., p. 9 & 12.* Meeks claimed that he noticed a stopped vehicle in the middle of the northbound lane. *Id., p. 11.* He saw one individual approximately 15 to 20 feet behind the truck with "a white shirt in his hand and he was jumping up and down and waiving traffic." *Id., p. 13.* Another individual was bending down behind the vehicle. *Id., p. 14.* The effort to attract attention appeared to be working, as cars were moving over. *Id., p. 17.* He saw a Mercedes following behind a semi-truck and then heard loud braking and noticed smoke. *Id., pp. 18-19.*

Meeks had trouble remembering significant circumstances about the accident, and could not tell if the Mercedes had been in the first, third, or "in lane ten." *Meeks Depo., pp. 30-32.* Later in the questioning, Meeks was certain that both the Mercedes and the semi-truck were in the second lane. *Id., p. 42.* He had described the semi-truck with significant detail during his deposition, but never mentioned it in the statement he furnished to the police shortly after the accident. *Id., pp. 18-20, 28-31, 35-36 & 40-41.* He also acknowledged that the median wall that separated the northbound and southbound lanes blocked much of his view, including the vehicle lights. *Id., pp. 32-33.* And his brief observations were made while he was travelling in the opposite direction at a speed of up to 65 m.p.h.

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D. Anthony Angey, Jr.

The parties also stipulated that the deposition of Anthony Angey ("Angey") is entitled to due consideration by the Court. *Tr., p. 8.* The Columbia Station resident was heading home from work northbound on Interstate 71. *Deposition of Anthony Angey, Jr., take April 13, 2012, pp. 6-8.* He was driving in the second lane behind a "silver car." *Id., pp. 9-10.* They were traveling close to 70 m.p.h. *Id., pp. 9-13.* Angey felt that he was keeping a safe distance between them. *Id., p. 13.* Suddenly he saw the car in front of him swerve slightly and lift into the air. *Id., pp. 15-16.* Angey was able to maneuver around and brought his vehicle to a stop on the side of the road. *Id., pp. 16-17.* He soon realized that someone had been killed in the collision. *Id., pp. 19-20.* The pickup truck was bent in half and the trailer had "exploded[,]" leaving parts everywhere. *Id., p. 21.*

As they were waiting for the police to arrive, Angey observed that other vehicles managed to drive around the wreckage in the middle of the highway. *Angey Depo., p. 38.* He explained that:

> Q. So everyone else was able to see it, stop, or go around it?
>
> A. Yeah. Had to have been because this was the only thing in the road. Everybody else pulled over. There was no other accidents. I was afraid of more accidents. I was just waiting. Nothing happened.
>
> Q. So after the accident cars are still going northbound?
>
> A. Yeah. There was no more accidents.

Id., p. 39.

E. James Crawford

As previously noted, the circumstances surrounding the fatal accident were thoroughly examined by James Crawford at the request of Plaintiff's counsel. *Tr., pp.*

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76-79. He has obtained a degree in electrical engineering and a Masters in aeronautical engineering. *Id., p. 70*. He presently teaches accident reconstruction courses for the Ohio Peace Officer Training Academy. *Id., p. 70*. Crawford is trained to conduct analysis of lighting conditions, including measurements and the conspicuity of pedestrians and vehicles. *Id., p. 75*. This term refers to the ability to discern particular hazards. *Id., p. 76*. Crawford has also developed expertise with regard to bulb analysis and lighting. *Id., pp. 76 & 82-83*. He has testified in Ohio courtrooms with regard to both conspicuity and visibility issues. *Id., pp. 82-83*.

Crawford described the investigation that was conducted by law enforcement authorities, including the use of high-precisions surveying equipment (known as "Total Station") that emits beams of light to measure distances and angles of key evidentiary points at the scene. *Tr., p. 86*. The analysis that was conducted confirmed that the skid marks that were left by the Mercedes on the freeway were North of the initial point of impact. *Id., pp. 108-109*. The damage to the vehicle and trailer was indicative of a straight head-on collision, which meant that Dr. Barth was not swerving at the moment of impact. *Id., pp. 111-113*. The skid marks were also consistent with this conclusion. *Id., p. 113*. The collision occurred entirely within the second lane. *Id., p. 118*.

Crawford was able to calculate the speed of the Mercedes at between 65 to 70 m.p.h. *Tr., p. 131*. The posted speed limit was 60 m.p.h. *Id., p. 102*. The interstate highway was well lit across each of the three lanes. *Id., p. 135*. Even without factoring in the contribution from the headlights of the passing vehicles, one could have read a book under those conditions. *Id., p. 138*.

Photographs that were taken by the police at the scene confirmed that the one trailer taillight that had not been destroyed in the collision was functioning and operational prior to impact. *Tr., p. 144*. Crawford was able to inspect the other taillight

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bulb that had been taken by the Brookpark Police Department. *Id., p. 149.* The nature of the tungsten filament inside indicated that the bulb had been operational and flashing at the time of the fatal incident. *Id., pp. 155-156.*

Furthermore, the taillight on the pick-up truck was higher than the trailer and plainly visible. *Tr., p. 116.* There were no obstructions that would have blocked Dr. Barth's view of the taillights and operational flashers. *Id., p. 116.*

And perhaps more significantly, the Mercedes was equipped with H7 Halogen headlights. *Tr., p. 159.* Regardless of the freeway lighting and the flashing bulbs on the pickup truck and trailer, Dr. Barth's headlights permitted visibility ahead of up to 430 feet. *Id., p. 159.*

Crawford opined that Jessie Fury, Gary Fury, and the Decedent responded properly to the emergency situation they encountered on the highway. *Tr., pp. 166-169.* Dr. Barth's excessive speed, however, impeded his ability to either brake or undertake evasive action to avoid hitting the Decedent. *Id., p. 161.* Given the ample lighting, the multiple vehicles that were safely slowing and stopping, and Jessie Fury's efforts to attract his attention, Dr. Barth should have identified and avoided the hazardous condition that was looming directly in front of him. *Id., pp. 170-171.*

F. Timothy J. Tuttle

Defendant arranged for Timothy J. Tuttle to testify that Dr. Barth had done nothing wrong on the evening in question. *Tr., 306-307.* He had never obtained a college degree, but claimed to have taken a "three-week traffic crash reconstruction course through the Institute of Police Management and Technology" in 1991. *Id., p. 307.* Issues of "visibility" were not covered. *Id., p. 334.* He also asserted that he had completed other unidentified "classes relating to traffic crash reconstruction, courses involving computer applications, motorcycles, commercial vehicles, visibility issues in

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traffic crashes." *Id., p. 307.* He was hired by the Ohio State Highway Patrol in 1983, ultimately achieved the rank of assistant post commander, and left in 2001 "due to some medical issues." *Id., p. 308.*

Tuttle claimed that his expertise in visibility issues had been developed in a one-week class that had been conducted by Dr. Abrams. *Tr., p. 322.* He than acknowledged that:

> Q. You are not claiming that attendance of this class in and of itself qualifies you as an expert on visibility; is that correct?
>
> A. No.

Id., p. 322. He conceded that the only experiments he had conducted on visibility were with Dr. Abrams, who proceeded to write the reports and furnish the testimony. *Id., pp. 324-325.* Tuttle was, in essence, just gathering the data. *Id.* He never took another visibility class. *Id., p. 328.*

Tuttle grudgingly acknowledged that he is not accredited by the Accreditation Commission for Traffic Accident Reconstruction (ACTAR), which recognizes excellency and competency in his field. *Tr., pp. 329-330.* He claimed he just did not have the time for the continuing education that is required. *Id., p. 331.*

The essence of Tuttle's opinion was that Dr. Barth had acted reasonably because he would not have seen the disabled trailer and white pick-up truck until he was approximately 150 feet away. *Tr., p. 400.* Seemingly unconcerned that Dr. Barth was speeding and had failed to maintain an assured cleared distance in front of him, he asserted that there simply was not enough time to avoid the collision. *Id.*

On cross examination, Tuttle acknowledged that he did not know the posted speed limit on that portion of the freeway or whether Dr. Barth was speeding. *Tr., p. 439.* He further conceded that a speeding vehicle is less likely to be able to stop in time

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to avoid a hazard. *Id., pp. 453-454.*

Tuttle acknowledged that there are federal standards governing the minimum visibility of taillights, but he did not know what the distances were. *Tr., p. 416.* He was unaware of the minimum visibility specifications for flashing lights. *Id., p. 417.* He did not bother to perform any testing on the vehicles with regard to the issue of visibility. *Id., p. 418.* He thus did not know how far away the taillights would be discernable *Id., pp. 418 & 421.*

Recognizing his predicament, Tuttle was evasive when asked whether the purpose of the flashing hazard lights is to warn those who are approaching of a stopped or slow-moving vehicle. *Tr., 422-423.* Notwithstanding his experience as a state trooper, he could not say whether it would be prudent for a driver to make such an assumption upon observing flashing lights ahead in a roadway. *Id., pp. 430-431.*

In a similarly lackadaisical fashion, the defense accident reconstructionist never determined the minimum visibility for the Mercedes headlamps. *Tr. p. 411.* Even without any additional lighting, however, they should have furnished illumination up to 250 feet ahead. *Id., p. 427.*

The sole defense "expert" was not aware of whether the Mercedes was responsible for any skid marks at the scene. *Tr., p. 433.* He later acknowledged that all of the tire marks had been left post-impact. *Id., pp. 41-42.* Tuttle then conceded that:

> Q. *** There is no sign whatsoever of Dr. Barth braking before this impact when he ran into the back of this Dodge pickup and the trailer, correct?
>
> A. Not that I'm aware of.

Id., p. 442.

While being gently questioned by defense counsel, Tuttle had maintained that Dr. Barth would have been heading northbound in a "sea of red taillights" as a result of the

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heavy traffic. *Tr., p. 364.* He then had to acknowledge on cross-examination that there also would have been a "sea of headlights[.]" *Id., p. 449.* That additional lighting was not factored into, however, his analysis of the visibility distances and his opinions with regard to illumination. *Id., p. 449.* The defense expert eventually admitted that he could not tell when the hazard would have been visible. *Id., pp. 450-451.* Other than perhaps one that was painted lime green, the white pickup truck would have had more easily identifiable than any other color of vehicle. *Id., p. 442.* All he could say was that "Dr. Barth shouldn't have reacted to 150 feet[.]" *Id., p. 451.*

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CONCLUSION

Based upon the more credible – and largely uncontradicted – testimony that was furnished and the controlling legal standards, this Court should enter a finding that Defendant OSUMC is liable for the conscious pain and suffering and wrongful death of the Decedent.

Respectfully Submitted,

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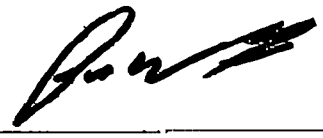

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I hereby certify that a copy of the foregoing **Brief** has been served by e-mail on this 12th day of September, 2014 upon:

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Attached please find a copy of Plaintiff's Post Trial Brief

Thank you,

Crystal

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