

[Cite as *Engle v. Ohio State Hwy. Patrol*, 1992-Ohio-283.]

IN THE COURT OF CLAIMS OF OHIO

|                                      |   |                     |
|--------------------------------------|---|---------------------|
| WAVEL ENGLE, Admx.                   | : |                     |
| Plaintiff                            | : | CASE NO. 91-08468   |
| v.                                   | : | <u>DECISION</u>     |
| OHIO STATE HIGHWAY PATROL,<br>et al. | : | Judge Russell Leach |
| Defendants                           | : |                     |

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This action was brought by Wavel Engle, as administratrix of the estate of her son, Dale Engle (Engle). At approximately 10:05 p.m. on August 15, 1989, Engle was killed after his motorcycle struck the front right fender of an Ohio State Highway Patrol (OSHP) cruiser being driven by Trooper Larry K. Phillips (Phillips).

This accident occurred on State Route 23 (S.R. 23), a short distance north of Portsmouth, in Clay Township, Scioto County, Ohio. Prior to the collision, Engle, driving a high performance Suzuki motorcycle, was "clocked" by Sergeant Elbert W. Kelly (Kelly), of OSHP going sixty m.p.h. and shortly thereafter at a speed of sixty-eight m.p.h. northbound on S.R. 23. At that time Kelly was in a southbound lane of S.R. 23. Both were in a zone

where the ***prima facie*** speed limit was forty-five m.p.h.

At about the same time, Trooper Phillips, on his way home after completing his shift, was north of both Engle and Kelly driving south on S.R. 23. He heard Kelly's radio transmission to the post, informing it that Kelly was then northbound on S.R. 23, intending to issue a citation to a northbound motorcyclist. Phillips, learning that the motorcyclist ought to be nearing his current vicinity on the "Clay Overpass," made a "u-turn," crossing over the two northbound lanes of S.R. 23 and going almost completely onto the easterly northbound berm. Almost instantaneously, Engle passed the patrol car in the small area of berm between the patrol car's right side and a guard rail, hit the cruiser's front fender and then the guard rail and sustained fatal injuries.

It is not necessary to decide whether or not Phillips was negligent ***per se*** for executing the "u-turn" onto northbound S.R. 23. The court has little difficulty in finding that Phillips was negligent and that his negligence was a proximate cause of the accident. At the least, Phillips turned in front of Engle, not knowing Engle's speed and assuming that he could make such a turn with safety.

Plaintiff has asked the court to find that Phillips' actions were reckless and that he is subject to civil suit in a court of common pleas. This court cannot and will not do so.

Although Phillips misjudged the time he had, his actions, while negligent, were not reckless.

Prior to the collision, Engle's motorcycle left skid marks which measured seventy-one feet. Expert witnesses for both parties testified that when the marks started, Engle's vehicle was travelling at a speed of at least fifty-five m.p.h. but not exceeding sixty m.p.h. The *prima facie* speed limit where the accident occurred was fifty-five m.p.h. and had been such for approximately seven-tenths of a mile (measured from the south where the forty-five m.p.h. zone ended). Based upon the totality of the evidence, the court finds that Engle was negligent by driving at an excessive speed and that his negligence was a proximate cause of the accident.

The difficulty in deciding this case is in determining the relativity of negligence and proximate cause between Engle and Phillips. No one knows for sure the speed being driven by Engle at each moment as he drove north beyond the last measurement of sixty-eight m.p.h. made by Kelly. When his first skid mark was made, his death was certain and, the faster he was driving within the last one thousand to five hundred feet before the collision, the more he was the primary cause of his own death and the less Phillips' negligence contributed to such a regrettable result.

The law of Ohio provides that should Engle be more than fifty percent the cause of his own death, plaintiff can recover nothing. On the other hand, should he be forty percent negligent, for example, plaintiff should recover sixty percent of the amount a court would determine to be fair compensation.

Engle was driving sixty-eight m.p.h. in a forty-five m.p.h. zone when he passed a point on S.R. 23 adjacent to the Holiday Inn. About one-tenth of a mile further north, as he passed a Harts Store, a witness estimated his speed at eighty m.p.h. and was of the opinion that he was accelerating as fast as possible.

At the intersection of S.R. 23 and Scioto Trail, six-tenths of a mile north of the Harts Store, two witnesses testified that Engle's speed was one hundred twenty m.p.h. or one hundred twenty-five m.p.h. Both of these witnesses testified that Kelly was following Engle with both his beacon lights and siren in operation. Kelly did not remember when he turned on such lights and did not remember that his siren was ever operating. Regardless, Kelly testified that he was not in "pursuit" or "hot pursuit" of Engle, that there was no emergency and that until after the accident, he, Kelly, never again saw the motorcycle once it passed the Holiday Inn. Kelly also testified that he thought the motorcyclist had pulled into a business lot and that

he had been looking for him in one of such lots.

Old Scioto Trail is approximately seven-tenths of a mile south of the beginning of the skid marks laid down just prior to the collision. Assuming, and the court so finds, that Engle was driving at a rate in excess of one hundred m.p.h. at Old Scioto Trail and a rate of at least fifty-five m.p.h. at the beginning of the marks, no one knows for sure where, how and when he started his deceleration.

A truck driver and his wife saw the motorcycle immediately before the collision and the driver's statement regarding excessive speed of the motorcycle assisted the **state** crash review committee in determining, contrary to the decision of the **local** crash review committee, that the crash (from the standpoint of the officer) was not preventable. Although the testimony regarding the crash review committees came into evidence without objection, this court cannot base its decision on what other bodies determine on the same, or substantially the same, evidence.

The difficulty presented to the court relates to the degree of negligence by the two drivers. If Engle slowed down rapidly immediately after passing Old Scioto Trail, he could have been driving only seventy or sixty m.p.h. for some time before the

collision; a fact that would lessen the degree of his comparative negligence. On the other hand, if he were still driving at an approximate speed of one hundred m.p.h. just before he saw Phillips' cruiser, at which time he decelerated as fast as possible until, at the last minute, he braked to the extent of laying down skid marks, such fact would greatly lessen the comparative negligence of Phillips.

As stated by this court in *Berz v. Ohio Department of Highway Safety* (March 6, 1992), Court of Claims No. 90-09291, unreported:

The law does not seem to place the burden of proof on either party respecting the degree of comparative negligence. Or, one might say that plaintiff has the burden of showing how little her negligence affected the injuries, whereas defendant has the burden of proving how much (particularly over fifty percent) plaintiff's negligence affected the result. The court believes that the finder of fact, in the absence of arbitrariness or capriciousness, has the discretion to determine the degree of negligence of the respective parties. Other than common sense or native logic, we know of no standards to use in such appraisal.

The court, because of the problem presented, after closing by both parties, called back the truck driver and his wife as court witnesses. In the judgment of the court, the only significant testimony presented was that each witness in the truck driving

south agreed that Kelly's cruiser's flashing lights and siren were operating **before** the crash.

Principally, but not exclusively, based upon the above testimony, the court finds that while Kelly did not see Engle until after the collision, Engle saw Kelly and was not decelerating after he passed Old Scioto Trail, but rather he was still driving at an extremely high speed in an attempt to avoid citation or arrest and did not start to decelerate until he saw Phillips' cruiser cutting off his clear pass to the north. The court finds that Engle's negligence was greater than was the negligence of Phillips' and accordingly finds for the defendants and against the plaintiff.

RUSSELL LEACH  
Judge

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| WAVEL ENGLE, Admx.         | : |                       |
| Plaintiff                  | : | CASE NO. 91-08468     |
| v.                         | : | <u>JUDGMENT ENTRY</u> |
| OHIO STATE HIGHWAY PATROL, | : | Judge Russell Leach   |
| et al.                     | : |                       |
| Defendants                 | : |                       |

: : : : : : : : :

This action was tried before the court on August 31, 1992. The court has considered the evidence and rendered a decision filed herein. Judgment is rendered in favor of defendants and against plaintiff. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

RUSSELL LEACH  
Judge

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