



about the amount of rain that had fallen overnight, the court does find that the roadway was wet on the morning of August 11, 1999. Plaintiff lost control of his motorcycle about three miles from his home, just past the intersection of SR 132 and Concord Road.

{¶3} Officer Souder of the Pierce Township Police Department, arrived at the scene of the accident at approximately 6:29 a.m. and found plaintiff laying off the east side of the roadway just south of the telephone pole. Plaintiff's motorcycle had come to rest just north of the utility pole. Souder wrote in his accident report that he observed what appeared to be motorcycle tracks in the mud, which veered off the roadway toward the pole near where plaintiff and his motorcycle had come to rest. Souder identified the specific pole that plaintiff had struck by its identification number but he took no photographs or measurements at the scene.

{¶4} Coincidentally, plaintiff's mother, Rosemary Preston came upon the scene of the accident just as her son was being taken to the ambulance. She was on her way to breakfast at the time. According to Preston, the northbound lane of SR 132 was covered with inch-deep mud, beginning at the Concord Road intersection and extending just north of the accident scene, and the mud was so thick that she was unable to see the solid white line at the right edge of the roadway.

{¶5} Preston testified that she saw the tracks in the mud leading from the middle of the roadway to the pole. According to

Preston, Officer Souder mistakenly identified the pole that plaintiff had hit, and the correct pole was just south of the misidentified pole. Preston also testified that it had rained heavily the night before the accident and that it was foggy and dark when she arrived at the accident scene. She further testified that she spoke to her son-in-law, Brian Farmer, later that day and asked him to take photographs of the accident scene. Farmer testified that he took photographs of the scene at some time between 3:00 and 4:00 p.m. in the afternoon. Several photographs of the roadway were admitted into evidence in this case.

{¶6} Two other drivers passed by the accident scene shortly after plaintiff's crash. One of the drivers, Gary Kiskaden, testified that when he came upon the accident scene his vehicle slid on mud as he applied the brakes and then maneuvered around the cruiser in the roadway. According to Kiskaden, the mud extended from the right side of the road to the middle of the northbound lane. He stated that he heard mud coming off the tires as he moved past the cruiser.

{¶7} Conversely, Barbara Hackney, an ODOT employee who was the other driver who passed the accident scene on her way to work that morning, testified that she did not notice any mud on the roadway.

{¶8} Darrell Hicks, the foreman for the project at issue, testified that he had used a small tractor known as a Bobcat on August 10, 1999, to remove and transport dirt from the side of the

roadway and to "scrape off the road" at the end of the workday. He also testified that the crew used brooms to sweep the roadway at the end of the workday on August 10, 1999. After reviewing the photographs taken by Farmer, Hicks stated that the dark colored substance near the curb line looked like dirt but that the lighter colored substance at the middle of the roadway and nearer the centerline did not appear to be dirt.

{¶9} James Armstrong held the position of Transportation Manager II in 1999 and was Darrell Hicks' supervisor for this project. Armstrong visited the worksite on August 11, 1999, about one hour after plaintiff had been injured. Armstrong testified that the northbound lane had some "pancake-sized" mud spots, but it did not resemble the mud-covered roadway shown in one of the photographs taken by Farmer.

{¶10} ODOT Transportation Administrator, Timothy Rallston testified that photographs taken by Farmer depicted "dirt stains" on the roadway, rather than an accumulation of dirt or mud. Rallston noted that the solid white edge lines were completely free of dirt, which indicated to him that the roadway had been swept. Rallston stated that the condition of the roadway depicted in the photographs was within ODOT's standards; that ODOT is not required to "scrub the roadway" at the end of the day.

{¶11} In order to prove that ODOT was negligent, plaintiff must establish by a preponderance of the evidence that ODOT owed him a

duty, that it breached that duty and that the breach of that duty was the proximate cause of his injuries. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42. ODOT has a statutory duty to maintain the highways in a reasonably safe condition. R.C. Sections 5501.01, 5501.11, *Madunicky v. Ohio Dept. of Transp.* (1996), 109 Ohio App.3d 418. However, ODOT is not an insurer of the safety of state highways. *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 730.

{¶12} Although plaintiff could not remember the accident, he did acknowledge that he was part of the ODOT crew performing work on SR 132 on the day prior to the accident. He testified that his crew was cutting back the hill on the east side of the northbound lane and periodically loading the excess dirt into a truck for removal. He could not recall whether he or his fellow workers allowed dirt to pile up on the side of the road. He stated that the crew used brooms to sweep the dirt off the highway at the end of the workday.

{¶13} Plaintiff first contends that defendant's failure to provide adequate drainage at the site from the previous evening's rain caused mud to slide into the roadway. The court finds little evidentiary support for plaintiff's erosion theory. Moreover, plaintiff's own expert forensic engineer, H. Richard Hicks, testified that erosion was not a factor, and that the mud on the roadway was a result of the dirt left by the ODOT crew on the previous day.

{¶14} Plaintiff next contends that ODOT breached its duty of care by leaving an excessive amount of dirt in the roadway, which created a hazard to motorists. As stated above, Hicks' testimony supports this contention. Plaintiff also presented the testimony of Jack Holland, an accident reconstruction expert specializing in motorcycle accidents. He opined that the mud on the roadway caused the rear tire of plaintiff's motorcycle to "kick-out" to the left, sending the vehicle out of control and off the right side of the roadway. Hicks acknowledged that a small spot of mud just one-quarter of an inch thick could cause a rear tire kick-out. Hicks also testified that the speed of the motorcycle at the time it encountered the mud and the experience of the driver are relevant factors in determining whether kick-out would occur and, if so, whether the rider could recover. Hicks admitted that he was unable to estimate the speed of the motorcycle from the information taken at the scene and that Officer Souder's estimate of speed was nothing more than a guess. Hicks also acknowledged that plaintiff was an inexperienced rider.

{¶15} The evidence is in conflict as to the exact location where plaintiff lost control of his motorcycle, the amount of dirt or mud that was left on the roadway, and the amount of precipitation that had fallen on the evening before the accident. There was no meaningful investigation at the scene of the accident and no reliable estimate of speed. There is also a conflict in the

testimony as to which one of the three utility poles on the east side of the highway was struck by plaintiff.

{¶16} Although the photograph admitted as Plaintiff's Exhibit 12C does show some dirt on the roadway, the greater accumulation of dirt is near the solid white line at the right edge of the roadway with smaller traces of dirt extending to the middle of the northbound lane and little or no accumulation of dirt from the middle of the roadway to the centerline. The court is unable to conclusively determine the thickness of the dirt from the photograph itself. The court notes, however, that there does not appear to be any accumulation of dirt or mud, which would even approach one inch in thickness. The accumulation of dirt is much less than that even at its thickest point near the edge of the road.

{¶17} Upon review of all the evidence admitted in this case, the court finds that ODOT did not breach its duty of care. Based upon the testimony and the photographs of the roadway, the court finds that the ODOT work crew did sweep the roadway at the end of the workday on August 10, 1999. Indeed, the photographs show that the solid white line at the right edge of the roadway was completely clear of mud or dirt on the afternoon of August 11, 1999. The standard of care does not require ODOT to sweep or scrub the road clear of all dirt. Thus, the evidence is insufficient to support a finding that the roadway was unreasonably dangerous on the morning of August 11, 1999.

{¶18} Moreover, even if the court were to conclude that the amount of dirt left on the roadway following the August 10, 1999, workday created a foreseeable and unreasonable risk of harm to the traveling public, the court is convinced that plaintiff's own negligent conduct was much greater than defendant's under the circumstances of this case. As stated above, plaintiff was a member of the crew that allegedly caused the hazardous condition on the roadway. Although plaintiff was not the supervisor on the job and could not dictate the method or thoroughness of the road cleanup, plaintiff was in a unique position to know both how much dirt was left on the roadway on the day prior to his fall and its exact location. Plaintiff was extremely familiar with the roadway both from his work at the site and from his daily travels. Plaintiff lived just a few miles from the worksite and he was well aware that it was dark, foggy and wet when he set out for work on the morning of August 11, 1999. Plaintiff also knew or should have known that he was a relatively inexperienced motorcycle operator.

{¶19} The court finds that plaintiff knew, prior to setting out for work on August 11, 1999, that a hazardous condition existed upon the roadway he was about to travel. He also knew the nature of the hazard and the exact location of the hazard. In light of this knowledge, plaintiff should have taken necessary precautions for his own safety. Plaintiff's failure to take the necessary precautions to avoid a dangerous condition of which he was fully aware

constitutes contributory negligence. In short, the court concludes that plaintiff's own fault was greater than defendant's. Consequently, plaintiff is barred from recovery by operation of Ohio's comparative negligence statute. See R.C. 2315.19.

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FRED J. SHOEMAKER  
Judge

Entry cc:

Barry D. Levy  
2200 Kroger Building  
1014 Vine Street  
Cincinnati, Ohio 45202

Attorney for Plaintiff

Susan Sullivan  
65 East State St., 16th Fl.  
Columbus, Ohio 43215

Assistant Attorney General

LP/cmd  
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