[Cite as *Weiss v. Ohio Dept. of Transp.*, 2002-Ohio-5389.]

IN THE COURT OF CLAIMS OF OHIO

JON BERENSTON WEISS :
2138 Clifton Way
Avon, Ohio 44011 : Case No. 2002-03406-AD

Plaintiff : MEMORANDUM DECISION

v. :

OHIO DEPT. OF TRANSPORTATION :

Defendant :

: : : : : : : : : : : : : : : : :

For Defendant: Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

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FINDINGS OF FACT

{¶1} Plaintiff, John B. Weiss, stated his automobile received paint damage at sometime between 8:00 p.m. and 11:30 p.m. on October 31, 2001 while traveling south on Interstate 71 between Cleveland and Columbus. Plaintiff indicated he was driving in the left southbound lane of Interstate 71 at milemarker 184 adjacent to a rest area when he swerved into the right southbound lane to avoid a truck laying fresh yellow paint down the edgeline of the roadway. Plaintiff did not explain why he drove over the edgeline berm area of the roadway as he changed lanes to avoid the paint truck traveling in the left southbound highway lane. Plaintiff maintained he did not receive any warning regarding the painting activity until he came upon the truck moving south in the left lane laying fresh yellow paint on the roadway. As a result of driving over the wet paint plaintiff asserted, "my car's left side now has

yellow highway paint on both wheel wells, on the left side tires, the driver's door, the rear bumper, and the mud guards." Plaintiff submitted photographic evidence depicting yellow paint markings on the areas of his automobile previously described. Plaintiff filed this complaint seeking to recover $1,674.99, the cost of automotive repair related to the paint damage. Plaintiff submitted the filing fee with the complaint. Plaintiff has contended defendant, Department of Transportation, was ultimately responsible for the damage done to his car by the wet paint from the highway edgeline. Plaintiff asserted he was not given any warning of the painting operation prior to his property damage occurrence.

{¶2} Defendant denied any liability in this matter. Defendant acknowledged its contractor, Chemi-Trol Chemical, Inc. (Chemi-Trol), was conducting edgeline painting on Interstate 71 on October 31, 2001. However, defendant denied plaintiff's damage was proximately caused by any negligent act or omission on the part of Chemi-Trol personnel. Defendant asserted all traffic control was in place during the painting activity. Furthermore, defendant contended sufficient signage was utilized to notify motorists of the painting operation on Interstate 71 South.

{¶3} Defendant's contractor explained a painting vehicle and trailing vehicle, both equipped with arrow boards and warning signs were used on October 31, 2001 during the painting. The arrow boards measured 4' X 8' and contained flashing lights. Warning signs were reflective, depicted with the words "WET PAINT", and an arrow pointing to the roadway area being painted. Additionally, a description of the paint applied and its properties were offered. Defendant's contractor stated:

{¶4} "The type of traffic paint used was a water-based material very similar in composition to latex house paint. It is applied at a rate of 16 mills, which is about the same thickness of 12 sheets of paper. Glass spheres are applied on top of the paint to provide nighttime reflectivity. The glass beads are on top of

the paint providing an additional buffer between the paint and anything that might come into contact with it. This material has a track free time of 60 seconds, meaning a vehicle can drive over the line to enter a driveway or turn at an intersection and perhaps the tires might pickup a yellow stripe on them but nothing else.

{¶5} When a vehicle drives down the stripes for an extended period, the tires start to pickup the paint. This is similar to repeatedly running a roller over a wall after it has been painted a short time before. While the paint may feel dry to the touch, the roller will pick up the paint because waterborne materials dry from the top down. After you break through the dried surface and the roller picks up the wet paint."

{¶6} Defendant has suggested plaintiff drove past Chemi-Trol's warning trail vehicle, entered the left lane of Interstate 71, and repeatedly drove over the freshly painted roadway edgeline as his car approached the Chemi-Trol painting vehicle. Therefore, defendant has argued plaintiff's own negligent driving was the sole cause of his property damage. Defendant asserted the evidence indicates plaintiff disregarding warnings, drove between two project vehicles, and chose to drive over a freshly painted highway edgeline.

{¶7} Defendant argued plaintiff's driving maneuver constituted a violation of R.C. 4511.17(B) which states:

{¶8} "No person, without lawful authority, shall do any of the following:

{¶9} (B) Knowingly drive upon or over any freshly applied pavement marking material on the surface of a roadway while the marking material is in an undried condition and is marked by flags, markers, signs, or other devices intended to protect it."

{¶10} Evidence has not been presented to establish plaintiff possessed the requisite mental state to show he violated R.C. 4511.17(B) when he drove on the roadway edgeline.

{¶11} Defendant contended its contractor acted responsibly in

using all traffic control and notifying devices during the painting operation. Also, defendant asserted Chemi-Trol exercised reasonable care towards the motoring public by using fast drying paint on the roadway edgelines. Finally, defendant maintained the sole cause of plaintiff's damage was his own negligence.

{¶12} On September 4, 2002, plaintiff filed a response to defendant's investigation report. Plaintiff denied Chemi-Trol used a trailing vehicle or maintained any warning devices during the October 31, 2001 painting project. Plaintiff insisted only one project vehicle was used, the painting vehicle, and no warning signs were posted at any roadway location. Plaintiff stated, "a trail vehicle was non-existent."

{¶13} Plaintiff denied he drove in a negligent manner which in any way contributed to his damage. Plaintiff reasoned, due to his contention he had no warning of the painting operation, driving on the freshly painted roadway edgeline was "unavoidable." Plaintiff argued Chemi-Trol did not exercise reasonable care in performing the painting activity by failing to adequately warn motorists of the operation. Plaintiff did not present any corroborating evidence regarding the lack of adequate warning. Plaintiff did not explain any set of circumstances showing why or how it was "unavoidable" for him to drive on a roadway berm edgeline where fresh paint had been applied.

CONCLUSIONS OF LAW

{¶14} Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶15} Defendant has the 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, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶16} Plaintiff has the burden of proof to show his property damage was the direct result of failure to defendant's agents to exercise ordinary care in conducting roadway painting operations. *Brake v. Ohio Department of Transportation* (2000), 99-12545-AD. In the instant claim, plaintiff has failed to prove his property damage was caused by any negligent act or omission on the part of defendant's agents. Conversely, evidence has shown plaintiff's own negligent driving was the cause of his property damage. See *Brady v. Dept. of Transportation* (2000), 2000-07196-AD; *Luce v. Dept. of Transportation* (2001), 2000-10286-AD. Therefore, plaintiff's claim is denied.

{¶17} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶18} IT IS ORDERED THAT:

{¶19} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶20} 2) the court shall absorb the court costs of this case in excess of the filing fee.

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DANIEL R. BORCHERT
Deputy Clerk

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9/17
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