[Cite as *Broz v. Ohio Dept. of Transp.*, 2005-Ohio-453.]

IN THE COURT OF CLAIMS OF OHIO

KENNETH S. BROZ	:	
Plaintiff	:	
v.	:	CASE NO. 2004-08863-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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

{¶ 1} On August 28, 2004, at approximately 10:00 a.m. to 10:30 a.m., plaintiff, Kenneth S. Broz, was traveling east on US Route 20 near Wakeman in Lorain County when he approached a row of slow moving cars following behind a paint truck. The paint truck was part of a moving operation involved in painting white edge lines along the roadway of US Route 20. All vehicles used in the painting activity were owned by defendant, Department of Transportation (DOT) and operated by DOT personnel. Plaintiff implied he followed the line of cars and DOT painting vehicles for some time before he exited US Route 20.

{¶ 2} A few days later, on August 31, 2004, plaintiff, while washing his automobile, discovered paint on the passenger side of the vehicle. On September 1, 2004, plaintiff, upon instruction from DOT, went to the Norwalk Highway Patrol Post to file a report regarding the paint splatter on his car. The investigating officer at the Norwalk Post photographed the white paint on plaintiff's vehicle. These photographs depicting paint damage were not submitted. Upon further inspection a small amount of yellow paint was noticed on the left front and left rear fender wells of plaintiff's car. Plaintiff has asserted DOT should bear responsibility for the paint damage to his automobile.

{¶ 3} Consequently, plaintiff filed this complaint seeking to recover $356.15, the cost of paint

removal, plus $25.00 for filing fee reimbursement. The requisite material filing fee was paid.

{¶ 4} Defendant acknowledged edge line painting operations were conducted on US Route 20 in Lorain County during the morning hours of August 28, 2004. The operation was described as a, "moving work zone," which complied with directives outlined in the Manual of Traffic Control for Construction and Maintenance Operations ("Manual") for that type of operation. Defendant explained the equipment used for the painting included a lead paint truck, a paint striper, and a follow truck. All trucks were equipped with "Wet Paint" signs. Additionally, defendant maintained "Wet Paint" signs and traffic control cones were positioned throughout the painting area to notify motorists of this activity on US Route 20. Defendant insisted all required equipment and signage were in place to perform the August 28, 2004, edge line painting.

{¶ 5} Defendant submitted a statement from DOT employee, Jim Myers, who was driving one of the trucks involved in the August 28, 2004, edge line painting on US Route 20. Myers, identified as a District Traffic Supervisor, noted the painting operation consisted of a paint striper truck and two other pickup trucks. According to Myers, "[t]he last truck had a sign stating edge line painting and the paint striper had a sign wet paint with a arrow pointing to the line" [sic]. Myers did not mention that stationary "Wet Paint" signs were posted and traffic control cones were positioned in the painting area, although defendant maintained signs and cones were in place. Myers did recollect he observed vehicles passing the paint trucks when opportunities were presented. Myers denied any motorist, "stopped to complain about the operation."

{¶ 6} Defendant denied any liability in this matter. Defendant suggested plaintiff, "could have encountered the paint anywhere," considering he waited until September 1, 2004, to report the paint damage on his car, four days after the August 28, 2004, edge line painting. Defendant insisted proper traffic control was in place, including stationary "Wet Paint" signs and cones during the operation. Defendant asserted adequate precautions were utilized to protect motorists from paint damage. Defendant explained plaintiff was sufficiently warned and notified of the edge line painting. Consequently, defendant contended plaintiff's own negligence in driving over wet paint was the proximate cause of his damage.

{¶ 7} Plaintiff noted, "[t]here were no cones placed throughout the painting operation as defendant states." Plaintiff asserted the entire DOT painting operation consisted of moving vehicles.

Plaintiff implied he was not sufficiently notified of the painting and that lack of notification was the proximate cause of his property damage. Plaintiff submitted a statement from his wife, Janet C. Broz, who was a passenger in plaintiff's car at the time of the August 28, 2004, incident. Janet C. Broz recalled she did not see any cones positioned along US Route 20 at the time DOT was conducting edge line painting.

{¶ 8} 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.

{¶ 9} 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. Generally, defendant has a duty to post warning signs notifying motorists of highway defects or dangerous conditions. *Gael v. State* (1979), 77-0805-AD.

{¶ 10} Specific referenced material is contained in DOT's Manual dealing with "Wet Paint" signs and placement of signage during a moving operation such as the one described in the instant action. Section 7-C-7 of the Manual provides:

{¶ 11} "7C-7 Wet Paint Keep Off Sign (R-87)

{¶ 12} "These signs may be used to protect freshly painted pavement markings until the markings have dried sufficiently to permit crossing without tracking. (Section 4511.17, R.C.)

{¶ 13} "If maximum observance is to be expected they shall be removed as soon as they are no longer necessary. At the beginning of the line application, or at the point where other markings are applied, a sign shall be placed so as to protect the fresh markings. In rural areas, signs shall be placed on the new line facing approaching traffic at intervals of approximately one mile (see Sec. 7 H-11)."

{¶ 14} The manual also contains a drawing identified as Figure C-16 depicting a DOT moving operation and placement of traffic control devices, particularly a notification sign positioned

on the berm of the roadway. A written note contained on this Figure C-16 drawing states, "[s]ign shall be moved up periodically so as to related positively to the work area."

{¶ 15} Plaintiff and his wife both related they did not observe any stationary traffic control devices or signs while traveling on US Route 20. Plaintiff asserted the only notice he received of the moving painting operation was the DOT vehicles involved in the painting. Defendant's employee, Jim Myers, confirmed no traffic control cones or stationary signs were utilized to notify motorists of the painting. Evidence tends to show DOT did not fully comply with certain Manual requirements in connection with moving operations and sign placement.

{¶ 16} The scope of defendant's duty to ensure the safety of state highways is defined by the Manual. *Leskovac v. Ohio Dept. of Transp.* (1990), 71 Ohio App. 3d 22, 27, 593 N.E. 2d 9. Certain portions of the Manual are permissive, meaning some decisions are within defendant's discretion and engineering judgment. *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App. 3d 487, 584 N.E. 2d 794. "The issue of whether an act constitutes a mandatory duty or a discretionary act determines the scope of the state's liability because ODOT is immune from liability for damages resulting from not performing a discretionary act. *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App. 3d 30, 33-34, 667 N.E. 2d 1009 citing, *Winwood v. Dayton* (1988), 37 Ohio St. 3d 282, 525 N.E. 2d 808. A deviation from the mandatory standards of the Manual renders DOT negligent per se and liable in damages if proximate causation is established. *Madunisky v. Ohio Dept. of Transp.* (1996), 109 Ohio App. 3d 418; *Perkins*, supra. In the instant claim, assuming defendant did not comply with the Manual, plaintiff still has to establish his damage was caused by DOT's failure to meet the Manual standards.

{¶ 17} Plaintiff has the burden of proof to show his property damage was the direct result of failure of defendant's agents to exercise ordinary care in conducting roadway painting operations. *Brake v. Ohio Department of Transportation* (2000), 99-12545-AD. In the present action, plaintiff's evidence tends to indicate he did not receive adequate warning of the DOT painting activity since stationary signs and traffic control cones were not used. Therefore, defendant's attempts at notifying motorists of the painting operation were ineffective pertaining to plaintiff. See *Hosmer v. Ohio Department of Transportation* (2003), 2002-08301-AD. Plaintiff has provided sufficient proof to show his car was damaged as a result of negligent acts or omissions on the part of defendant.

Consequently, defendant is liable to plaintiff for all damages claimed.

IN THE COURT OF CLAIMS OF OHIO

KENNETH S. BROZ	:	
Plaintiff	:	
v.	:	CASE NO. 2004-08863-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $381.15, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa

12/13
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