

roadway. Plaintiff acknowledged that she noticed a DOT paint truck at the head of the row of cars. Plaintiff related she drove past the cars in front of her as well as the DOT vehicle. Plaintiff stated she did not observe any "Wet Paint" signs or cones posted on US Route 33 to warn her of defendant's painting activity. Furthermore, plaintiff insisted she saw only one DOT vehicle involved in edge line painting and did not observe a lead truck or a follow truck on the roadway.

{¶ 3} After arriving at her destination, plaintiff examined her automobile and discovered white paint splattered all over the side of the vehicle. Plaintiff asserted DOT was responsible for this paint damage to her car. Consequently, plaintiff filed this complaint seeking to recover \$1,924.96, the cost of automotive repair needed to correct the paint damage to her automobile. Plaintiff contended her property damage was the result of negligence on the part of DOT in conducting the July 29, 2004, painting operation. Specifically, plaintiff contended DOT failed to provide motorists such as herself with adequate warning of the edge line painting so precautions to avoid the paint could be taken. Plaintiff submitted the filing fee with the complaint.

{¶ 4} Defendant denied the July 29, 2004, painting operation was conducted in a negligent manner. Defendant submitted statements from three DOT employees, Dean Renner, Bob Richter, and Mark Hovatter, who all worked on the edge line painting. Dean Renner, who drove the paint striper vehicle, stated signs and cones were placed on US Route 33 during the edge line painting of both the eastbound and westbound lanes of the roadway. Renner also stated all vehicles involved in the painting carried "wet paint signs." Renner recalled, "Bob Richter was in the follow truck setting out wet paint signs and cones, following behind Bob was Mark Hovatter picking up signs and cones after paint dried." In his statement,

Bob Richter recollected painting started in the eastbound lane at the intersection of US Route 33 and State Route 274. Once painting was completed in the eastbound lane the operation moved to the westbound lane of US Route 33. Richter related he placed and removed traffic control cones along the course of the roadway during the painting. Richter also related he placed a cone with a wet paint sign at a roadway intersection. Mark Hovatter noted, "I was picking up cones on US 33 when I seen that cars and trucks had drove in the wet paint." Defendant asserted necessary precautions were taken to advise motorists of the edge line painting and reasonable measures were implemented to protect motorists from the danger of property damage associated with the painting.

{¶ 5} Plaintiff maintained she did not observe any cones or signs on US Route 33 to notify her of the painting. Plaintiff stated she did not see a DOT lead truck or a DOT follow truck when she drove through the intersection of State Route 720 and US Route 33 at 11:00 a.m. on July 29, 2004. Plaintiff did not offer any additional evidence to support the position regarding lack of signs and cones. Plaintiff did not offer an explanation regarding why she drove over a freshly painted roadway edge line.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} Plaintiff has the burden of proof to show her 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.

{¶ 9} 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:

{¶ 10} "7C-7 Wet Paint Keep Off Sign (R-87)

{¶ 11} "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.)

{¶ 12} "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)."

{¶ 13} 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 position 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."

{¶ 14} Evidence in this claim is in conflict concerning whether or not DOT complied with Manual requirements in connection with moving operations and sign placement. Plaintiff contended no

signs or traffic control devices were in place. Defendant insisted DOT personnel complied with all Manual requirements when performing the painting operation.

{¶ 15} "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 DOT 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 v. Ohio Dept. of Transp.* (1989), 65 Ohio App. 3d 487, 494" *Wax v. Department of Transportation*, 2001-Ohio-1856. In the instant claim, even assuming defendant did not comply with the Manual, plaintiff still has to establish her damage was caused by DOT's failure to meet the manual standards. In the present action, plaintiff has failed to prove her property damage was caused by any negligent act or omission on the part of defendant's agents. Conversely, evidence directs the court to conclude plaintiff's own negligent driving was the cause of her property damage. Therefore, this claim is denied.

