

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MINA E. MARLOW

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2006-07864-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} From 7:30 a.m. to 4:30 p.m., on November 9, 2006, employees of defendant, Department of Transportation (“DOT”), engaged in edge line painting operations on state highways in Miami County. During the morning hours of November 9, 2006, DOT personnel painted white edge lines from mileposts 0 to 3.3 on State Route 718. This DOT painting operation was a moving work zone governed by the DOT Manual of Traffic Control for Construction and Maintenance Operations (“Manual”). Under the guidelines of the Manual, the edge line painting involved three vehicles, a lead paint truck, the actual paint striper vehicle, and a following truck. “Wet Paint” signs and traffic control cones were emplaced throughout the entire area of the painting project. On the date of painting, the average temperature was 55° F (temperature ranges between 43° and 66° F), which would, according to defendant, permit a paint drying time of approximately 10 minutes after application. Defendant related DOT, “crews test the paint to ensure that it has dried properly prior to the removal of any traffic control,” such as cones and or signs.

{¶2} Plaintiff, Mina E. Marlow, stated she, “drove on St. Rt. 718, between Shilo Road and the bridge,” at some unspecified time on November 9, 2006. Plaintiff further stated, “[d]uring that time, my van drove over the portions of the road where the paint did not dry properly causing white paint to splash on my vehicle.” Plaintiff essentially asserted she drove her van over wet edge line paint on State Route 718 from defendant’s painting

Case No. 2006-07864-AD	- 2 -	MEMORANDUM DECISION
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operation. Plaintiff implied the DOT paint crew did not check to determine if the paint had timely dried after application.

{¶3} Plaintiff submitted four photographs of State Route 718, that she observed show the roadway including the edge line, “between Rangeline Road and the bridge, prior to getting into Pleasant Hill.” The photographs depict a roadway surface edge line that is either devoid of white paint, or displays paint streaks or paint faded areas. Plaintiff asserted these photographs constitute evidence that the, “paint did not dry properly.” The trier of fact notes the photographs may be construed as depictions of a roadway area where passing vehicles traveled over freshly applied wet paint.

{¶4} Plaintiff reported defendant’s personnel (during the week of November 6-10, 2006) conducted roadway repairs on State Route 718 in the same area that was painted on November 9, 2006. Plaintiff surmised the edge line paint that was applied on November 9, 2006, failed to properly dry due to the recent repairs or roadway treatment performed by defendant. Plaintiff, in essence, claimed the paint damage to her van was proximately caused by negligent maintenance activities on the part of DOT. Plaintiff filed this complaint seeking to recover \$1,743.51, the cost of repairing the paint damage to her vehicle. The filing fee was paid.

{¶5} Defendant denied plaintiff’s property damage was caused by any negligent act or omission on the part of DOT. Defendant contended the November 9, 2006, edge line painting project was performed according to proper procedure and all controls were in place to notify motorists of the operation and provide for their safety. Defendant pointed out the only “repair operation” performed by DOT in this particular vicinity of the painting was for sealing roadway cracks (completed November 6, 2006) and had no bearing on drying time for edge line paint. Defendant asserted plaintiff failed to produce sufficient evidence to prove her property damage was attributable to negligent conduct on the part of DOT. Defendant contended plaintiff’s own conduct of choosing to driver over freshly applied paint was the sole cause of her damage.

Case No. 2006-07864-AD	- 3 -	MEMORANDUM DECISION
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{¶6} Plaintiff filed a response acknowledging DOT followed proper procedure in conducting the November 9, 2006, edge line painting project on State Route 718. However, plaintiff insisted the white edge line paint did not dry properly and this inability to dry directly caused the damage to her van. Plaintiff reasserted the paint did not dry properly due to DOT's November 6, 2006, sealing operation, a supposition rebutted by defendant. Plaintiff also attributed natural conditions as a reason explaining why the edge line paint did not dry. Plaintiff observed the area where the paint did not dry properly was shaded by trees, thereby proposing that factor as a possible explanation for delayed drying time. Plaintiff did not offer supporting evidence to establish her assertions.

{¶7} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 61 N.E. 2d 198, approved and followed.

{¶8} 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, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d

Case No. 2006-07864-AD	- 4 -	MEMORANDUM DECISION
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{¶19} 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. Department of Transportation* (2000), 99-12545-AD. A failure to exercise ordinary care may be shown in situations where motorists do not receive adequate or effective advisement of a DOT painting activity. See *Hosmer v. Ohio Department of Transportation*, 2002-08301-AD, 2003-Ohio-1921. In the instant claim, 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. See *Rolfes v. Ohio Dept. of Transportation*, 2004-09941-AD, 2005-Ohio-840.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

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 defendant. Court costs are assessed against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Mina E. Marlow
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RDK/laa
7/24
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