[Cite as *Paradise Tree Farm, Inc. v. Ohio Dept. of Transp.*, 2008-Ohio-4213.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
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PARADISE TREE FARM, INC., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2005-11167

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} Plaintiffs brought this action against defendant, Ohio Department of Transportation (ODOT), alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiffs own and operate tree nurseries on property that is located due east of and adjacent to Interstate 71 (I-71) in northern Ohio. Plaintiffs allege that during the winter seasons for 2002-2003, 2003-2004, and 2004-2005, defendant negligently applied a salt brine solution to its roadways and that the airborne salt spray damaged plaintiffs' nursery stock. Plaintiffs filed their complaint seeking monetary damages and injunctive relief.

{¶ 3} Defendant denies liability and argues that the state has a statutory duty under R.C. 5501.01, 5501.11, and 5501.41 to keep the roadways safe for travel and that this duty includes snow and ice removal from the roadway surface during periods of inclement weather. As such, defendant maintains that decisions regarding snow and ice removal involve a high degree of official judgment or discretion, for which defendant is entitled to immunity. In the alternative, defendant disputes plaintiffs' allegations that the salt brine was applied in a negligent manner.

{¶ 4} The doctrine of discretionary immunity "has been applied to immunize the state from liability for discretionary decisions such as whether or not to install a traffic signal at an intersection, [and] what type of traffic signal to install." (Citations omitted.) *Young v. Univ. of Akron*, Franklin App. No. 06AP-1022, 2007-Ohio-4663, ¶14.

{¶ 5} "The language of R.C. 2743.02 that 'the state' shall 'have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, *the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.*" (Emphasis added.) *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70. "For example, the state is immune for its decision to furlough a prisoner. Once the state makes the decision to furlough a prisoner, however, it can be held liable for the negligence of its employees in dealing with the prisoner. Additionally, the negligent implementation of a basic policy decision may also be actionable, even if such implementation allows state employees to exercise some degree of discretion." (Citations omitted.) *Young* at ¶15.

{¶ 6} The court concludes that defendant is entitled to immunity with regard to the decision to pre-treat the roadways with salt brine; however, defendant may be found liable for the negligent application of the product. In other words, despite defendant's immunity, the court finds that once the decision was made to apply salt brine to the roadways, defendant can be held liable for negligently implementing such decision. *Reynolds*, supra.

{¶ 7} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed them a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused plaintiffs' injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶ 8} Joseph Demeter, owner of Paradise Tree Farms, Inc., testified that he grows ornamental and shade trees including ash, linden, pear, hawthorn, birch, and poplar. Demeter estimated that approximately 2,000 linear feet of his property borders I-71. He explained that he has been in business for 19 years, that he has approximately 38,000 trees, and that the damage is confined primarily to trees that are located closest to or that border I-71. Demeter stated that he first noticed a problem in the spring of 2003 when some of the trees were not leafing out as expected. After those branches were pruned, the trees then sprouted deformed buds or areas where multiple buds formed instead of just one. The aberrant growth resulted in what was identified at trial as a "witches broom" effect at the top of the trees. Demeter explained that instead of the tree having a single, straight-up leader and a rounded form at the top, the trees sprouted multiple side branches that were significantly weaker. Weaker side branches affected tree development, resulting in a deformed pyramidal shape that is unsightly. Demeter testified that the deformed trees could not be sold and he estimated the damage to extend 400 to 600 feet into the field, or approximately 3,000 trees.

{¶ 9} From the testimony and the photographs presented at trial it is evident that Demeter's property slopes several feet below the level of the roadway. Demeter maintained that the damage was a result of salt spray drifting onto his property from the roadway. He stated that he had witnessed the application of brine in windy conditions and that when the winds come out of the west, across I-71, salt is deposited onto his trees. According to Demeter, he saw evidence of salt residue on the trees while he was pruning them and he could even taste the salt left on the trees. Demeter testified that there are very few if any varieties of trees that are salt tolerant but he acknowledged that some species may be more resistant to salt damage.

{¶ 10} David Jenkins testified that he was the owner of Jenkins Maintenance Co., Inc. and that since 2000 he has planted evergreens and deciduous trees such as maple, oak, serviceberry, pear, birch, and hawthorn. He estimated that approximately

3,000 linear feet of his property bordered I-71. Jenkins testified that he has stopped planting along the border of I-71 and that his closest trees are now approximately 200 feet from the roadway. Jenkins asserted that he had observed the salt brine being applied to I-71 while he was operating his tractor some 200 feet from the roadway and that a briny mist was wind-driven over his tractor such that white salt spots were deposited on the windshield. Jenkins recalled that defendant was spraying brine even though it was a clear day with abundant sunshine. He maintained that his trees continue to be damaged by the salt brine spray, that said damage extends approximately 600 feet onto his property, and that the affected trees exhibit the witches broom effect. Jenkins testified that he first observed the symptoms in 2003 and that the damage became more evident in 2004. According to Jenkins, the trees had been growing well prior to 2003 and he believed that the damage was attributable to the salt spray because the trees grew well in the summer and yet during the following spring the new buds were malformed or dormant and the uppermost branches exhibited significant "dieback."

{¶ 11} Both Demeter and Jenkins testified that although they noticed the trees were growing poorly in 2003, they recalled that it was not until 2004 that they discovered that the damage was caused by salt brine drifting onto the trees, as opposed to some other cause such as insects. Demeter testified that he discussed the problem with an ODOT deputy director, Timothy O'Leary, who told him that his only recourse was to file suit. The complaint was filed on November 22, 2005.

{¶ 12} R.C. 2743.16(A), the statute governing the statute of limitations for actions against the state, states in part: "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The court finds that the complaint is timely filed inasmuch as plaintiffs eliminated other possible causes and were able to

attribute the damage to salt spray aerosol after the trees exhibited the same damage for the second growing season, in 2004.

{¶ 13} Plaintiffs' expert, Dr. Sydnor, testified that with a dieback, the tree loses the most recent year's new growth, i.e., the plant does not get any bigger and eventually it gets smaller and may even die. In evaluating the extent of damage to plaintiffs' trees, Dr. Sydnor noted that while damage was more prevalent near the roadway, the damage extended several hundred feet onto plaintiffs' properties, which he attributed to the propensity of drift with the salt brine. According to Dr. Sydnor, the excessive salt-mist exposure resulted in form-altering damage to the trees over a period of three to four years. He also opined that the damage was caused by salt brine and that it was not caused by insects or other factors. He verified that the witches broom effect was a classic manifestation of salt damage. He noted that the trees in this condition are not salable as they are not considered healthy, vigorous stock.

{¶ 14} Plaintiffs also offered the expert testimony of Dr. Powell who opined that the symptoms presented by plaintiffs' trees were the result of brine aerosol[1] exposure to the upper part of the trees. He further opined that there was evidence of repeated "insult" to the tops of the trees. According to Dr. Powell, the damage was caused by excess exposure to salt spray drifting from the roadway and that such cause and effect was apparent because of the time that the damage appeared on the trees. He noted that there was no evidence of increased concentrations of salt in the soil inasmuch as the trees showed vigorous growth during the summer months. Dr. Powell also testified that there are no truly salt-tolerant trees but that there are some varieties that are more tolerant than others.

{¶ 15} Plaintiffs characterized the damage as occurring in phases such that there is poor or stunted growth during the growing season, then dieback and browning of

leaves, and that as the process repeats each year, those trees planted closest to the roadway eventually die. Farther afield, the symptoms lessen and the remainder of the stock is healthy and salable. Both Drs. Powell and Sydnor noted that the damage described by plaintiffs was consistent with the damage that has been reported in other parts of the state and attributed to the introduction of salt brine applications to the roadways.

{¶ 16} Defendant's snow and ice coordinator, Diane Clonch, testified that by 2003, ODOT had instituted a statewide program to pre-treat roadways with a salt solution.[2] She explained that ODOT employees prepare a salt solution which is then poured into a holding tank on the back of an ODOT vehicle equipped with a spray bar unit that extends across the back of the truck. The system was designed to deliver streams of brine through several evenly-spaced, rubber hoses such that the solution is then expelled a few inches above the roadway. Once the solution dries, the chemical remains on the roadway surface and as a storm deposits moisture the liquid precipitation mixes with the chemical. This reaction depresses the freezing point of the pavement such that ice formation is inhibited.

{¶ 17} Clonch testified that there are guidelines[3] for when pretreatment is recommended, that defendant developed a protocol of delivering 40 to 50 gallons per

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[1]Dr. Powell defined the term aerosol as small particles capable of being swept up in wind and carried for some distance.

[2]This anti-icing process is defined by defendant as "the proactive approach of applying snow and ice control materials to roadways prior to the onset of frozen precipitation. The goal of anti-icing is to prevent the formation of a strong bond between frozen precipitation and the pavement surface." (Defendant's Exhibit B4.)

[3]The pre-treatment plan states that the brine is to be applied "for black ice, unexpected winter events, frost control, and forecasted winter events when conditions warrant." Conditions warranting the application of anti-icing agents include dry roadways where rain is not expected for the following 24 hours, when the low temperature is projected to be within 20 to 35 degrees Fahrenheit, and when blowing snow is not anticipated. (Defendant's Exhibits B1, B2, B3.)

lane mile, and that to accomplish this, there is an automated controller on the truck that ODOT employees can calibrate. Clonch advised that ODOT employees regularly pre-treat roadways a minimum of twice weekly and she verified that the brine is deposited while the trucks maintain the prevailing speed of the traffic. Clonch explained that because the anti-icing operations are performed when the weather conditions are clear and dry, ODOT's tankers travel at the posted speed so as not to impede traffic flow. According to Clonch, each county manager has the responsibility to decide whether or not to pre-treat roadways and that the presence of windy conditions does not factor into the decision to pre-treat. Although Clonch agreed that other non-corrosive, anti-icers are available, she commented that Ohio uses salt because it is readily available, inexpensive, and easy to use. Clonch added that once a storm arrives, ODOT uses granular or rock salt.

{¶ 18} Timothy Farley, ODOT's District 3 Highway Manager,[4] testified that the district began a program of salt brine pretreatment in late 2002. He explained that pretreatment is performed as often as twice a week when the pavement is dry and the temperature is above 20 degrees. He acknowledged that the materials application guidelines suggest an application rate from 20 to 40 gallons per lane mile. (Defendant's Exhibit B4.) According to Farley, defendant had no policy limiting the application of salt brine in windy conditions; however, he noted that brine should not be dispensed when blowing snow was predicted as the snow would tend to stick to the treated surface rather than to simply blow across the roadway. He estimated that the tankers routinely travel at 30-35 miles per hour (mph); however, he was unsure whether the amount of salt brine released through the spray bar apparatus varied either with the speed of the truck or with the volume of product remaining in the tank.

[4]District 3 encompasses eight counties including those counties where plaintiffs' properties are located.

{¶ 19} Matthew Simon, ODOT's District 3 Transportation Manager, described the process whereby ODOT employees mix a 23 percent salt solution at the ODOT garage, pump it into the tank, and set the tanker's hydraulic system to deliver the brine at a rate of 40 gallons per mile. He testified that when he is engaged in pretreatment operations, he sets the vehicle's cruise control to 45 mph and that salt dispersion is estimated after he returns to the garage by comparing the gallons of solution used and the number of miles traveled. He also testified that all of the District 3 tankers use the same application rate for every trip and that the common practice is to set the controller gauge at number 6, in order to deliver 40 gallons per lane mile on every run.

{¶ 20} Based upon all the evidence presented, the court finds that defendant's employees were negligent in the application of salt brine in the areas of the roadway that border plaintiffs' property. The court finds that defendant owed plaintiffs a duty to use reasonable care in the application of salt brine, that defendant committed a breach of that duty, and that damage to plaintiffs' trees resulted proximately from defendant's lack of due care. The court based this determination, at least in part, upon the photographs which depicted unevenly-spaced, bent, and misdirected rubber hoses, as well as substantial clouds of spray mist roiling up behind ODOT's trucks. (Defendant's Exhibits C1, C2, C7.) Indeed, the court finds that the photographs showed that as the brine streamed onto the road surface there was a clouding and a volatilization of the solution. The court finds that this effect combined with windy conditions as a tanker released brine while traveling 45 to 55 mph resulted in the significant and unreasonable drift of the aerosol as described by plaintiffs.

{¶ 21} The court also bases its findings of negligence, in part, upon the testimony of Farley and Simon. Farley testified quite credibly that the ODOT workers do not adjust the rate of application regardless the amount of precipitation anticipated in the forecast, despite the fact that the regulations suggest a variance of application ranging from 20 to 40 gallons, depending on specific conditions. (Defendant's Exhibit B4.)

According to Simon, it is common practice for the gauge to remain set to deliver the maximum amount of brine. Both acknowledged that the application rate is always off to some extent, that it always varies, and that it is never exact. In addition, they testified that the controllers on the tankers are calibrated just once a year. Both Farley and Simon also admitted that there were discrepancies as noted in the photographs showing that some of the rubber hoses were positioned to terminate as much as four inches above the roadway while another photograph displayed a spray bar with the ends of some of the hoses nearly touching the road surface. (Defendant's Exhibit C4.) Clonch testified that defendant did not have regulations or guidelines for adjusting the spray bar apparatus or for maintaining correct placement of the rubber hoses to ensure even application. None of the witnesses seemed to know whether the amount of brine released would vary with either the speed of the tanker or the volume of solution in the holding tank.

{¶ 22} Thus, the court finds that while defendant has discretion to implement salt brine pretreatment, defendant is liable to plaintiffs for the failure to make reasonable efforts to ensure an appropriate amount of product was deposited based on the anticipated need. As Clonch stated, the goal for anti-icing is to apply the least amount of product necessary to be effective. The court finds that the damage to plaintiffs' nursery stock was caused by the negligent distribution of excessive amounts of salt brine during pretreatment performed by defendant. In essence, the specific manner of application caused damage to plaintiffs' business. The court finds further that defendant failed to exercise reasonable care to avoid over-application of salt brine after receiving notice from plaintiffs that the trees were dying. Based upon the testimony presented, the court finds that defendant continued to engage in regular twice-weekly applications of brine at high speeds without regard to whether or not a particular snow and ice event was predicted.

{¶ 23} In addition, the court was not persuaded by defendant's argument that the damage was more likely caused by unusually severe winter conditions rather than by salt aerosol, inasmuch as such explanation does not account for the severity of damage closest to the roadway and the diminishing damage farther into the fields.

{¶ 24} Likewise, although defendant suggests that some or all of the damage may be attributed to granular salt mixing with precipitation, plaintiffs testified quite credibly that their trees did not exhibit dieback or the witches broom effect until the 2003 growing season, the first season after defendant instituted a salt brine pretreatment program. In addition, Dr. Sydnor stated that in his opinion the damage attributed to the introduction of salt brine has been far more extensive than the damage caused by granular rock salt. For the foregoing reasons, the court finds that defendant is liable to plaintiffs on their claim of negligence.

{¶ 25} As to plaintiffs' request for injunctive relief, the court finds as follows:

{¶ 26} "In determining whether to grant injunctive relief, Ohio courts generally apply the following factors:

{¶ 27} "'(1) The likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction.' *Corbett v. Ohio Bldg. Auth*. (1993), 86 Ohio App.3d 44, 49, 619 N.E.2d 1145.

{¶ 28} "An injury is irreparable when there could be no plain, adequate, and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult or incomplete." *Sequoia Voting Sys. v. Ohio Secy. of State,* 125 Ohio Misc.2d 7, 10, 2003-Ohio- 4799, ¶4-6.

{¶ 29} Upon review, the court finds that enjoining defendant from applying salt brine pretreatment on I-71 may cause harm to the motoring public and defendant maintains that the public interest will not be served by granting plaintiffs' request. In

addition, the court finds that plaintiffs have an adequate remedy at law. Thus, the court finds that injunctive relief is not appropriate in this instance.

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Case No. 2005-11167

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiffs on their claim of negligence. However, plaintiffs' request for a permanent injunction is DENIED. The case will be set for trial on the issue of damages.

_____

CLARK B. WEAVER SR.
Judge

cc:

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SJM/cmd
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