[Cite as *Machan v. Ohio Dept. of Transp.*, 2015-Ohio-5565.]

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

CONNIE MACHAN, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2012-05681

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} Plaintiffs brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.[1]

{¶2} On February 4, 2009, a winter storm began in northeast Ohio, resulting in several inches of snowfall. On February 5, 2009, plaintiff[2] left her house in the early morning hours to ensure that she had plenty of time to drive from Massillon, Ohio, to work at Hillcrest Hospital, which was approximately a one-hour drive north. Plaintiff testified that the road conditions were "bad" and that there was "a lot of snow everywhere." At approximately 5:45 a.m., plaintiff was driving her vehicle on a bridge located on I-271 northbound over Solon Road in Cuyahoga County, Ohio. The bridge was comprised of three travel lanes, a right shoulder, and a left shoulder. Both sides of the bridge were bordered by a concrete parapet wall.

[1]On November 7, 2014, plaintiffs filed a motion to strike the attachment to defendant's post-trial brief and any references thereto that were not testified to by plaintiff's expert witness, on the basis that the attachment constitutes a learned treatise under Evid.R.803, and, therefore, the document itself is not admissible. On November 18, 2014, defendant filed a response, wherein it acknowledges that the attachment is not being offered as an exhibit. Therefore, plaintiff's motion is GRANTED, in part, such that the attachment is not admitted as an exhibit, but DENIED as to any statements therein upon which plaintiffs' expert presented testimony.

{¶3} Plaintiff was following tire tracks in the snow in the left lane on the bridge and testified that it was difficult for her to see the pavement markings of the other two lanes because of the snow. Another vehicle was following her closely, so plaintiff attempted to steer into the middle lane. However, when she did so, her vehicle began to "fishtail," and she lost control of her vehicle. Plaintiff's vehicle traveled back into the left lane, then into the left shoulder, and over a mound of snow that had resulted from both natural accumulation and plowed snow that had been pushed into the left shoulder from the travel lanes. Plaintiff's vehicle then went over the parapet wall and fell to the ground.

{¶4} Plaintiff asserts that defendant was negligent when it plowed snow into the left shoulder on the bridge, because defendant created a hazardous "ramp" of snow which allowed plaintiff's vehicle to travel over the parapet wall. Plaintiff asserts that defendant breached its duty of care to her when it deviated from its own plowing technique as set forth in training manuals, and that defendant's breach was the proximate cause of her injuries.[3]

{¶5} In order for plaintiff to prevail upon her 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, citing *Menifee v. Ohio Welding Prods., Inc.,* 15 Ohio St.3d 75, 77 (1984). Defendant has a general duty to maintain its highways in a reasonably safe condition for the traveling public. *Knickel v. Ohio Dept. of Transp.*, 49 Ohio App.2d 335 (10th Dist.1976); *White v. Ohio Dept. of Transp.*, 56

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[2]"Plaintiff" shall be used to refer to Connie Machan throughout this decision.

[3]The court notes that the companion case, *Wynne v. ODOT*, 2012-05690, was dismissed for failure to prosecute. However, the police report from Wynne's accident, along with photos taken of the bridge after his accident, were admitted as exhibits. Wynne's accident occurred three hours prior to plaintiff's accident on the same bridge, and no photographs were taken of the bridge after plaintiff's accident.

Ohio St.3d 39, 42 (1990). However, ODOT is not an insurer of the safety of its highways. *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723, 730 (10th Dist.1990). The state of Ohio may be liable for an off-roadway condition only if that condition jeopardizes the safety of the ordinary traffic on the roadway. *Steele v. Ohio Dept. of Transp.*, 162 Ohio App.3d 30, 2005-Ohio-3276 (10th Dist.); *Manufacturer's Nat'l Bank of Detroit v. Erie Cty. Road Comm.*, 63 Ohio St.3d 318 (1992).

{¶6} Plaintiff presented the testimony of Richard Balgowan, P.E., who has worked for the New Jersey Department of Transportation for over 30 years and has specialized training in snow and ice removal. Although he did not conduct a site visit, Balgowan testified that based on the materials he reviewed, the bridge was approximately 1,000 feet long, and the parapet wall was made of concrete "jersey barrier," which typically measures between three and three and one half feet tall. Balgowan testified that the parapet wall was designed to slow a vehicle down and redirect it back into the travel lanes if a vehicle loses control.

{¶7} Balgowan testified that defendant failed to plow the bridge according to its own Highway Technician Academy materials, in that the bridge was a "high barrier or overpass bridge," and defendant's training materials state: "Plow straight through and move snow to the end of the bridge." (Defendant's Exhibit J, p. 77.) According to Balgowan, a snowplow operator should straighten the plow blade and push the snow forward the entire length of the bridge so that snow is not pushed over the wall onto Solon Road. Balgowan further stated that if a plow operator angles the blade and allows snow to pile up in the shoulder, the function of the barrier wall is eliminated and the snow becomes a ramp for errant vehicles. Balgowan stated that although defendant applied the appropriate salts and chemicals to treat the travel lanes on the bridge during the snowstorm, defendant failed to follow both its own guidelines and the American Association of State Highway and Transportation Officials (AASHTO)

guidelines for snow and ice control when it plowed snow into the shoulders on the bridge. Balgowan opined that straightening the plow blade when plowing a bridge deck should always be the standard to follow.

{¶8} Balgowan also stated that the shoulders on the bridge should have been plowed during the storm, not afterward. Balgowan explained that shoulders are an integral part of the highway because they are necessary to drive upon during emergencies. Balgowan criticized defendant's decision to wait until after the snow storm to clear the shoulders because at that point, the sheer volume of the snow makes it difficult to remove. Balgowan testified that defendant should have used multiple snowplows in a tandem formation to push the snow with a straight plow blade to the end of the bridge. Alternatively, Balgowan testified that if defendant had plowed snow onto the shoulders, it should have used front-end loaders to haul the snow away during the storm.

{¶9} On cross-examination, Balgowan agreed that the guidelines for snow and ice removal are not "written in stone" and that sometimes conditions in the field mandate that adjustments to the guidelines be made. Balgowan acknowledged that defendant's guidelines state that the priority during a snow storm is to keep the travel lanes open and then clear the shoulders after the storm. (Defendant's Exhibit J). Balgowan also agreed that the AASHTO standards state that loading, hauling, and disposing of stored snow should occur after a storm is over, not during a storm, and that shoulders should be cleared after a snow storm to accommodate disabled vehicles and provide temporary snow storage during the next snowfall. Balgowan conceded that he did not analyze the manpower or the number of vehicles that defendant had available to it to perform snow plowing operations on the morning of the accidents. After viewing the photographs that were taken after Wynne's accident, Balgowan agreed that the travel lanes and part of the left shoulder had been plowed. Balgowan

stated that he did not perform an accident reconstruction in this matter and that he did not know the speed of either plaintiff's or Wynne's vehicles when the accidents occurred.

{¶10} Plaintiffs also presented the deposition testimony of Bill Gajewski, who was employed for defendant as a Transportation Manager 2 in February 2009, where his duties included overseeing maintenance crews. Gajewski testified that during a snow event, the first priority is plowing and treating the interstates, specifically, the right lanes, to keep traffic moving and to prevent ice from forming. Once the right lane is plowed, workers move on to plowing the other travel lanes. Gajewski testified that berms and shoulders are to be plowed after the snow event is over.

{¶11} Gajewski stated that bridges are to be plowed "straight bladed" for the portions of the bridge that are directly above a roadway, because of the risk of pushing snow onto the roadway below. However, Gajewski also stated that it is permissible to push snow into the shoulders on a bridge once the plow passes the area where the roadway lies underneath. After viewing the photographs taken after the Wynne accident, Gajewski testified that he would expect to see snow plowed into the shoulder during a storm. According to Gajewski, after the snow event has concluded, workers return to remove snow from the shoulders and berms.

{¶12} Defendant presented the testimony of Howard Huebner, who was the Highway Management Administrator for District 12 which includes Cuyahoga, Geauga, and Lake Counties. Huebner has driven snow plows in the area where the accident occurred and he teaches the annual snow and ice refresher course for District 12's snow plow drivers. Huebner described District 12 as the "Snowbelt" in Ohio. Huebner testified that defendant uses the terms "shoulder" and "berm" interchangeably, and that both terms refer to the paved portion of the roadway past the edge line.

{¶13} According to Huebner, the National Weather Service from Hopkins Airport showed that the recorded snowfall for February 4, 2009 was 10.9 inches. Huebner explained that the priority during a snow and ice storm is to treat the right lanes and ramps on interstates, then move to middle lanes, left lanes, and finally shoulders and gore areas.

{¶14} Huebner testified that the travel lanes on the bridge were each 12-feet wide, the right shoulder was 11-feet wide, and the left shoulder was 24 to 26-feet wide. According to Huebner, the left shoulder was twice as wide as normal because it was built in anticipation of adding a fourth travel lane. Huebner testified that the extra width of the left shoulder on the bridge permitted defendant to store snow there during an event while the travel lanes of the highway were being plowed. Huebner stated that while using multiple plows in a tandem formation allows three lanes to be treated simultaneously, defendant does not have enough trucks to do tandem plowing during a snow event.

{¶15} Huebner testified that when plowing bridges, drivers need to make sure that they are not plowing snow over the bridge wall that would create a hazard for motorists on a roadway under a bridge, such as Solon Road. Huebner testified that because the travel lanes are top priority, berms and shoulders will not be plowed during a snow event. Huebner testified that the shoulder is used to store snow during a storm because defendant does not have enough equipment or manpower to remove snow from shoulders during a snow event.

{¶16} On cross-examination, Huebner acknowledged that defendant's training manual advises to push the plow straight through on a bridge, but stated that it is an impossibility to straight plow the entire length of this particular bridge because snow would build up on the front of the plow and spill over on both sides. Huebner added that the supplemental snow and ice training checklist which states that high barrier or

overpass bridges should be plowed straight through is county-specific and is not used in District 12.

{¶17} Upon review of the evidence, the magistrate finds that plaintiffs have failed to prove that defendant breached its duty to maintain its highways in a reasonably safe condition for the traveling public. The maintenance records show that the bridge was plowed and the appropriate chemicals were applied to the travel lanes on the bridge prior to plaintiff's accident. Moreover, defendant's policies clearly state that interstate roadways are to be given the first priority, with plowing from right to left. The photographs taken after the Wynne accident show that the three travel lanes, plus part of the left shoulder, had been plowed. The mound of snow that was a combination of both natural accumulation and snow that had been pushed into the left shoulder was not located in the traveled lanes of the roadway. Under the circumstances, the magistrate finds that plowing snow into the extra wide left shoulder on the bridge was both permissible per defendant's policies and reasonable during a snowstorm. Although plaintiff's injuries from her accident were more severe because the "snow ramp" allowed her vehicle to traverse the parapet wall, the evidence shows that she lost control of her vehicle in the traveled portion of the roadway when she decided to change lanes. Drivers upon Ohio's highways have a duty to maintain control of their vehicles on the traveled portion of the roadway. Pursuant to R.C. 4511.202, "[n]o person shall operate a motor vehicle, * * * on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle * * *." The magistrate finds that plaintiff's failure to maintain reasonable control of her vehicle was the sole and proximate cause of her injuries.

{¶18} In addition, it is well established that "[t]he 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." *Reynolds v. State*, 14 Ohio St.3d 68, 70 (1984); *Pottenger v. Ohio Dept. of Transp.*, 10th Dist. No. 88AP-832 (Dec. 7, 1989). Defendant's decision as to how to allocate its resources in snow plowing operations, based upon the number of workers and trucks it has available, is clearly an executive or planning function. The court concludes that defendant is entitled to discretionary immunity for the discretionary decisions it made when plowing the bridge on I-271 during a snow storm.

{¶19} To the extent that plaintiff claims that defendant is liable for improperly inspecting the plowing operations on the bridge, defendant is immune under the public duty doctrine.

{¶20} R.C. 2743.02(A)(3)(a) states, "Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state."

{¶21} R.C. 2743.01(E)(1) states, in pertinent part: "'Public duty' includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

{¶22} "(a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity * * *

{¶23} In order for a special relationship to exist between the state and an injured party, pursuant to R.C. 2743.02(A)(3)(b), all of the following must exist:

{¶24} "(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

{¶25} "(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

{¶26} "(iii) Some form of direct contact between the state's agents and the injured party; "(iv) The injured party's justifiable reliance on the state's affirmative undertaking."

The magistrate finds that the duty to inspect plowing operations on the bridge was performed on behalf of the general public, and that plaintiff has failed to prove that a special relationship existed between herself and defendant.

{¶27} With respect to Todd Machan's claim for loss of consortium, such claims are "derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93 (1992). Since plaintiffs have failed to prove negligence on the part of defendant, the loss of consortium claim also must fail.

{¶28} For the foregoing reasons, the magistrate finds that plaintiffs have failed to prove their claims of negligence by a preponderance of the evidence. Therefore, judgment is recommended in favor of defendant.

{¶29} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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HOLLY TRUE SHAVER
Magistrate

cc:

Jacob Beausay
495 South High Street, Suite 300
Columbus, Ohio 43215

James P. Dinsmore
Peter E. DeMarco
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

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