[Cite as *Vitek v. Ohio Dept. of Transp.*, 2005-Ohio-1071.]

IN THE COURT OF CLAIMS OF OHIO

EDGAR S. VITEK	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09258-AD
OHIO DEPARTMENT OF TRANSPORTATION, et al.	:	MEMORANDUM DECISION
Defendants	:	

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{¶ 1} On November 4, 2003, at approximately 11:00 a.m., plaintiff, Edgar S. Vitek, was traveling east on Interstate 270 near the Cleveland Avenue entrance in Franklin County, when he drove over a black mud-like substance which had been deposited on the roadway. Plaintiff referred to the substance as "black ooze." Plaintiff stated that this black ooze not only splattered the body of his vehicle, a 1981 white Pontiac Bonneville, but the black substance also entered the interior of the car through an open window. The black ooze, according to plaintiff, damaged the shirt he was wearing, and caused further damage to the interior of his automobile. Furthermore, plaintiff maintained the black substance destroyed an "irreplacable jacket" which was laying on the rear seat of his car. Plaintiff professed the black ooze had been deposited on the roadway from a truck owned by defendant, Department of Transportation ("DOT"), and operated by DOT personnel. Plaintiff related he later attempted to wash the substance from his car and after three separate attempts most of the substance was removed. However, plaintiff asserted his shoes

and trousers were ruined when the articles of clothing came into contact with the black ooze during a car washing attempt. Plaintiff filed this complaint seeking to recover $500.00 for damage to his car, costs incurred to wash his car, and ruined clothing items. Plaintiff also claims, "court costs and the costs incurred to bring this matter to the court's attention." The filing fee was paid.

{¶ 2} Defendant acknowledged a DOT truck splashed mud on plaintiff's automobile. Defendant has apparently admitted liability for some damage caused to plaintiff as a result of the acts of DOT personnel. However, defendant has disputed plaintiff's damage claim and has contended plaintiff's total damage award should not exceed $100.00. Defendant submitted photographs taken on December 2, 2003, depicting damage to the body of plaintiff's car and damage to plaintiff's clothing items. Defendant described the damage to plaintiff's personal property as "little more than what appears to be everyday wear on most of the items." Defendant argued plaintiff's vehicular damage claim is excessive and unreasonable, "simply because mud was splashed on it."

{¶ 3} Plaintiff, in his response to defendant's investigation report, disputed DOT's characterization of the substance that caused his property damage as "mud." Plaintiff referred to the damage-causing substance as "sludge" or "ooze." Plaintiff explained the photographs taken of his automobile were shot after the car had been washed three times with "mud" or "sludge" still evident on the car body. Plaintiff asserted the amount claimed for his automotive damage is reasonable.

{¶ 4} Additionally, plaintiff insisted his damage claim amount for his clothing items is conservative. For example, plaintiff related a new jacket similar to the damaged jacket may be priced as high as $1,200.00. Plaintiff requested $150.00 for the damaged

jacket. Plaintiff submitted copies of ads showing clothing items similar to his damaged clothing. These ads also contained price listings for the similar clothing items. The priced amounts listed for the similar clothing exceeded the total claim amount requested by plaintiff.

{¶ 5} 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 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.

{¶ 6} Further, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance or construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶ 7} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. Plaintiff has the burden of proving, by a preponderance of the evidence, that he 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v.*

Indus. Comm. (1945), 145 Ohio St. 198, approved and followed.

{¶ 8} In the instant claim, plaintiff has presented sufficient evidence to prove his property damage was caused by the acts of DOT personnel. Consequently, defendant is liable to plaintiff for damages resulting from DOT's act.

{¶ 9} Plaintiff has proven, by a preponderance of the evidence, his automobile and clothing were damaged as a proximate cause of the negligent driving of defendant's employee. Therefore, defendant is liable to plaintiff for all damages plaintiff can prove that naturally flow from the negligent conduct. Damage assessment based on personal property loss is such amount as will make the plaintiff whole for the loss sustained. *West American Ins. Co. v. Carter* (1989), 50 Ohio Misc. 2d 20. As trier of fact, this court has the power to award reasonable damages based on evidence presented. *Sims v. Southern Ohio Correctional Facility* (1988), 61 Ohio Misc. 2d 239. A plaintiff is competent to testify with respect to the true value of his property. *Gaiter v. Lima Correctional Institution* (1988), 61 Ohio Misc. 2d 293. The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Anthill* (1965), 176 Ohio St. 61. The court finds plaintiff's statements and evidence persuasive concerning his property damages.

{¶ 10} As stated previously, the assessment of reasonable damages is a matter within the province of the trier of fact. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42. Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148. Only

reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits. *Bemmes v. Pub. Emp. Retirement Sys. Of Ohio* (1995), 102 Ohio App. 3d 782. From the evidence before the court, it is determined plaintiff's damages shall include the $500.00 amount claimed, plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

IN THE COURT OF CLAIMS OF OHIO

EDGAR S. VITEK	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09258-AD
OHIO DEPARTMENT OF TRANSPORTATION, et al.	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendants	:	

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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 $525.00, 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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