

[Cite as *Waugh v. Ohio Dept. of Transp.*, 2004-Ohio-4375.]

IN THE COURT OF CLAIMS OF OHIO

FLETCHER WAUGH :
Plaintiff :
v. : CASE NO. 2004-01877-AD
OHIO DEPARTMENT OF : MEMORANDUM DECISION
TRANSPORTATION :
Defendant :
:.....

{¶1} On January 15, 2004, defendant, Department of Transportation (DOT), dispatched crews to State Route 132 in Clermont County to do berm repair work on the roadway. To control traffic flow at the particular berm repair site, defendant employed DOT personnel as flaggers. Each flagger was equipped with a two sided sign labeled STOP on one side and SLOW on the other side. These SLOW/STOP signs were apparently used to direct motorists using State Route 132 to either proceed slowly through the area where repair work was being performed or come to a complete stop on the roadway.

{¶2} Plaintiff, Fletcher Waugh, stated he was driving his van south on State Route 132 between Owensville and Batavia when he noticed the DOT employees engaged in road repair work. Plaintiff related he saw that traffic in the northbound lane of State Route 132 was stopped. As he traveled toward the actual construction area, plaintiff asserted he observed a DOT employee get out of a parked DOT truck and begin flagging using the SLOW/STOP sign.

Plaintiff explained this DOT employee, later identified as Terry Nicholson, "kept spinning the sign first in slow and back to stop and then back to slow." Plaintiff maintained he stopped his van while Nicholson held the sign "in slow position," but then began to drive the van forward without depressing the accelerator. According to plaintiff, the van had, "just started to roll forward and the man (Nicholson) yelled stop, stop and he took the SLOW/STOP sign and hit the side of my van as if to make me stop." Plaintiff further explained he stopped his van immediately after the vehicle was struck with the sign and inspected the vehicle for damage, noting red paint and scratches on the right passenger side. Plaintiff insisted that Terry Nicholson had held the sign in the SLOW position directing him to proceed and then struck the van with the sign after this direction was obeyed.

{¶3} Plaintiff submitted a written statement from Beth Wendel, a witness to the January 15, 2004 incident. Beth Wendel is plaintiff's sister and a passenger in plaintiff's van at the time of the property damage event forming the basis of this claim. Wendel noted she was in the van with plaintiff traveling on State Route 132 going toward Batavia when she observed the DOT construction crew ahead on the roadway. According to Wendel, as the van neared the construction activity she saw, "a man (Nicholson) came running from the other side of the road looking up at his slow and stop sign." Wendel suggested Nicholson pointed the SLOW portion of the sign toward plaintiff's van. Wendel related traffic in the northbound lane of State Route 132 was stopped as plaintiff began to slowly drive the van forward. Wendel further related when the van began to move forward, Nicholson, "started yelling at us and he hit my brother's van with the sign leaving red paint on one side of it." Wendel expressed the opinion that Nicholson at the time of the incident, "seemed very confused."

{¶4} Plaintiff contended the damage to his van was directly caused by negligence on the part of defendant's employee in directing traffic through a construction zone. Plaintiff filed this complaint seeking to recover \$250.00, his cost of automotive repair, resulting from the alleged act of the DOT employee. Plaintiff paid the requisite material filing fee.

{¶5} Defendant filed a written statement from Terry Nicholson regarding his recollection of the January 15, 2004, flagging episode involving plaintiff and his van. Nicholson stated, "[w]hile flagging on Rt 132-southbound traffic in my lane a blue van ran my stop paddle and as I got out of the way my paddle bumped the vehicle." Nicholson noted the driver of the van, plaintiff, then stopped the van, got out, and checked the vehicle for damage.

Nicholson professed plaintiff accused him of hitting the van with the SLOW/STOP sign. Nicholson asserted the flagging paddle he used was in the STOP position when plaintiff drove the van forward. It was also asserted plaintiff's van was struck by the paddle as Nicholson tried to avoid the moving vehicle.

{¶6} Defendant also submitted a written statement from Delores Taylor, a witness to the January 15, 2004, property damage event. Taylor, a DOT employee, was working as a flagger in the northbound lane of State Route 132 at the time of the incident involving plaintiff and Nicholson. Taylor wrote she was directing a semi-truck to proceed north on the roadway when she apparently turned and saw Nicholson brandishing his STOP paddle directing plaintiff to stop in his van in the southbound lane of State Route 132. Taylor commented she observed plaintiff's van moving in disregard of Nicholson's direction to stop, which now involved Nicholson waving his hand and sign at the van. At approximately the same time, Taylor noted she had to motion for the proceeding semi-truck to stop. Then, Taylor remarked, she saw Nicholson step back

quickly to avoid plaintiff's moving van. According to Taylor, as Nicholson stepped away on the roadway berm, which abutted a steep drop, he leaned forward to balance himself causing the stop sign to "lightly hit" plaintiff's van. After this incident, Taylor stated, plaintiff stopped his van, got out, made remarks to Nicholson, returned to his van, and attempted to drive away when Nicholson stepped in front the van. Taylor further stated she then saw the van stop again, watch plaintiff exit and then inspect the van, and heard plaintiff say there was red paint on the van. Finally, Taylor related plaintiff returned to his van after vehemently cursing at Nicholson. Taylor observed plaintiff then continued southbound on the roadway after waiting for northbound traffic to pass.

{¶7} In order to prevail, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that defendant breached that duty, and that defendant's breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282. Further, defendant must exercise due diligence in the maintenance and repair of 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 construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Reasonable or ordinary care is that degree of caution and foresight which an ordinary prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310.

{¶8} 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* (1964), 176 Ohio St. 61. In the instant action, the trier of fact finds the statements of DOT personnel regarding the events of January 15, 2004, are not particularly persuasive. Conversely, the trier of fact finds the recollections of plaintiff and Beth Wendel concerning the incident forming the basis of this claim are credible. Consequently, the court concludes plaintiff's van was damaged by the negligent act of defendant's employee while directing traffic through a construction area. Defendant is therefore liable to plaintiff for all damages claimed.

{¶9} 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 \$275.00, 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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6/25

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