

Court of Claims of Ohio

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AUDRA YOE, Admr., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF AGRICULTURE

Defendant

Case No. 2005-09006

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiffs brought this action asserting survivorship and wrongful death claims on behalf of the estate of the decedent Greyson Yoe. Plaintiffs' decedent, an eight-year-old child, received a severe electrical shock when he came into contact with a metal railing of a bumper car ride known as the "Scooter" at the Lake County Fair on August 12, 2003.

{¶ 2} Plaintiffs assert that employees of defendant were negligent when they inspected the electrical connections associated with the ride and failed to ascertain that utility power was supplied to the ride through wires that were not properly connected or grounded. Plaintiffs have requested a determination that the employees who inspected the ride are not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86 inasmuch as they allegedly acted maliciously, in bad faith, and in a reckless, willful and wanton manner. Plaintiffs also argue that defendant failed to adequately train the inspectors. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of liability and civil immunity.

{¶ 3} Defendant, Ohio Department of Agriculture (ODA), contends that the duty to inspect the ride was a duty owed to the general public and inasmuch as its inspectors did not have any special relationship to plaintiffs' decedent, defendant owed no duty to protect the minor child from the negligent acts of a third party. In the alternative, defendant argues that the alleged negligent inspection was not the proximate cause of the child's death.

{¶ 4} ODA's inspector, Ted Brubaker, testified that he was hired by ODA in April 2003 and that he had worked previously as a mechanic for 25 years at Cedar Point Amusement Park. Brubaker admitted that he had no previous training or experience in performing electrical inspections. He explained that from April through August 2003, he had received training on the job while he worked with another, more-experienced inspector. According to Brubaker, he arrived at the Lake County Fair on August 11, 2003, and began inspecting various games and rides. He recalled that on August 12, 2003, he approached the Scooter with another inspector, Kalin Turner, who had been assigned to assist him. Both testified that when they first arrived at the Scooter, the ride was not yet operational so they went on to complete inspections for other rides and then returned.

{¶ 5} During their inspection, Brubaker and Turner noted some deficiencies and informed the owner, Mr. Chaffee, that he needed to correct the problems before the ride could be licensed. One of the deficiencies involved a bank of lights above the entrance to the ride that was not illuminated. According to the inspectors, the ride operator or owner was instructed to repair it, replace it, or remove it. When they returned a third time, Brubaker and Turner discovered that the ride was open to the public and operating despite the fact that a license had not been issued. They also noted that the inoperable panel of lights had been removed and placed on the ground behind the ride. They allowed the ride to operate temporarily in order to complete their assessment. Once they finished their inspection of the Scooter, they jointly completed the inspection form, and then permitted the Scooter ride to resume operation.

{¶ 6} The inspection form allowed for a code of Satisfactory (indicated by a checkmark), Unsatisfactory (U), Does not apply (X), or Remarks (R) for several categories including location and installation, structural integrity, and electrical safety.

For any instances where (R) was used, written remarks were added at the bottom of the page. On the inspection form pertaining to the Scooter, Brubaker placed a checkmark beside the entries that stated that the ride was properly grounded and that all cables were properly connected at plugs and boxes. Brubaker testified that he had assumed that the Scooter was powered by a generator that he had seen on another part of the fairgrounds. He stated that he had observed the generator and he had verified that the generator was properly grounded. He admitted, however, that he had not traced the wires emanating from the Scooter to its source of power.

{¶ 7} Turner corroborated Brubaker's description of events that had taken place on August 12, 2003. He testified however, that he never thought that the ride was powered by a generator, that he knew the ride was powered by utility power from a pole located near the ride, and that he understood that the connection was completed by an individual identified to him as the "fair electrician." He explained that on one site visit he saw a man in a bucket truck connecting cable to "the secondary" at the top of the utility pole and that Robby, the Scooter operator, told him that the individual was the electrician for the fair. Turner testified that he had been employed by ODA for over 20 years, that he had extensive experience in inspecting rides, and that he received annual training from ODA on topics relevant to his duties. Turner stated that he did not verify that the wires were properly connected as it was his policy and practice to defer to the electrician when a ride was powered by utility power. Nevertheless, he also acknowledged that this was the first time that he had seen the power cable connected at the top of the pole.

{¶ 8} Conversely, Brubaker testified that even if he had noticed the power being connected at the top of the utility pole he would not have had the expertise to discern whether it was connected properly. Indeed, he testified that he had never before seen a fair powered by a mix of utility power and generators.

{¶ 9} Lieutenant Ron Walters testified that he was in charge of security for the fair and that he had worked a security detail there for the previous eight to ten years. On the night in question, once he learned that a young boy had been seriously injured near the Scooter he immediately responded and took charge of the scene. He recalled that the Scooter was still energized and the lights remained on. When he went to the

power pole to disconnect the power to the ride, he realized that the cable did not run through the disconnect boxes on the pole but rather that the power was connected at the top of the pole. He then sought to have the operator cut the power from the disconnect box at the back of the ride so that the bumper cars were shut down.

{¶ 10} Walters completed an investigation and identified Nicholas Rock as the retired electrical lineman who had worked for the fair board and who had connected or set up the rides over the years. Walters determined that Rock had performed the electrical work to connect the Scooter to utility power on this occasion as well. Walters also testified that the connection made by Rock was determined to have been improper in that the green or ground wire was not connected at the secondary access; rather, it had been looped over and left disconnected at the top of the utility pole. Walters asserted that as he stood at the base of the pole and looked up, he had been able to discern from that position that the green wire was hanging loosely and not connected.

{¶ 11} Plaintiffs' electrical expert, Ralph Dolence, testified that he was asked to help Lieutenant Walters determine what caused Greyson Yoe to suffer the electrical shock. Upon inspection, Dolence was able to trace the power cable from the back of the ride, across the grass, and follow it to the power pole where it was looped around (but not connected at) the metal disconnect box attached to the pole. Instead, the cable went up to the top of the pole where it was connected at the secondary access area. Upon closer inspection from a bucket truck, Dolence noted that the green ground wire was left dangling at the top of the pole and that it was not connected to a grounding wire or rod.

{¶ 12} According to Dolence, he then began to isolate various circuits throughout the ride to discover where the suspected fault was located. As he moved closer to the front of the Scooter, it became evident that the fault was contained in a circuit that included the missing panel of lights at the front of the ride. He then questioned the owner regarding the possibility of any broken or loose wires. Chaffee responded immediately that he knew where the problem originated and he took Walters to the top of the ride to the junction box associated with the inoperative light panel. Chaffee recalled that during times of assembling and disassembling the ride, an electrical wire near the light canopy in the front of the ride had been pulled loose and not repaired. In

fact, it was learned through the investigation that this damaged wire accounted for the inability of Chaffee to make the light panel operational. Dolence concluded that the severe electrical shock suffered by Greyson Yoe occurred when an exposed wire inside a connector box became energized and then, due to the jarring movement of the ride, the tip of the wire came in contact with the metal wall of the junction box causing current to flow through the metal bonded parts of the ride.

{¶ 13} Dolence explained that when an energized wire unintentionally touches a metal surface while the entire structure is properly grounded, the energy travels to the ground and the circuit breaker is tripped. In this case, with the ground wire not connected to the grounding rod buried beside the utility pole, when the ride became energized the breaker was not tripped and the AC (alternating current) continued to flow through the metal structure. Once Greyson Yoe touched the energized metal railing and then stepped off the ride ramp onto the ground, all of the current surged through him.

{¶ 14} Upon cross-examination, Dolence acknowledged that the current which caused injury to Greyson Yoe was the AC that was powering the lighting panel. Dolence further conceded that the disconnect boxes attached to the utility pole were fully in use such that the fair electrician most likely would have had to add another temporary disconnect box to the pole in order both to connect the cable and to ground it properly. Dolence then responded that even assuming that the cable could not have been connected in some manner through one of the disconnect boxes already on the pole, the electrician still could have rigged a jumper to connect the green wire at the top of the pole to the grounding wire located at the bottom of the pole and that had he done so this would have prevented the electrical injury.

{¶ 15} Plaintiffs also presented their safety consultant, Kenneth Martin, who testified that he was a certified amusement ride inspector for the state of Virginia. Martin stated that he had inspected over 5,000 rides in Virginia and that he had also inspected the Scooter twice. He explained that the term Scooter was actually a brand name but that it referred to bumper car rides, that this particular ride with the same owner was in Virginia, and that he had previously inspected it. He opined that an inspection should start from the foundation and work upwards. He further opined that a

reasonably trained inspector should be able both to discern the source of the power connected to the ride and to assess whether or not the ride is properly grounded. He further opined that a reasonably competent inspector should have identified that the power was tapped into at the top of the pole, that the connecting cable or wire was not brought down the pole through a disconnect box, rather that it flowed directly to the ride and that this configuration was improper. In addition, he emphasized that the Scooter was more of an electrical ride than a mechanical ride such that the thoroughness of the electrical inspection takes on greater significance.

{¶ 16} On cross-examination, however, Martin confirmed that the industry standard places the ultimate responsibility for safety with the amusement ride owner and that the inspection process merely verifies that the owner has complied with industry standards.

{¶ 17} Defendant presented the testimony of its Chief of the Division of Amusement Ride Safety, James Truex. Truex acknowledged that the purpose of having rides inspected by ODA is to protect the riding public from harm. Nevertheless, Truex explained that rides such as the Scooter are temporary and portable, that the rides are assembled and disassembled frequently, and that the owners transport the rides from fair to fair during the summer season. Truex admitted that Brubaker had not yet attended classroom training on the basics of electrical safety, but he noted that Brubaker did receive some on-the-job training prior to his being assigned to the Lake County Fair. Truex explained that inspectors hired by the department are not licensed electrical contractors or electrical engineers. He related that an inspector performs a mostly visual inspection of the various applicable inspection points for the particular ride, be it mechanical, electrical or inflatable. In addition, inspectors assess whether electrical equipment is grounded in accordance with basic electrical safety standards. He emphasized, however, that in order to operate in Ohio, an amusement ride need be inspected only once during a calendar year. Consequently, the mere possession of a permit or the display of a metal decal affixed to the ride does not serve as a guarantee to the public that the ride is safe. Rather, according to Truex, the owner is solely responsible to perform daily pre-opening inspections and to properly set up and maintain the amusement ride.

I. CIVIL IMMUNITY

{¶ 18} R.C. 9.86 provides, in pertinent part:

{¶ 19} “[N]o officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer’s or employee’s actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.”

{¶ 20} R.C. 2743.02(F) provides, in pertinent part:

{¶ 21} “A civil action against an officer or employee * * * that alleges that the officer’s or employee’s conduct was manifestly outside the scope of the officer’s or employee’s employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.”

{¶ 22} The issue whether Brubaker and Turner are entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether they acted outside the scope of their employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9. Plaintiffs bear the burden of proving that the state employees should be stripped of immunity. *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), Franklin App. No. 98AP-142.

{¶ 23} After due consideration of the testimony and evidence presented, the court finds that plaintiffs failed to establish that the conduct of either Brubaker or Turner was manifestly outside the scope of their state employment. Furthermore, in the context of immunity, in order to find malicious purpose, bad faith, or wanton or reckless conduct there must be a showing that the employee harbored a willful or intentional design to do injury; acted upon self-interest or sinister motive; and/or perversely disregarded a known risk. See, e.g., *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991),

76 Ohio App.3d 448, 453-454; *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102.

{¶ 24} “Malice” has been defined as the “willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Lowry*, supra; quoting *Jackson*, supra, at 453-454. “Bad faith” was defined in *Lowry*, as “a design to mislead or deceive another, * * * not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *Id.*, quoting *Black’s Law Dictionary* (5 Ed.1979) 127. Finally, the term “reckless,” refers to when one “does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” *Id.*, quoting *Thompson*, supra, at 104-105. See also *Habeeb v. Ohio House of Representatives*, Franklin App. No. 07AP-895, 2008-Ohio-2651.

{¶ 25} The court finds that the testimony of both Brubaker and Turner was candid and credible, and that there was nothing in their testimony or demeanor that compelled the court to believe that either of them harbored willful, intentional, sinister or perverse motives or dispositions toward either plaintiffs’ decedent or fair riders in general. In addition, the court finds insufficient evidence to prove that the electrical safety inspection of the Scooter was performed with malicious purpose, in bad faith, or in a wanton or reckless manner. In so holding, the court notes that Turner testified that his pattern and practice was to rely on the expertise of the electrician in those instances when he learned that an electrician had performed the work to connect a ride. The court finds that Turner’s deference to an electrician (based upon his expectation that an electrician would complete the connections in a proper manner) did not rise to the level of recklessness.

{¶ 26} Likewise, the court finds that Brubaker’s actions do not rise to the level necessary to constitute wanton or reckless conduct. Evidence presented at trial emphasized that the inspectors have general guidelines to follow rather than specific

requirements as to how the inspections are to be performed. Brubaker testified that he thought the ride was powered by a generator and that he had verified that the generator was properly grounded. Truex testified that, in fact, all but two rides at the fair were powered by the generator. In addition, Brubaker stated that it was not his usual practice to trace all the wires that were emanating from a generator as they snaked and crisscrossed throughout the fairgrounds. Thus, upon review, the court finds that the evidence fails to demonstrate that the conduct of Brubaker or Turner rises to the level necessary so as to strip them of civil immunity under R.C. 2743.02(F) and 9.86.

II. Negligence

{¶ 27} According to ODA, its licensing and inspection functions are intended to benefit the public, generally. In the decision denying defendant's motion for summary judgment, the court stated that the public-duty rule¹ does not apply to the situation presented in this case. In so ruling, the court relied on the holding of the Supreme Court of Ohio in *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210. The Supreme Court held that pursuant to the express language of former R.C. 2743.02(A)(1) the state's liability in the Court of Claims must be determined "in accordance with the same rules of law applicable to suits between private parties." *Id.* ¶ 31. The court opined that "[g]iven the unambiguous directive of R.C. 2743.02(A), there is no legal or logical basis to conclude that the public-duty rule, which is by definition unavailable to private litigants, can apply to suits against the state in the Court of Claims." *Id.* ¶ 26. Accordingly, the court held that "[i]n negligence suits against the state, the Court of Claims must determine the existence of a legal duty using conventional tort principles that would be applicable if the defendant were a private individual or entity." *Id.* ¶ 31.

{¶ 28} Defendant argues that its performance of licensing and inspecting functions pursuant to statute does not result in a personal guarantee of safety such that it creates a cause of action to individual members of the public. In *Hoffert, et al. v. Owatonna Inn* (1972), 293 Minn. 220, the Supreme Court of Minnesota upheld the

¹The public duty rule provided that "[w]hen a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury." *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, paragraph two of the syllabus.

dismissal of a complaint and a third-party complaint that had been filed against the city of Owatonna² by plaintiffs and a motel owner after plaintiffs were injured in a fire at the motel. The complaints alleged that the building code inspector acted negligently in issuing a building permit for remodeling to the motel that violated the city's building code. The court found that a "building inspector acts exclusively for the benefit of the public. The act performed is only for public benefit, and an individual who is injured by any alleged negligent performance of the building inspector in issuing the permit does not have a cause of action." *Id.* at 223. Likewise, in *Lemke v. Dept. of Commerce*, Ct. Cl. No. 2004-07093, 2007-Ohio-1869, ¶ 3 the court noted that when the state grants a license to an exhibitor of fireworks, the state only had a "ministerial duty" to issue or renew such licenses on an annual basis to applicants who met certain basic requirements. Accordingly, the court held that the state agency owed no duty to spectators who alleged injuries from the explosion of an errant firework.

{¶ 29} ODA also argues that even if a duty were owed to plaintiffs' decedent, the state has immunity from liability in tort when it makes policy decisions that involve a high degree of official judgment or discretion.³ The doctrine of discretionary immunity "has been applied to immunize the state from liability for discretionary decisions." (Citations omitted.) *Young v. Univ. of Akron*, Franklin App. No. 06AP-1022, 2007-Ohio-4663, ¶ 14. Despite defendant's assertion of immunity, the court finds that ODA can be held liable for negligently implementing such decision.

{¶ 30} 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. *Young* at ¶ 15. Thus, the court concludes that ODA may be found liable for the alleged negligently performed inspection.

{¶ 31} Defendant asserts that the Ohio legislature never intended for the state to be liable in negligence to any one person with regard to the issuance of licenses and the performance of inspections. Despite the fact that the legislature has since amended R.C. 2743.02 to grant the state immunity with respect to the performance of licensing

²The court noted that the city admitted it had waived any municipal immunity by purchasing liability insurance. *Id.* at 222.

and inspection activities; the circumstances forming the basis of this case occurred prior to the effective date of the amendment and therefore, the court is bound by the Supreme Court's holding in *Wallace*.⁴

{¶ 32} In order to prevail upon a claim of negligence, plaintiffs must prove by a preponderance of the evidence that defendant owed plaintiffs' decedent a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused injuries to plaintiffs' decedent. *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.

{¶ 33} "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability.' *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549, 690 N.E.2d 1332. Determination of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265." *Uhl v. Thomas*, Butler App. No. CA2008-06-131, 2009-Ohio-196, ¶ 10.

{¶ 34} Former R.C. 1711.53 states as follows:

{¶ 35} "(A)(1) No person shall operate an amusement ride within the state without a permit issued by the director of agriculture under division (A)(2) of this section. The owner of an amusement ride, whether the ride is a temporary amusement ride or a permanent amusement ride, who desires to operate the amusement ride within the state shall, prior to the operation of the amusement ride and annually thereafter, submit to the department of agriculture an application for a permit, together with the appropriate permit and inspection fee, on a form to be furnished by the department. Prior to issuing any permit the department shall, within thirty days after the date on which it receives the application, inspect each amusement ride described in the application.

{¶ 36} "(2) For each amusement ride found to comply with the rules of the director issued under division (B) of this section and division (B) of section 1711.551 [1711.55.1] of the Revised Code, the director shall issue an annual permit, provided that

³To the extent that plaintiffs responded to defendant's assertion of immunity by relying on an analysis of Chapter 2744 of the Revised Code, the court notes that the statutory language cited therein refers to political subdivisions and not to the state.

⁴The amendment to R.C. 2743.02(A)(3)(a) went into effect on March 31, 2005.

evidence of liability insurance coverage for the amusement ride as required by section 1711.54 of the Revised Code is on file with the department.

{¶ 37} “(3) The director shall issue with each permit a decal indicating that the amusement ride has been issued the permit. The owner of the amusement ride shall affix the decal on the ride at a location where the decal is easily visible to the patrons of the ride. A copy of the permit shall be kept on file at the same address as the location of the amusement ride identified on the permit, and shall be made available for inspection, upon reasonable demand, by any person. An owner may operate an amusement ride prior to obtaining a permit provided that such operation is for the purpose of testing the amusement ride or training amusement ride operators and other employees of the owner and the amusement ride is not open to the public.

{¶ 38} “(B) The director, in accordance with Chapter 119. of the Revised Code, shall adopt rules providing for a schedule of fines, with no fine exceeding five thousand dollars, for violations of sections 1711.50 to 1711.57 of the Revised Code or any rules promulgated pursuant to this division and for the classification of amusement rides and rules for the safe operation and inspection of all amusement rides as are necessary for amusement ride safety and for the protection of the general public. Rules adopted by the director for the safe operation and inspection of amusement rides shall be reasonable and based upon generally accepted engineering standards and practices. In adopting rules under this section, the director may adopt by reference, in whole or in part, the national fire code or the national electrical code prepared by the national fire protection association, the standards of ASTM or the American national standards institute, or any other principles, tests, or standards of nationally recognized technical or scientific authorities. Insofar as is practicable and consistent with sections 1711.50 to 1711.57 of the Revised Code, rules adopted under this division shall be consistent with the rules of other states. The department shall cause sections 1711.50 to 1711.57 of the Revised Code and the rules adopted in accordance with this division and division (B) of section 1711.551 [1711.55.1] of the Revised Code to be published in pamphlet form and a copy to be furnished without charge to each owner of an amusement ride who holds a current permit or is an applicant therefor.”

{¶ 39} According to the evidence produced at trial, there was no specific process that inspectors in Ohio were required to follow when performing an inspection. The Ohio Administrative Code contains the procedure for safety inspection of amusement rides or devices. Former Ohio Adm.Code 901:9-1-04 reads as follows:

{¶ 40} “(A) The owner of an amusement ride shall ensure that the ride or device is well maintained and conforms to the manufacturer's or equivalent specifications or in the absence of such specifications, generally accepted engineering standards and practices.

{¶ 41} “(B) Inspection of amusement rides and devices shall be conducted by authorized inspectors of the department in accordance with the provisions of rules 901:9-1-01 to 901:9-1-47 of the Administrative Code. These inspectors shall file a form provided for this purpose for every ride or device they inspect. This form shall be kept on file in the amusement ride safety division of the department for a minimum of two years following the term of the permit application to that particular ride or device. All rides submitted for inspection shall show evidence that the ride is in substantial compliance with all owner requirements of American society for testing and materials, volume 15.07, 2003 edition, (ASTM) standards regarding amusement rides currently in effect.”

{¶ 42} While an inspection of the ride must be completed before ODA issues a license to operate during the calendar year, ODA contends that such act does not proclaim that the ride is safe and the public does not rely on the ODA inspection as an assurance of ride safety. ODA argues that once the permit is issued, another inspection is not required until the following year and it remains the responsibility of the owner to ensure that the ride is properly assembled and safe to operate on any given day. The court finds that defendant's argument might have been more compelling had the injury to Greyson Yoe happened at some later time after the Scooter had been moved to another location, rather than mere hours after the inspectors completed their task and allowed the ride to operate.

{¶ 43} The court takes notice of a limited number of cases upholding a private cause of action against state actors based upon negligent performance of their assigned tasks. The Supreme Court of Alaska found in *Adams v. Alaska* (1976), 555

P.2d 235 that the state could be held liable for its failure to abate fire hazards found upon inspection of a hotel under construction. In that case, inspectors from the state fire marshal's office had inspected the Gold Rush Hotel while the third floor was still under construction. Several hazards were noted, including an inoperative fire alarm system, and the hotel manager was informed that he would receive written notification concerning the deficiencies. During the following months, the state failed both to formally notify the hotel of the deficiencies and to order their remedy. A fire caused injuries and fatalities when the alarms failed to sound and the hotel desk clerks, who were going room by room to rouse the guests, were halted by smoke and flames and forced to flee the building. Rather than focusing on the existence of any statutory duty, the court in *Adams*, supra, determined that the state owed a common-law duty to act in a reasonable manner.

{¶ 44} “The responsibility to perform the act may arise from [statute], but the duty to perform the act *with reasonable care* arises from principles of common law negligence.” *Brennen v. Eugene* (1979), 285 Ore. 401, 407, 591 P.2d 719. (Emphasis sic.) See also *Walls v. City of Columbus* (1983), 10 Ohio App.3d 180 (finding potential common-law tort liability against the state where a state employee negligently furnished incorrect information to a police officer resulting in plaintiff's arrest).

{¶ 45} In *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70, the Supreme Court of Ohio stated 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.) In this case, the court finds that once ODA instituted a policy to inspect amusement rides and specifically to perform electrical safety inspections of rides, ODA's employees had a duty to complete each inspection with due care and in a reasonable manner.

{¶ 46} In order to find defendant liable on plaintiffs' claim of negligence, the court must determine that Brubaker and Turner violated a duty of care that was owed to

plaintiffs' decedent. In *Adams*, supra, the court found that the inspectors owed a duty to the hotel guests to detect and to remedy fire hazards. The court noted that plaintiffs and their decedents, as guests of the hotel that was inspected, "were the intended beneficiaries of the inspection services provided and the foreseeable victims of the fire hazards left uncorrected." *Id.* at 241. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. * * * The foreseeability of harm usually depends on the defendant's knowledge." *Wallace v. Ohio DOC*, Franklin App. No. 99AP-1303, 2003-Ohio-6935, ¶ 24. Likewise, the duty to perform the amusement ride inspection with reasonable care is a duty owed to those persons or the class of persons who partake of the fair's rides. Greyson Yoe was a member of the class of persons who arrived at the fair and rode the Scooter that day.

{¶ 47} In the instant case, the issue involves the failure to discover that the ride was not properly grounded, rather than the failure to abate a known hazard. In addressing this scenario, the Supreme Court of Alaska opined that "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach where there is a negligent failure to discover fire hazards which would have been brought to light by an inspection conducted with ordinary care. What constitutes reasonable care will, of course, vary with the circumstances and hazards involved." *Adams*, at 240-241.

{¶ 48} Here, both inspectors had a duty to visually inspect the electrical connections that the owner used. In this case, the inspection process, though episodic, took place over several hours, and the inspectors relied upon their own independent observations concerning the source of power to the Scooter. ODA has not authored or adopted a detailed procedure pertaining to amusement ride inspections; however, ODA inspectors had access to an employee manual which listed general guidelines for inspections. There was conflicting testimony as to whether ODA employees, including Brubaker and Turner, utilized the manual on a regular basis.

{¶ 49} The court finds that the duty to inspect the ride in a reasonable manner included the performance of a visual inspection of the electrical connections and an assessment whether, based upon such visual inspection, the ride was properly

grounded. Turner stated that he was not an electrician, that he had assumed that the electrician would connect the ride to utility power in a proper manner, and that it was his normal practice when he encountered such a situation to rely on the electrician. Brubaker testified that he assumed the Scooter was powered by the generator and that he verified that the generator was properly grounded. Brubaker maintained that it was not his custom or practice to trace the cables and wires emanating from the ride to the power source, nor did he routinely follow all the cables from the generator to their individual insertion point.

{¶ 50} The determination that the ride was properly grounded required some level of deductive reasoning, and the inspectors compiled information based upon their visual assessments. The troubling aspect of this case is that the inspectors concluded that the ride was properly grounded based upon their observations made at the power source, not based upon their inspection of the electrical connections and other components originating from the Scooter. Plaintiffs assert that as a result of such failure to visually inspect the cable and follow it to its power source, the inspectors' conduct was negligent. Indeed, plaintiffs insist that the simple act of tracing the thick cable from the back of the ride to the nearby utility pole would have, at a minimum, raised concerns for the inspectors about grounding safety inasmuch as the cable was obviously looped around, and not through, the disconnect boxes. The court agrees.

{¶ 51} After considerable deliberation, the court finds that Brubaker and Turner performed inadequate visual inspections and failed to complete their responsibilities with due care. As a result of the failure to visually inspect the cable and to determine either the true source of power for the Scooter or that the power cable was connected to a grounding rod or wire, the inspectors failed to perform an adequate inspection. The court finds that the assertion that the ride is properly grounded required some level of deductive reasoning, yet the inspectors neglected to compile the visual assurance that such was accurate. The fact that this ride was entirely dependent upon electrical power to operate emphasizes to the court the significance of the duty of care that was owed by the inspectors. Thus, the court finds that Brubaker and Turner did not perform adequate inspections or complete their responsibilities with due care.

{¶ 52} In finding that Brubaker and Turner did not act with due care in the performance of their inspection of the Scooter, the court does not believe that the inspectors were required to climb to the top of the ride as part of the inspection. Moreover, the evidence at trial showed that even assuming that they had done so, they would not have been able to readily observe the exposed wire that was contained in the connector box. In addition, the court was not convinced that an inspector standing at the base of the utility pole would be able to see or to recognize the presence of the green-colored ground wire. Indeed, the court was not persuaded that a person could determine from that vantage point that the wire was disconnected and hanging loose.

{¶ 53} The court does find, however, that had an adequate inspection been performed, no reasonable ride inspector would have concluded that the ride was properly grounded. Brubaker assumed, incorrectly, that a generator on site at the fairgrounds was the source of power; whereas, Turner disregarded his duty to perform a visual inspection of the cables and connections and instead relied upon his observation of the fair electrician who was in the process of connecting the cable from the Scooter to the top of the utility pole. Assuring that the ride was properly grounded according to basic electrical safety standards was a key component of the inspection. The court also notes that there was abundant testimony and evidence presented concerning the deterioration in various components of the ride including broken gauges, disabled bumper cars, and missing insulation from cabled wires. The court realizes that none of these trouble spots caused or substantially contributed to the injury suffered by the minor child. In fact, some of these deficiencies were not egregious enough to cause the ride otherwise to be shut down; however, they did appear to signify a lack of upkeep and maintenance that, when looked upon as a whole, would prompt a reasonable inspector to question whether the ride was assembled and ready to operate in substantial compliance with all owner requirements.

{¶ 54} Based upon the testimony and evidence in toto, the court concludes that Brubaker and Turner failed to properly perform their inspection with respect to the issue of the electrical safety of the Scooter on the date in question. Having found both a common-law duty to those persons who ride amusement rides and a breach of due care, the court must then address the issue of proximate cause. Plaintiffs have the

burden of proving that the decedent's injuries were proximately caused by defendant's negligent inspection. An injury is proximately caused by a breach of duty when the injury is the natural and probable consequence of the breach. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140. Therefore, a defendant "is not liable for proximately causing an injury if, under all of the circumstances, he did not foresee and, acting as a reasonably prudent person, could not have foreseen the consequences of his alleged negligent acts." *Jeffers*, supra, at paragraph one of the syllabus. Foreseeability is based upon whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of the act. *Menifee*, supra, at 77.

{¶ 55} Clearly, the negligence of the electrician who failed to properly connect the ride to its power source was a proximate cause of the harm. The owner also has significant responsibility shared with the electrician. The owner is responsible for the daily setup and the overall safety check. He is expected to be familiar with the ride, its components, and the power source in use at all times. The owner is required to comply with the manufacturer's guidebook for safe assembly and safe operation. Indeed, the owner was in the best position to know from the manufacturer's specifications, how the ride operated, how much power it needed to pull and in what manner the power was supplied. The owner had firsthand notice of the deplorable condition of the ride, including the presence of broken gauges, inoperable cars, faulty lighting, and missing insulation on various parts of the power cable. The evidence showed that the owner was negligent when despite having actual notice of the damaged wire, he failed to repair the wire that he knew had been pulled loose and left exposed during prior disassembly of the light panel canopy.

{¶ 56} As for defendant's share of responsibility, the court notes that R.C. 1711.53(B) directs defendant to adopt "rules for the safe operation and inspection of all amusement rides as are necessary for amusement ride safety and for the protection of the general public." R.C. 1711.53 states, in relevant part:

{¶ 57} "(B) Rules adopted by the director for the safe operation and inspection of amusement rides shall be reasonable and based upon generally accepted engineering standards and practices. * * * The amusement ride owner shall not be issued a permit to

operate unless and until the ride inspector determines that the inspection is satisfactory.” R.C. 1711.53(A)(1).

{¶ 58} There was some evidence at trial that one or both of the inspectors had reprimanded the owner for allowing members of the public to ride the Scooter before the owner had obtained a permit from them certifying that the ride had been inspected. The inspectors conveyed that they had the authority to prevent the ride from operating. Former Ohio Adm.Code 901:9-1-02 states, in part:

{¶ 59} “(B) Ride inspectors or other designees of the department are authorized by the director to prohibit the operation of any ride found to be in an unsafe condition, or the ride was not set-up, and ready to operate at the time ready for inspection listed on the ride company’s itinerary on file with the department, by issuing a ‘Stop Operation Order’ as provided in division (F) of section 1711.55 of the Revised Code.

{¶ 60} “A ‘Stop Operation Order’ may be issued to any owner who is operating an unlicensed ride based on the premise that under division (F) of section 1711.55 of the Revised Code no ride can be presumed to be safe until it is inspected.”

{¶ 61} In addition, former Ohio Adm.Code 901:9-1-01, states, in pertinent part:

{¶ 62} “(F) Upon receipt of proper applications and upon completion of a satisfactory inspection as set forth in paragraphs (A), (B), (C), and (E) of this rule, the department shall issue a permit in the name of the applicant. All permits shall expire on the thirty-first day of December following the date of issue. Accompanying such permit shall be a decal with a unique number corresponding to the unique number noted on the permit. In addition to the decal referred to in this rule, the department shall issue a permanent identification plate for all permitted rides. Such plate shall be permanently attached to the ride as part of the licensing procedures. In the case of the temporary licensing of a given ride or device, such permanent plate shall not be affixed but rather a temporary decal with specified expiration date. On all annually licensed rides, the decal shall be affixed to the permanent plate. In the event that the ride is sold, leased or transferred to a new owner during the period that the permit is in effect, the decal shall be removed from the plate by the previous owner prior to the sale, lease or transfer.

{¶ 63} “(G) The department shall, within thirty days of the date of receipt of the application, determine whether a permit will be issued. If the owner/operator meets all

requirements for a permit, such permit will be issued. If the owner fails to meet these requirements, the department will inform the owner in writing that the permit is being denied. In the event of a denial, the owner shall be afforded a hearing in accordance with Chapter 119. of the Revised Code.”

{¶ 64} Accordingly, the court finds that defendant’s negligent inspection was a proximate cause of the injury. Defendant, in adopting rules for amusement ride operations, was granted the power to deny operations to an owner who failed to meet basic requirements. Had the inspectors ascertained that the ride was not properly grounded, they then had the authority to issue a Stop Operation Order and, to that extent, thereby prevent the harm that occurred in this case. Accordingly, judgment shall be rendered in favor of plaintiffs on their claim of negligence.

Court of Claims of Ohio

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AUDRA YOE, Admr., et al.

Plaintiffs

v.

OHIO DEPARTMENT OF AGRICULTURE

Defendant

Case No. 2005-09006

Judge Joseph T. Clark

JUDGMENT ENTRY

This case was tried to the court on the issues of liability and civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence, and for the reasons set forth in the decision filed concurrently herewith, the court finds that Ted Brubaker and Kalin Turner are entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case. 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. The case will be set for trial on the issue of damages.

JOSEPH T. CLARK
Judge

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SJM/cmd
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