

# Court of Claims of Ohio

The Ohio Judicial Center  
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GARY D. SIMMONS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-01394

Judge Joseph T. Clark  
Magistrate Anderson M. Renick

## MAGISTRATE DECISION

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

{¶ 2} This case arises out of a motor vehicle collision involving plaintiff's vehicle and a tractor-trailer driven by Spencer McKimmie, an employee of defendant, Ohio Department of Transportation (ODOT). The collision occurred at approximately 12:20 p.m. on February 2, 2005, at the intersection of State Route (SR) 104 and Moundsville Road in Ross County, Ohio. SR 104 is a two-lane divided highway that generally runs north and south. According to the traffic crash report that was completed by Major George Lavender, Jr., an officer of the Ross County Sheriff's Office, the contour of the roadway at the site of the accident was straight and level. (Defendant's Exhibit B.)

{¶ 3} McKimmie testified that he was hauling equipment on a "drop-deck" trailer and that the combined length of the truck and trailer was approximately 40 feet. According to McKimmie, he had observed plaintiff's vehicle approaching the intersection prior to making a turn onto Moundsville Road and, at that time, he was confident that

there was sufficient distance between the vehicles to allow him to safely exit the highway. McKimmie testified that, during his turn, he observed an automobile that had been traveling east on Moundsville Road proceed past the stop sign that was posted at SR 104, enter the intersection, and come to a stop in a position that prevented McKimmie from completing his turn. McKimmie stated that he slowly continued to proceed while the driver of the eastbound automobile backed up to allow McKimmie to complete the turn onto Moundsville Road.

{¶ 4} Plaintiff testified that he was familiar with the roadway and he described the weather conditions as being clear and sunny. According to plaintiff, he was driving his pickup truck at a speed of 40 to 50 miles per hour in the southbound lane of SR 104 when he observed defendant's truck heading northbound before it began a left turn across his lane of travel. Plaintiff recalled seeing the truck "hesitate in the intersection" during the turn. Plaintiff testified that he was unable to avoid a collision with the ODOT truck and that the front of his vehicle struck the right rear of defendant's trailer.

{¶ 5} Plaintiff alleges that the negligence of defendant's employee was the proximate cause of the accident.

{¶ 6} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his 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.

{¶ 7} R.C. 4511.39 provides in relevant part:

{¶ 8} "(A) No person shall turn a vehicle \* \* \* or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety \* \* \*."

{¶ 9} R.C. 4511.42 states:

{¶ 10} “(A) The operator of a vehicle \* \* \* intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle \* \* \* approaching from the opposite direction, whenever the approaching vehicle \* \* \* is within the intersection or so close to the intersection, \* \* \* as to constitute an immediate hazard.”

{¶ 11} On cross-examination, plaintiff testified that he continued to proceed at 50 to 55 mph after defendant’s truck began to turn left. Plaintiff testified that he informed Major Lavender that he had observed the ODOT truck begin its turn and that, at that time, he had believed there was sufficient time for the truck to complete the turn and “clear the intersection” before plaintiff’s vehicle entered the intersection. Based upon plaintiff’s own testimony, the court finds that when McKimmie initiated the turn, plaintiff’s approaching vehicle was not so close to the intersection as to constitute an immediate hazard.

{¶ 12} According to McKimmie, there was enough distance between the truck he was operating and plaintiff’s vehicle for him to safely complete the turn. McKimmie testified that the eastbound vehicle had not reached the stop sign at the intersection when he began the turn. McKimmie offered credible testimony that he was forced to slow his turn onto Moundsville Road upon encountering the eastbound driver who had entered the intersection after failing to stop at the stop sign. McKimmie’s only alternative to slowing in the intersection was to collide with the eastbound automobile. McKimmie’s testimony was corroborated by plaintiff’s testimony that he observed defendant’s truck hesitate during the turn.

{¶ 13} “Under Ohio law, the driver of a motor vehicle proceeding over a through street in a lawful manner has the absolute right of way over a vehicle on an intersecting stop street, and the driver on the through street may ordinarily assume that such right of way will be respected and observed by the driver of the vehicle on the intersecting stop street.” *Timmins v. Russomano* (1968), 14 Ohio St.2d 124, paragraph one of the syllabus. Furthermore, the driver with the right of way is not required to anticipate that

this situation might occur, and may proceed along the right of way under the assumption that the right of way will be respected. *Id.* at 127; *Deming v. Osinski* (1970), 24 Ohio St.2d 179, 181.

{¶ 14} The court finds that McKimmie had the right of way as he proceeded to turn his vehicle at the intersection, and that he exercised due care and acted in a lawful manner when he encountered the eastbound vehicle entering the intersection while making a left turn across the path of plaintiff's oncoming vehicle. Therefore, McKimmie was lawfully proceeding through the intersection while the eastbound vehicle was not.

{¶ 15} Although plaintiff initially had the presumed right to proceed through the intersection without being impeded by defendant's truck turning left, if plaintiff "as he is approaching or entering the intersection, discovers that \* \* \* [another driver] is not yielding the right of way and has thereby placed himself in a perilous situation, it becomes the duty of \* \* \* [plaintiff] to use ordinary care not to injure \* \* \* [the other driver] after becoming aware of his perilous situation." *Morris v. Bloomgren* (1933), 127 Ohio St. 147, paragraph five of the syllabus. In short, plaintiff could lose the right of way upon discovering that another driver was not yielding the right of way and that, therefore, plaintiff was in a perilous situation. *Deming, supra*, at 182.

{¶ 16} The weather was clear and sunny, and the highway was straight and level with no obstructions to obscure plaintiff's view either of the intersection or of defendant's 40-foot long tractor-trailer. Plaintiff estimated that the intersection was visible from a distance of approximately three-quarters of a mile as he was approaching. Plaintiff observed the ODOT truck hesitate in the intersection after its turn was impeded by the eastbound vehicle that had unlawfully entered the intersection. According to his own testimony, plaintiff initially continued to proceed at 50 to 55 mph because he believed there was sufficient time for the truck to clear the intersection. Plaintiff had an opportunity either to apply his brakes or to take other evasive action to avoid a collision with the ODOT truck, but he failed to do so.

{¶ 17} Based upon the evidence presented in this case, the court concludes that plaintiff's negligence was the sole proximate cause of the accident. Accordingly, judgment is recommended in favor of defendant.

*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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ANDERSON M. RENICK  
Magistrate

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AMR/cmd  
Filed March 13, 2009  
To S.C. reporter March 31, 2009