[Cite as *Dunlap v. W.L. Logan Trucking Co.*, 2003-Ohio-1987.]

IN THE COURT OF CLAIMS OF OHIO

DAVID DUNLAP, et al.	:	
Plaintiffs	:	CASE NO. 2001-04646-PR
v.	:	DECISION
W.L. LOGAN TRUCKING COMPANY, et al.	:	Judge J. Warren Bettis
Defendants/Third-Party Plaintiffs	:	
v.	:	
DEPARTMENT OF TRANSPORTATION	:	
Third-Party Defendant	:	

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{¶1} This cause of action arose as a result of a motor vehicle collision that occurred on June 19, 1998, on State Route 30 (SR 30) in Ashland, County, Ohio. The accident took place in a construction zone created and maintained by third-party defendant, Ohio Department of Transportation (ODOT). To facilitate the road repair project, ODOT closed both eastbound lanes of SR 30 and diverted all traffic such that one of two lanes on the westbound side accommodated all eastbound traffic and the other accommodated all westbound traffic. The two lanes were then separated by double, yellow lines of reflective tape applied to the asphalt.

{¶2} Immediately prior to the accident, Norman Munnal, who was an employee of defendant/third-party plaintiff W.L. Logan Trucking Co. (Logan) and who was operating a tractor-

trailer owned by Logan, traveled across the yellow dividing lines and entered the lane of oncoming eastbound traffic. Plaintiffs Dunlap and Grimm were in the first car to encounter the errant vehicle. The driver, Dunlap, swerved his car sharply to the right and off the roadway, narrowly avoiding a collision. Dunlap and Grimm suffered relatively minor injuries as a result of the incident. The second eastbound car, driven by Reganne Heffelfinger, collided nearly head-on with Logan's truck. The car flipped upside down and Ms. Heffelfinger was grievously injured and subsequently died.

{¶3} Plaintiffs, David Dunlap, et al., previously filed a negligence action against Logan and Munnal. Beth Hart was a party plaintiff in that case as Administratrix of the Estate of Ms. Reganne Heffelfinger. Plaintiffs filed a Civ.R. 41(A) dismissal in the *Hart* case to allow the settlement with the Heffelfinger estate to proceed.

{¶4} Plaintiffs subsequently refiled their cause of action in the Stark County Common Pleas Court. On April 19, 2001, Logan and Munnal filed a third-party complaint for contribution to recover sums paid in settlement of the claim filed by the estate of Heffelfinger. The case was thereafter removed to this court. The parties agree that in the *Hart* case, Great West Casualty Company (Great West) and Gulf Insurance (Gulf) paid $1.39 million of a $1.40 million settlement with Heffelfinger's estate. There is also no dispute that Logan was responsible for the remaining $10,000 payment.[1] Prior to the instant action coming on for trial, plaintiffs Dunlap and Grimm settled their claims with Logan for $6,000 and $1,500, respectively, and the monies were paid by Gulf.

{¶5} ODOT argues that under R.C. 2743.02(D)[2] and the rule of law set forth in *Community Ins. Co. v. Dept. of Transp.*, 92 Ohio St.3d 376, 2001-Ohio-208, Logan and Munnal are not entitled

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On December 4, 2001, Logan and Munnal filed a notice of joinder of additional third-party plaintiffs, Great West and Gulf, alleging that they are real parties in interest.

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R.C. 2743.02(D) states in part: "Recoveries against the state shall be

to recover from the state any monies paid on their behalf by Great West and Gulf. Logan and Munnal argue that R.C. 2743.02 and the holding in *Community Ins.* do not apply to claims for contribution. The court disagrees.

{¶6} By operation of R.C. 2307.31, Great West and Gulf are subrogated to any right of contribution Logan and Munnal may have against a joint tortfeasor.[3] In *Community Ins.*, supra, the Supreme Court of Ohio held that an insurer who has been granted the right of subrogation by a person, on whose behalf the insurer has paid medical expenses incurred as the result of the negligent conduct of the state, is subject to the statute which mandates reduction in recoveries against the state by the "aggregate of insurance proceeds, disability award or other collateral recovery received by the claimant." R.C. 2743.02(D). Although the insurance proceeds were paid to plaintiffs and to Ms. Heffelfinger's estate instead of to Logan, it cannot reasonably be argued that Logan received no benefit from the $1.39 million payment. Gulf and Great West cannot avoid the application of R.C. 2743.02(D) and the holding of *Community Ins.*, by settling with the injured parties on behalf of an alleged tortfeasor and then seeking contribution from the state. In addition, despite the arguments of defendants/third-party plaintiffs to the contrary, the court finds that the holding of *Nevins v. ODOT* (1998), 132 Ohio App.3d 6, is not applicable to the facts of this case. In *Nevins,* plaintiffs sued both alleged tortfeasors and both were found liable as concurrent tortfeasors. The damages awarded were based on the parties' proportionate share of negligence as determined by separate fact finders. In addition, the case did not involve issues of either subrogation or insurance companies.

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reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant."

[3] R.C. 2307.31(C) states in pertinent part:
"A liability insurer that by payment has discharged in full or in part of the liability of a tortfeasor and has thereby discharged in full its obligation as insurer is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proportionate share of the common liability. ***"

{¶7} Under R.C. 2743.02(D) and *Community Ins.*, supra, Logan and Munnal's recovery in this contribution action against the state must be reduced, as a matter of law, by the insurance proceeds paid on their behalf. Such a ruling is consistent with the legislative intent to preserve public funds while providing reimbursement for an uninsured claimant. See *Community Ins.*, supra, at 378. However, with regard to the $10,000 payment made by Logan, R.C. 2743.02(D) does not apply. See *Heritage Insurance Company v. Department of Transportation,* (July 10, 2002), Court of Claims No. 99-01250.

{¶8} The trial before this court addressed, inter alia, defendant/third-party plaintiffs' claims against third-party defendant, ODOT. Logan seeks reimbursement of the sums paid to plaintiffs and the Heffelfinger estate on the grounds that ODOT is the sole (or at a minimum, a joint) tortfeasor. Logan asserts that ODOT was negligent in the design of the construction zone and in controlling the flow of traffic through the restricted area. Logan posits that ODOT's negligence in not placing a temporary concrete barrier between the two lanes of traffic was the sole proximate cause of injury to plaintiffs and Ms. Heffelfinger. Logan maintains Munnal was not negligent because he suffered a sudden and unforseen emergency which caused him to lose consciousness while driving. The issues for this court are whether ODOT was negligent in design or maintenance of the construction zone, and if so, whether ODOT's negligence was the sole cause of the accident.

{¶9} In 1997, ODOT commenced construction of a planned improvement to a five-mile section of SR 30. The project plans called for a 9-inch concrete overlay process, a method that creates a significant height difference in the lanes of travel. The project necessitated completely closing one side of the roadway while the work was being performed and, then once that section was completed and open to travel, closing the lanes on the other side. ODOT initially considered dividing the project into two-mile segments but discarded that plan once it was determined that the hilly terrain would not support a cross-over. Thus, it was decided that traffic would be maintained in two directions on one side of the roadway such that the two lanes of eastbound traffic would be

reduced to one lane to become what was previously the westbound left lane. The westbound lanes were reduced to one lane. This type of traffic pattern was known as a two-lane, two-way operation (TLTWO). The construction area in question had four at-grade intersections which ODOT determined needed to remain open to facilitate county-wide access for emergency response vehicles. ODOT initially considered using physical barriers or channelizing devices to separate the traffic. Tom Culp, ODOT's Plan Preparation Manager assigned to the project, testified that the first and safest choice was to install a temporary concrete median barrier (TCMB) to provide a physical obstruction between the lanes of opposing traffic. He explained that Ohio uses two types of concrete barriers. One type is 32 inches in height but is installed with an 18-inch glare screen. Ohio also uses a 50-inch barrier. However, Culp stated that concrete barriers tended to obstruct sight lines for cross-traffic at the intersections.

{¶10} ODOT also considered using nylon pylons to provide a physical barrier as well as a visual cue alerting drivers of the no-passing restrictions. This channelizing device consisted of raised vertical plastic tubes that were affixed to a base attached to the pavement. However, use of raised nylon pylons was rejected because they tended to break off or become dislodged and there was no safe way to enter the construction zone to make repairs. According to Culp, ODOT's design team ultimately decided not to use any channelizing devices, but opted to rely on highly reflective yellow tape with beads. In addition, ODOT lowered the speed limit and posted numerous and varied signs warning of the need for caution due to the altered traffic pattern. This plan was approved in September 1997 by ODOT's constructability review committee.

{¶11} Logan argues that the use of signage and striping alone was insufficient and that federal regulations required ODOT to install some type of channelizing device as a physical barrier between the lanes. Logan claims that because SR 30 qualified as a freeway and because the project was financed in part using federal funds, ODOT was required to adhere to the federal regulations

which provide that signage and striping are insufficient for lane separation in a TLTWO. ODOT maintains that Ohio's manual of regulations controls the project design.

{¶12} Upon review of the evidence submitted, the court finds that SR 30 is not a freeway or an expressway, but constitutes a four-lane divided roadway with at-grade intersections. The court further finds that Ohio regulations control the design requirements of the project. Ohio courts have noted previously, "ODOT's duty to ensure the safety of state roadways is defined by its construction and design manuals, including the Ohio Manual of Uniform Traffic Control Devices (OMUTCD), which mandates certain minimum safety measures." *Roadway Express, Inc. v. Ohio Dept. of Transp.* (Sept. 29, 2000), Court of Claims No. 98-06541, citing *Leskovac v. Ohio Dept. of Transp*. (1990), 71 Ohio App.3d 22, 27.

{¶13} ODOT contends that it was not required to install channelizing devices under Ohio's regulations and that the decision whether to install such devices was one left to ODOT's engineering judgment. ODOT reasoned that use of concrete barriers would create greater hazards to traffic at the intersections due to blocked or diminished sight lines and that the option it chose was reasonable. The court does not find ODOT's arguments to be persuasive.

{¶14} Courts in Ohio have consistently held that ODOT has a duty to maintain the roadway in a reasonably safe condition. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335. Moreover, the Tenth District Court of Appeals in *Roadway Express, Inc. v. Ohio Dept. of Transportation* (June 28, 2001), Franklin App. No. 00AP-1119, (citing *White v. Ohio Dept. of Transp*. (1990), 56 Ohio St.3d 39, 42; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 729 and *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App.3d 346, 354) emphasized that ODOT must exercise ordinary reasonable care to keep highways free from an unreasonable risk of harm. In *Roadway*, the court of appeals stated that "this court, in *Feichtner*, supra, discussed ODOT's duty to the traveling public in construction zones. This court recognized that ODOT cannot guarantee the same level of safety during a highway construction project as it can under normal

traffic conditions. Id. In addition, we acknowledged that ODOT is, nonetheless, required to provide the traveling public with a reasonable degree of safety in construction zones by way of utilizing traffic control barrels, reducing the applicable speed limit, and erecting construction warning signs. Id. We further found that a court must look at the totality of the circumstances in determining whether ODOT's actions were sufficient to render the highway reasonably safe for the traveling public during the construction project. Id. See, also, *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp.* (1988), 49 Ohio App.3d 129, 130." *Roadway*, supra.

{¶15} The standard is one of reasonableness and in the instant case, this court finds that it was unreasonable for ODOT to forgo the use of some type of channelizing device for this project. In *Balbach v. Ohio Dept. of Transp.* (April 19, 1989), Court of Claims No. 86-10603, this court looked at the circumstances surrounding a similar incident. In *Balbach*, the traffic flow on Interstate 70 was directed into a TLTWO throughout a construction zone. A motorist drove left of center into the oncoming lane of travel, killing himself and the other occupants of his vehicle. At issue in that case was the decision by ODOT to use an asphalt median strip[4] rather than a TCMB as a channelizing device. The court found that "by installing the asphalt divider as a means of separating traffic at the project site, defendant did not breach its duty to maintain highways in a reasonably safe condition." *Balbach*, supra. On appeal, the Tenth District Court of Appeals affirmed the judgment of the Court of Claims. The court summarized its holding as follows: "the decision by ODOT to utilize the asphalt median did not create an *unreasonable* risk of harm to plaintiff's decedents. This evidence indicates that various channelizing devices were considered by ODOT in formulating and reviewing the traffic maintenance plan; that ODOT recognized the necessity of physically separating opposing traffic in a high-speed, high-volume TLTWO; that a TCMB was considered as one such channelizing

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[4] The asphalt median strip was described as being four inches high and 18 inches wide at the base upon which orange plastic pylons were spaced at 50-foot intervals.

device, but rejected because of the expense and attendant risks associated with such barrier, including risks to the traveling public posed by decreased widths of the lane imposed by TCMB, the necessity of closing the interstate while installing the TCMB, the potential posed by the TCMB for causing accidents, and the fact that the TCMB rendered highway accidents inaccessible to emergency vehicles; that the asphalt divider provided a highly visible, yet more economical alternative to the TCMB; and that the asphalt divider had been used successfully in North Carolina and recommended by the Federal Highway Administration. Given this evidence, this court cannot conclude that the claims court erred in finding that the decision of ODOT to use the asphalt divider was a reasonable accommodation of both the risks and benefits associated with the device." *Balbach v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 582. However, in the instant case, despite having a high-speed, high-volume TLTWO, ODOT chose to forgo the use of any channelizing device and elected to rely on yellow reflective tape, reduced speed, and signage.

{¶16} In order for defendants/third-party plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that third-party defendant owed them a duty, that it breached that duty, and that the breach proximately caused the injuries at issue in the case. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. After considering the totality of the circumstances, the evidence adduced at trial, and the relevant case law, the court finds that ODOT breached its duty to the traveling public by failing to keep the roadway free from an unreasonable risk of harm to motorists. While ODOT considered a variety of designs which called for the use of channelizing devices, it eventually decided not to implement any of them. The court finds that defendant failed to utilize some method to physically separate adjacent lanes of travel which thereby created an unreasonable risk of harm to motorists utilizing the roadways. The court further finds that such negligence was a proximate cause of the accident.

{¶17} Testimony was elicited at trial from witnesses presented by both parties that a channelizing device does provide some warning by way of sound and resistance when contacted and

that such vibrations serve to notify drivers of the inherent risk they are about to encounter if they inadvertently leave the designated lane of travel. ODOT's failure to utilize a channelizing device effectively eliminated the errant driver's last opportunity to realize that he must remain in his lane of travel. For the foregoing reasons, the court finds that ODOT created an unreasonable risk of harm which resulted in injury and death and that ODOT's negligence proximately caused plaintiffs' injuries.

{¶18} Nevertheless, upon review of the testimony and evidence presented at trial, the court finds that ODOT's negligence was not the sole proximate cause of the accident. It is undisputed that Logan's employee, Munnal, drove the tractor-trailer left of center in violation of R.C. 4511.25. The statute provides a clear mandate that motorists have a duty to drive within their side of the road. An unexcused failure to comply with the statute constitutes negligence per se. *Oechsle v. Hart* (1967), 12 Ohio St.2d 29. Logan posits that at the time of the accident, Munnal was unaware that he suffered from a condition subsequently diagnosed as sleep apnea. Logan asserts that Munnal was not negligent because he experienced a "sudden emergency" and lapsed into an unconscious state. In *Lehman v. Haynam* (1956), 164 Ohio St. 595 at the syllabus, the Supreme Court of Ohio held that "Where the driver of an automobile is suddenly stricken by a period of unconsciousness which he has no reason to anticipate and which renders it impossible for him to control the car he is driving, he is not chargeable with negligence as to such lack of control. Where in an action for injuries arising from a collision of automobiles the defense of the defendant driver is that he was suddenly stricken by a period of unconsciousness, which rendered it impossible for him to control the car he was driving *and which he had no reason to anticipate or foresee*, the burden of proof as to such defense rests upon such driver." (Emphasis added.)

{¶19} This court finds that Munnal has failed to sustain his burden of proof and that, based on the evidence presented at trial, Munnal knew or should have known that over the course of his adult life, he had a propensity to fall asleep at unpredictable times; e.g., when standing up and

leaning against a wall, while playing cards, or while conversing at parties. Although Munnal insisted at trial that prior to the accident he had slept well at night and that he usually slept eight hours per night, his fiancee, Christine Natale, testified that Munnal slept poorly; that he was restless and jerky while sleeping; and that he slept, on average, only three hours per night. While Munnal testified that he knew when he was tired and that he often needed to pull over and rest for a few hours before he could proceed on his route, he also acknowledged that on at least one occasion he had fallen asleep while driving, only to wake up after his vehicle had gone off the road onto the berm.

{¶20} After reviewing the evidence and evaluating the credibility of all of the witnesses, the court is not persuaded that Munnal did not know of his condition prior to the accident. This court is convinced that whether or not Munnal was aware that he suffered from sleep apnea, he was certainly aware that he had repeatedly experienced episodes of excessive sleepiness which, standing alone, would seem to this court to be an unsafe state for any commercial truck driver. For the foregoing reasons, the court concludes that Munnal was also negligent and that his negligence was not excused by any sudden emergency.

{¶21} "The doctrine of respondeat superior is expressed in the Restatement of the Law 2d, Agency (1958) 481, Section 219(1), which states as follows: 'A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.' Ohio law provides, '[i]t is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment.'" *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, citing, *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58. In the instant case, it is undisputed that when Munnal traveled left of center he was driving a tractor-trailer for Logan in the ordinary course of business. Since Munnal's negligence is not excused, Logan is necessarily liable for the acts of its employee.

{¶22} Pursuant to R.C. 2315.19, the court must determine the comparative negligence of the parties. Under Ohio law, defendants/third-party plaintiffs are barred from recovery if their contributory negligence is greater (more than 50 percent) than third-party defendant's negligence.

{¶23} Based upon the totality of the evidence presented, the court finds that the negligence imputed to Logan is equal to that imputed to ODOT.

{¶24} Thus, the court concludes that judgment shall be rendered in favor of Logan as to their claim for contribution from ODOT. Reducing damages by 50 percent to account for Logan's own negligence, judgment shall be rendered in favor of Logan and against ODOT for $5,025, which includes the filing fee paid by Logan.

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J. WARREN BETTIS
Judge

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