

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION**

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LENDELL LYNCH,

Claimant,

v.

CLAIM NO. T20130670

STATE OF TENNESSEE,

Defendant

JUDGMENT

I.

INTRODUCTION

Claimant Lendell Lynch brings this action against the State of Tennessee for damages he sustained in a motor vehicle accident under Tenn. Code Ann. § 9-8-307(a)(1)(A), relating to negligence in the operation of a motor vehicle. Jeffrey P. Boyd, Esq., represented Claimant. Amanda S. Jordan, Esq., and Sarah Robbins, Esq., represented the State of Tennessee.

The parties have stipulated that Claimant had medical bills as a result of the accident totaling \$27,210.38. (Tr. Ex. 1)

II.

SUMMARY OF TRIAL TESTIMONY

Johnny Ray Rogers, who has been employed with the Tennessee Department of Transportation, hereinafter referred to as TDOT, for thirty years, testified in the trial of this cause. (Tr., p. 18, lines 2-7) Rogers first testified that

he had received training on the placement of signs, but admitted that he stated in his deposition that had been grandfathered in and did not have to take the course. (Tr., p. 18, line 16- p. 19, line 6)

Rogers testified that the dump truck he drives for TDOT was involved in the May 9, 2012 wreck that is the subject of Claimant's claim. (Tr., p. 19, lines 14-17) Rogers stated that there were 3 signs on his truck the day of the wreck, "[o]ne lane road ahead and road machinery ahead and flagman." (Tr., p. 21, lines 2-3) At the time of the wreck, he already had put out the sign which said road machinery ahead. (Tr., p. 21, lines 9-11)

Rogers testified that his dump truck was "on top of that hill." (Tr., p. 22, line 4) He agreed that during his deposition he had put an X on a photograph where he believed his dump truck was parked. (Tr., p. 22, lines 19-23; Collective Exhibit 2) He acknowledged a picture of a red truck in a driveway and admitted the X where his truck was parked was beyond that driveway. (Tr., p. 22, line 24- p. 23, line 11)

When asked why he parked his dump truck in the roadway, Rogers said: "I was going to put out a sign." (Tr., p. 23, line 21) He said Randy Perry, his supervisor at TDOT, "said not to move the vehicle off the road or on a driveway." (Tr., p. 23, line 25- p. 24, line 2) He said the reason was "[b]ecause we'll make a rut and have to fix the driveway back." (Tr., p. 24, lines 3-4)

Rogers said he had his strobe lights and his hazard lights on when he got out of the truck to place the sign. (Tr., p. 24, lines 23-25) Rogers testified that the sign he put out was 500 feet from where the accident occurred. (Tr., p. 33, lines

1-13) Rogers testified that while he was out placing the sign he saw Lynch's vehicle approach; it was about 300 feet away at the time he saw it. (Tr., p. 33, lines 20-25) He said he stood behind the truck and tried motioning Claimant around the truck, but he did not have a flag and there was no flagman. (Tr., p. 25, lines 1-7)

Rogers said he did not go check on the Claimant after the wreck. "I just knew he was dead." (Tr., p. 25, line 11) He said right after the wreck he tried to call his boss on his radio. (Tr., p. 25, line 15) Rogers said he called another man who called for him. (Tr., p. 25, line 25- p. 26, line 1) When asked why he didn't go across the street to a neighbor for help or try to talk to Claimant, Rogers said, "Well, I just didn't feel like it—I could stand it." (Tr., p. 26, lines 16-17)

Rogers identified a photo of a dump truck, like the one he drives at work, parked in a private "field drive." (Tr., p. 28, lines 1-25) When asked why his co-worker was allowed to park in the private drive, Rogers responded: "Well, he seen that wreck and all and he knew the road was gonna be full and he backed in there. But he was—I think he was empty." (Tr., p. 29, lines 15-17; Tr. Ex. 3) Rogers then identified another photograph showing another TDOT truck in the first driveway. (Tr., p. 30, lines 17-19; Tr. Ex. 4)

Randy Joe Perry, who was a highway maintenance county supervisor at the time of the wreck, also testified in this cause. (Tr., p. 35, lines 21-23) He said when he arrived at the scene of the wreck, he saw that Rogers had placed the sign that said "road machinery." (Tr., p. 37, lines 13-14) Right in front of

Rogers' vehicle he saw the sign which "one lane road ahead." (Tr., p. 37, line 18)

Perry confirmed that because of complaints that dump trucks scar up driveways, "we just made it a procedure to not pull in; to always pull on the shoulder. Don't try to back in or nothing. Stay off of private drives." (Tr., p. 38, lines 7-10)

After examining pictures of Rogers' vehicle, Perry conceded that it was parked "[p]artly on the roadway and partly on the shoulder." (Tr., p. 39, lines 9-10) Perry testified that in parking where he did instead of pulling off the roadway, Rogers did exactly what Perry would have told him to do if he were standing right there. (Tr., p. 39, line 25- p. 40, line 1)

When asked about pictures of another state truck which was parked in a field drive, Perry was asked if it mattered that it was a field drive as opposed to a paved one. Perry responded:

Yes it does. And especially on a mercy (sic) like that because we're right on the crest of the hill and you can't get too far where he could not see me when I'm trying to help with the traffic. Because our responsibility is to get the safety of this man and, you know, get the traffic through with the emergency vehicles and keep the traffic flowing and not have a big traffic jam . (Tr., p. 40, line 21- p. 41, line 3)

Perry confirmed on cross-examination that the only reason he told the driver of this other truck to park in the field drive was because it was an emergency situation. (Tr., p. 43, lines 6-8) Perry stated that Rogers himself "pull down there to where he wouldn't block, you know, and still could see his truck from oncoming traffic." (Tr., p. 41, line 25- p. 42, line 2) He reiterated that

Rogers' truck, where it was parked at the time of the wreck, was visible to oncoming traffic. (Tr., p. 44, lines 13-16)

Perry further testified that it is actually safer for a dump truck to pull off the shoulder and back onto the highway than to back into the roadway (as they would have to do if they pulled into a private drive). (Tr., p. 44, lines 17-23)

When asked about the dump truck Rogers was driving, he said it was 10 feet to the top of the truck where the strobe light is. (Tr., p. 45, lines 3-4) He said the roadway signs were three foot orange signs with black writing on them. (Tr., p. 45, lines 6-9)

James Daniel Laughlin, TDOT's regional safety coordinator, also testified in this cause. Laughlin testified on direct that the *Manual on Uniform Traffic Control Devices*, hereinafter referred to as MUTCD, directs the State with regard to its policies on signage and temporary traffic control. (Tr., p. 47, line 21- p. 48, line 1) He stated that Part 6 of MUTCD addressing setting up work zones. (Tr., p. 48, lines 16-23) Laughlin was asked to read the following MUTCD language about areas prior to work zones:

Since rural highways are normally characterized by higher speeds, the effective placement of the first warning sign in feet should be substantially longer -- from 8-12 times the speed limit in miles per hour. Since two or more advanced warning signs are normally used for these conditions, the advance warning area should extend 1500 feet or more for open highway conditions.

(Tr., p. 50, lines 4-11; Tr. Ex. 7)

When questioned by the State's attorney, Laughlin acknowledged that the 1500 feet referred to in the passage was for the actual construction zone and

would not have been applicable to where Rogers' dump truck was parked. (Tr., p. 51, line 23- p. 52, line 5) Perry further stated that this section of the manual applies only to the placement of signs and barriers in a construction zone and does not govern where vehicles park while setting up signs. (Tr., p. 52, lines 15-19)

Claimant, Lendell Lynch, testified in this cause. Lynch is a resident of Martin, Tennessee and is currently studying business at the University of Tennessee at Martin. (Tr., p. 53, lines 21-24) Lynch served in the Tennessee Army National Guard following high school and was deployed in Kuwait. (Tr., p. 53, line 25- p. 54, line 8) On the day of the wreck he was employed by Johnny Jackson's cable contractors. He was getting paid by the job. (Tr., p. 54, lines 12-19) He stated that he usually did one to two jobs a day and got paid thirty to forty dollars for each. (Tr., p. 55, lines 1-8)

Claimant testified that the truck destroyed in the wreck belonged to his father. (Tr., p. 55, lines 9-12; Collective Tr. Ex. 5)

When asked what he remembered about the wreck, Claimant said:

I remember getting up and going to Alamo, Tennessee to go to work. Leaving the shop and turning right off of Highway 54 onto Highway 152. And made a phone call quick, told them I was headed there and that's the last thing I remember. (Tr., p. 56, lines 9-12)

Lynch stated that he has no recollection of passing any signs or of the collision itself. (Tr., p. 56, lines 17-25) Lynch said the next thing he remembers is seeing rescue squad worker Jerry Privitt. (Tr., p. 56, lines 17-18)

Lynch testified he was taken by ambulance to the hospital in Humboldt, Tennessee, then flown by helicopter to the Med in Memphis. (Tr., p. 57, lines 7-9) Lynch said he did not sustain serious injuries; he just had glass stuck in his arm. (Tr., p. 57, lines 15-16) Lynch testified he did not choose himself to go by helicopter to Memphis. (Tr., p. 57, lines 21-23)

Lynch said that as a result of the collision he lost his job because he no longer had a vehicle he could drive for work. (Tr., p. 58, lines 1-3) He said he had continued to have difficulty finding employment after the wreck because “nobody wants to hire anybody with a driving job that’s had a wreck where he got flown to the Med in Memphis.” (Tr., p. 58, lines 9-11) Lynch said he now has a summer job working for a construction company. (Tr., p. 58, lines 15-16) Lynch testified that the collision is not preventing him from doing anything physical. (Tr., p. 58, lines 17-19)

On cross-examination, Lynch admitted that prior to the accident that is the subject of this claim, he was involved in several motor vehicle accidents. (Tr., p. 59, lines 8-12) He further acknowledged that after the accident that is the subject of this claim, he was involved in another, very similar collision in which he rear-ended a vehicle in the roadway. (Tr., p. 59, lines 13-21)

Claimant also admitted that on the morning of the collision he had his cell phone with him. Upon reviewing a copy of his cell phone record for the billing period April 21-May 20, 2012, he acknowledged that the numbers called included his parents and his ex-wife and that a number of calls were made between 8:00

a.m. and 9:00 a.m. the morning of the wreck, including some lasting several minutes. (Tr., p. 62, line 3- p. 64, line 10; Tr. Ex. 8)

State Trooper and crash investigator Christopher Johnstone also testified in this matter. He stated that on May 9, 2012, he was dispatched to investigate the crash between a TDOT truck and the vehicle being driven by Lendell Lynch. (Tr., p. 68, line 23- p. 69, line 1) He testified the collision occurred around 8:30 a.m., (Tr., p. 69, lines 2-3) and that the speed limit on that stretch of State Route 152 was 55 mph. (Tr., p. 69, lines 7-9)

Johnstone said when he arrived, the TDOT dump truck was facing east on 152 and that it was parked partially on the roadway and partially off. (Tr., p. 69, lines 18-19) Johnstone said he took photographs at the scene (Tr., p. 70, lines 1-10) and also "walked west from where the crash occurred and looked at the entire length there." (Tr., p. 71, lines 2-4) He said he saw no indications of braking by Mr. Lynch. (Tr., p. 71, lines 17-20) He also noted that the TDOT truck was parked in a way that it could be seen by Claimant prior to the collision. (Tr., p. 71, lines 21-25)

On cross-examination, the following exchange took place:

Q. And so you would agree with me that Mr. Rogers parked that TDOT truck beyond the crest of the hill as depicted in collective Exhibit 2?

A. Yes.

Q. So he was over the top of the hill?

A. He was on top of the hill. (Tr., p. 76, lines 1-6)

Trooper Shane Moore also testified for Defendant. Moore, who has been with the Tennessee Department of Safety for 8 years, is on the Critical Incident Response Team, CIRT Team 4. (Tr., p. 84, lines 18-25) Moore did an additional 240 hours of training before joining the CIRT Team. (Tr., p. 85, lines 20-22) As part of that work, he is called upon to reconstruct accidents, which often involves calculating sight distance and stopping distance. (Tr., p.85, lines 9-15)

Moore testified that he was asked to provide “distance of perception from the Ford Ranger’s perspective . . . and that distance would have been sufficient for the Ford Ranger to have stopped before impact.” (Tr., p. 86, lines 20-24)

Moore testified that he used the photo labeled Tr. Ex. 11 to determine that the dump truck came to a rest directly across the street from a house. (Tr., p. 87, lines 11-25) When he visited the site in November, 2013, he placed a laser measuring device called a total station in the driveway of the house in the photograph. (Tr., p. 88, lines 19-23) Moore noted that the total station also reads the roadway elevation. (Tr., p. 89, lines 1-3)

Moore opined that the roadway has an elevation of 0.0254 percent or 1.4549 degrees. He said for the length of the roadway it is not a significant incline. (Tr., p. 91, lines 13-18; Tr. Ex. 12) Moore acknowledged on cross-examination that as you get closer to the hill, the grade increases. (Tr., p. 104, lines 5-7)

Moore walked west on State Route 152 to see how far he could go and still see the sergeant who was operating the total station. He said he calculated the minimum distance because he was not sure what foliage might have been on

a tree that was in his line of sight. Moore opined that the minimum distance was 1298 feet. (Tr., p. 89, lines 3-15) So, he concluded, the TDOT vehicle would have been visible from 1298 feet away on State Route 152. (Tr., p. 89, lines 18-22)

Moore opined that at a speed of 55 mph (the speed limit on 152), Claimant's vehicle would have needed a distance of 265 feet to stop. (Tr., p. 96, lines 1-2) At 70 mph it would have taken 387 feet to stop. (Tr., p. 96, lines 23-24) Moore further opined that the roadway elevation was not a contributing factor to the collision. (Tr., p. 97, lines 13-15)

Moore stated that a construction vehicle with a flashing strobe light on top "does have the right to be in the roadway as long as his emergency equipment is working properly." (Tr., p. 98, lines 8-11)

When asked whether Tennessee drivers have a reasonable expectation that there won't be vehicles parked in the roadway, Moore replied, "[o]nly on Interstate 40." (Tr., p. 105, line 9) He explained that only interstates, which do not have driveways, are considered "closed" highways. (Tr., p. 105, line 11)

Moore was asked whether a TDOT vehicle parked half on the roadway would have been disguised by foliage or trees behind it. He responded: "If it were camouflaged." (Tr., p. 108, line 22) Moore agreed that the photographs show that the tree line is more pronounced toward the accident site, making it more difficult to see. (Tr., p. 109, lines 6-20; Tr. Ex. 14) He said there was nothing on the roadway to prevent Claimant from seeing an orange warning sign 500 feet from where the collision took place. (Tr., p. 111, lines 11-12)

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the arguments of counsel and, indeed, the entire record as a whole. After carefully weighing the credibility of each of the witnesses, the Commissioner makes the following findings of fact.

Under Tennessee law, a negligence claim requires that plaintiff prove:

- (1) a duty of care owed by the defendant to the plaintiff;
- (2) conduct by the defendant falling below the standard of care; (3) an injury or loss; (4) causation in fact; and
- (5) proximate or legal cause. *Coln v. City of Savannah*, 966 S.W. 2d 34, 37 (Tenn. 1998).

Duty is simply the legal obligation, based on the reasonable person standard, that the State owes the Claimant to protect him against unreasonable risks of harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). As stated by the Tennessee Supreme Court in *Rice v. Sabir*, 979 S. W.2d 305, 308 (Tenn. 1998),

In analyzing duty, the court must balance foreseeability and gravity of the potential risk of harm to a plaintiff against the burden imposed on the defendant in protecting against that harm. *McClung v. Delta Square Ltd. Partnership*, 937 S. W.2d 891, 902 (Tenn. 1996).

In the case at bar, in analyzing a potential breach of duty, it is critical to keep in mind that the source of jurisdiction in this case is the negligent operation of the TDOT dump truck being driven by Mr. Rogers. Thus, there is one primary issue of negligence: whether the fact that Rogers parked his dump truck partly

on and partly off highway 152 when there was a private driveway approximately 75 feet from the site of the collision was a breach of duty to the Claimant. Relatedly, the Court must determine whether Claimant was sufficiently warned of the danger that was ahead because his lane of traffic was partially blocked by the truck.

In support of his position, Claimant cites *Barr v. Charley*, 215 Tenn. 445; 387 S.W.2d 614 (Tenn. 1964). In *Barr*, Mr. Charley apparently had a flat tire and no spare. He left his car partially blocking the roadway where decedent's car hit it, resulting in decedent's death. The Court held that defendant violated a Tennessee statute making it illegal to park a vehicle on state roads outside business or residential areas. Although the statute did not apply to disabled vehicles, the court emphasized that the car was "not that disabled," *id.* at 616, and could have been moved to a wider section of the overpass. *Id.* The Court noted that "a motorist has the right to assume that his passage will not be blocked by the illegal placement of another vehicle, and he is not required to maintain such control of his vehicle as to stop before striking an obstruction which he has a right to assume will not be there." *Id.* at 616-617. It should be noted that in a more recent case, *Rickets v. Robinson*, 169 S.W.3d 642, 647 (Tenn. App. 2004), the Court of Appeals held that a party was not entitled to a jury instruction that a motorist has a right to assume a passage will not be blocked. The Court emphasized that the party's reliance on *Barr v. Charley* was misplaced because it was a contributory negligence case decided before Tennessee courts adopted comparative fault. *Id.*

Claimant also suggests the Commission look for guidance to Am. Jur.2d. which lists the following factors for determining the suitability of a stopping place for a vehicle, including: (1) whether the vehicle is on any portion of the roadway; (2) whether the vehicle can be readily seen by other motorists and (3) whether the vehicle is reasonably capable of being moved to a safer location. 8 Am. Jur.2d *Automobiles and Highway Traffic* §§ 905 & 906 (1980).

Applying these factors to the instant case, it is clear the State dump truck was on a portion of the roadway. Although the Claimant argued that the vehicle's location with respect to the crest of the hill and with respect to foliage made it difficult for motorists to see, the State proffered the testimony of an expert who stated the truck could be seen from a distance of 1298 feet. (Tr., p. 89, lines 18-22) And although the Claimant argued that the State could have prevented the accident by parking the dump truck in a driveway that was not more than 75 feet away, the highway maintenance supervisor testified that it is actually safer for a dump truck to pull off on to the shoulder and back onto the highway than to back into the roadway, as they would have to do if they pulled into a private drive. (Tr., p. 44, lines 17-23)

In support of its position, the State relies on a 1954 Court of Appeals case, *Carney v. Goodman*, 38 Tenn. App. 55, 270 S.W.2d 572 (1954). In *Carney*, Defendant parked her 1941 Plymouth Coupe in front of a gift shop "standing at an angle in the highway with its left rear about 5 feet and its left front about 2 feet on the paved part of the east half, of the northbound traffic lane." *Id.* at 573. When a truck stopped in the lane because half of the northbound lane was

blocked by the Plymouth, another truck collided with it, causing the collision and the resulting personal injuries and damages. In analyzing whether the proximate cause of the collision was the negligence of the Plymouth or the negligence of the truck driver who ran into the standing vehicle, the Court looked at whether the “driver running into the standing vehicle can see it in time to enable him, by use of due care, to avoid the collision?” *Id.* In upholding the directed verdict for the defendant truckers, the Court found that the driver of the second truck did not become apprised of the vehicles obstructing his way until the collision was inevitable and therefore his negligence was not the proximate cause of the wreck. *Id.*

The question in this case is a little different, both because this case also was decided before Tennessee adopted the doctrine of comparative fault, and because, in the case at bar, there is no evidence that Mr. Lynch saw the obstruction in the road at all. The state trooper who investigated the case testified that he saw no sign at the scene of any braking. (Tr., p. 71, lines 17-20) In fact, the parties seem to be in agreement that Mr. Lynch made no attempt to stop prior to plowing into the back of the TDOT dump truck, leading to the conclusion that he either didn't see the truck at all or at the very least he didn't see it in time to react. The question is, therefore, whether with the exercise of due care, Mr. Lynch should have seen the TDOT truck in time to have avoided the collision, making his negligence a proximate cause of the accident.

In support of its contention that, with the exercise of due care, Lynch would have seen the TDOT dump truck in time to avoid the collision, the State of

Tennessee proffered the testimony of an expert, State Trooper Shane Moore. Moore opined the TDOT vehicle would have been visible from 1298 feet away on State Route 152. (Tr., p. 89, lines 18-22) He further testified that at a speed of 55 mph (the speed limit on 152), Claimant's vehicle would have needed a distance of 265 feet to stop. (Tr., p. 96, lines 1-2) At 70 mph it would have taken 387 feet to stop. (Tr., p. 96, lines 23-24) Moore further opined that the roadway elevation was not a contributing factor to the collision. (Tr., p. 97, lines 13-15)

The State also proffered the testimony of the dump truck driver, Johnny Ray Rogers, that the strobe light on top of his truck and his hazard lights were on (Tr., p. 24, lines 23-25), and that he placed a warning sign that read "road machinery ahead" some 500 feet before Lynch would have reached the truck. (Tr., p. 33, lines 1-13) Rogers further testified that he saw Lynch when he was some 300 feet from the dump truck (Tr., p. 33, lines 20-23) and tried to wave him around the dump truck, to no avail. (Tr., p. 25, lines 1-7)

It is clear that a policy of never parking a TDOT truck in a private drive could, under the right facts, lead to a finding of negligence. However, the Commission **FINDS** that Roger's decision to park the TDOT dump truck on this stretch of Highway 152 with his strobe lights and hazard light turned on and with a warning sign 500 feet in front of the truck was not a proximate cause of the collision under these facts.

The Commission **FURTHER FINDS** that with the exercise of due care Lendell Lynch clearly could have seen the TDOT dump truck in time to avoid the

collision and that Lendell Lynch's negligence was a proximate cause of the collision on May 9, 2012.

In the event that some appellate court should not agree with the Commission's finding that the State was not negligent, the Commission **FINDS** alternatively that Lendell Lynch's negligence exceeded fifty percent (50%) of the total.

In light of the above findings, Claimant's claim is hereby **DISMISSED**. Costs of this cause are taxed pursuant to T.C.A. § 9-8-307 (d).

IT IS SO ORDERED.



NANCY C. MILLER-HERRON
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed by first class U.S. mail, postage prepaid, electronically transmitted, or hand-delivered to:

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this the 29th day of June, 2015.

Paula Merrifield

PAULA MERRIFIELD, CLERK
TENNESSEE CLAIMS COMMISSION