[Cite as *Popovich v. Ohio Dept. of Transp.*, 2002-Ohio-3505.]

IN THE COURT OF CLAIMS OF OHIO

RATKO POPOVICH, et al.	:	
Plaintiffs	:	CASE NO. 2000-02704
v.	:	DECISION
DEPARTMENT OF TRANSPORTATION, et al.	:	Judge Russell Leach
Defendants	:	

: : : : : : : : : : : : : : : : :

{¶1} Plaintiffs, Ratko and Mira Popovich, and Roger and Eleanor Rudd, assert claims of negligence and loss of consortium against defendants, Ohio Department of Transportation (ODOT), and the Office of Risk Management. This case was tried to the court on the sole issue of liability.

{¶2} On August 20, 2001, plaintiffs filed a motion to strike the opinion testimony of Carl Leonhart (Leonhart) with regard to the issues of fault and proximate causation. Upon review, plaintiffs' motion is GRANTED on that limited basis.

{¶3} At approximately 5:10 p.m., on January 24, 1997, Ratko Popovich was operating his vehicle northbound on SR 45 in Mahoning County, Ohio. Roger Rudd was a passenger in the vehicle. SR 45 is a four-lane roadway, with two northbound lanes and two southbound lanes, separated by a double yellow line. It was dusk, and the entire road was wet with snow and slush. Plaintiffs[1] were

[1] "Plaintiffs" shall refer to Ratko Popovich and Roger Rudd throughout this decision.

traveling in the left northbound lane, guided by two tire tracks that had formed in the snow. A snowplow was traveling in the left southbound lane. As it passed, it forced snow and slush onto the hood and windshield of plaintiffs' vehicle. Immediately thereafter, Popovich lost control of his vehicle, crossed the center line and collided with a truck. Plaintiffs do not remember the events surrounding the accident and did not testify on the issue of liability.

{¶4} Plaintiffs contend that the snowplow in question was operated by ODOT, that ODOT was negligent in the operation of the snowplow, and that ODOT's negligence proximately caused plaintiffs' injuries. Defendants contend that plaintiffs have not proven that it was ODOT's snowplow, but that even if it were, the snowplow operator was not negligent.

{¶5} Leonhart was driving directly behind plaintiffs' vehicle for about four or five miles immediately prior to the accident. He characterized the weather condition as "warm snow." He estimated that he was driving approximately thirty-five to forty miles per hour and that plaintiffs were traveling at about the same speed. He saw the snowplow as it was traveling in the left southbound lane and estimated that its speed was between thirty-five and forty-five miles per hour. The snowplow was a yellow color and had flashing yellow lights. In Leonhart's opinion, it appeared to be an ODOT snowplow. It had its blade down and was plowing snow into the right southbound lane, but snow was also being thrown onto the cars in the left northbound lane. The snowplow was close to the center line, which had accumulated slush and snow. Leonhart stated that the thrown snow came from the left front tire of the snowplow. He

estimated that Popovich lost control of his vehicle within four or five seconds after it was covered with snow.

{¶6} Leonhart stated that when he saw the snowplow coming, he turned on his windshield wipers because he anticipated that his vehicle would become covered with snow. He stated that he saw the plow coming before it passed plaintiffs' vehicle. He described the thrown snow as a "heavy splash," like hitting a big puddle of water. He steered his vehicle toward the right lane to avoid being splashed, but to no avail. He stated that slush appeared to spray from all four tires of the snowplow.

{¶7} Aaron Curry, plaintiffs' expert, stated that he was a vocational trainer with the Wyoming Department of Transportation (WY-DOT), that he had operated snowplows and worked at WY-DOT for approximately twenty-two years, that he had trained WY-DOT's operators in maintenance and snow removal for eight years, and that he had investigated snowplow accidents. He stated that a snowplow operator must be aware of his surroundings and aware of any hazards which he may be creating. He opined that, given the speed involved in this incident and the angle of the plow and amount of coverage on the cars, the snow must have come from the plow itself rather than from the tires. He further opined that the driver was not operating the plow in a safe manner and that he should have been aware that the plow was throwing snow into the path of oncoming traffic. It was his opinion that the driver caused the accident by allowing snow to come off the leading edge of the plow and land on plaintiffs' car. Curry conceded that he did not know what angle the plow was turned.

{¶8} Defendants' expert, Sergeant Toby Wagner, the supervisor of the Crash Reconstruction and Analysis Unit for the Ohio State

Highway Patrol, stated that ODOT was responsible for the removal of snow and ice from state routes. Based upon the crash report and Leonhart's testimony, he opined that plaintiffs' vehicle was traveling at an excessive speed given the road conditions; that under those conditions, any motorist should have anticipated the possibility that their view would be obscured; and that plaintiffs' failure to anticipate the need to remove the substance from the windshield proximately caused the accident. He further opined that the slush that struck plaintiffs' windshield could have come from either the plow blade or its tires. According to Sgt. Wagner, if the snow came from the blade, throwing snow into oncoming traffic could have been avoided by adjusting the blade, but if the snow came from the tires, the condition could not have been avoided.

{¶9} Ed Hartman, an employee of ODOT, testified that he had operated snowplows for ODOT for twenty years in Mahoning County. He stated that SR 45 was a secondary road maintained by ODOT and that ODOT did not subcontract work for removal of snow or ice on its routes in Mahoning County. He described ODOT's snowplows as being either white or yellow single-axle or tandem trucks with plows. He stated that it was possible for workers to plow a route without its being listed on their time cards, because a worker could receive a call while working on one route and be directed to go to another. He stated that no other entity should have been plowing SR 45 on that day and that in his experience he has never seen or heard of another municipality plowing state routes.

{¶10} Hartman further stated that the goal was to make roads safe and, in order to do that, the operator must be aware of his surroundings at all times. He further stated that when the plow blade is angled all the way to the right, snow will go to the right

but there is a chance for snow to come off the leading edge of the plow blade if it is not angled correctly. He also stated that it is not safe to plow snow into oncoming traffic and that it would be unlikely for tires to be throwing snow while the truck was plowing.

{¶11} William L. Johnson, the other driver involved in the accident, testified that there were two cars between the snowplow and his vehicle, that he was driving about thirty-five to forty miles per hour before the collision, that the plow was throwing snow into the right lane, and that he followed the plow because it was clearing snow. He did not recall seeing an ODOT emblem on the truck, but he did see its flashing lights. He did not recall seeing the plow throw any snow into oncoming traffic, but he stated that once plaintiffs' vehicle passed the plow, the rear end of the vehicle began to slide and turn, resulting in the collision with his vehicle.

{¶12} Robert J. Pallow, Jr., a safety and health department consultant with ODOT since 1993, testified that his office conducted the preliminary investigation for this claim. After researching all the records for its snow plowing workforce, he did not find any ODOT records specifying which trucks, if any, were plowing that day or where they may have been plowing. He stated that if the blade is down and snow is coming off the left edge, it could be caused by a wrong blade angle or the driver of the plow could be speeding. He stated that it would be improper not to have the blade all the way down because slush could reach the tires and be kicked up into oncoming traffic.

{¶13} The court must first decide whether plaintiffs have proven by a preponderance of the evidence that ODOT owned the snowplow in question. Based upon the testimony presented at trial,

the court finds that plaintiffs have proven by a preponderance of the evidence that the snowplow was owned by ODOT based upon the following facts: 1) the accident occurred on SR 45, a route maintained by ODOT; 2) the snowplow was yellow with flashing lights and ODOT's snowplows were yellow or white; and, 3) it was possible for ODOT to plow a route without it showing up on an employee's time card.

{¶14} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendants owed them a duty, that they breached that duty, and that the breach proximately caused plaintiffs' injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶15} Based upon the testimony and evidence presented at trial, the court finds that plaintiffs have failed to prove that defendants breached any duty owed to them. Plaintiffs have not shown by a preponderance of the evidence that the snow that covered their vehicle was thrown from the plow blade. The testimony of Leonhart and Johnson, witnesses to the accident, established that the snow was coming from the tires of the truck and that the truck was plowing snow to the right. There is insufficient evidence in the record to establish that ODOT's snow removal work fell below the standard of care owed to plaintiffs. Accordingly, judgment shall be rendered in favor of defendants.

RUSSELL LEACH
Judge

Entry cc:

Jeffery J. Jurca
Robert B. Graziano
175 South Third Street
Columbus, Ohio 43215

Attorneys for Plaintiffs Ratko Popovich and Mira Popovich

Gregg A. Rossi
26 Market Street, 8th Floor
P.O. Box 6045
Youngstown, Ohio 44501

Attorney for Plaintiffs Roger L. Rudd and Eleanor Rudd

Sally Ann Walters
65 East State St., 16th Fl.
Columbus, Ohio 43215

Assistant Attorney General

HTS/cmd

Filed 5-16-2002
Jr. Vol. 705, Pgs. 80-81
To S.C. reporter 7-9-2002