Overcoming the Assured Clear Distance Defense in Trucking Cases

Many defense lawyers try to defend trucking cases by asserting some form of comparative negligence on the part of the plaintiff. Often times, they allege that the plaintiff failed to maintain an assured clear distance ahead in violation of R.C. 4511.44. This defense is asserted when a semi-tractor performs an illegal U-turn on dark rural highway, and the plaintiff drives underneath a poorly marked flatbed trailer; or when a semi-tractor pulls suddenly across a highway into the path of the plaintiff with the right-of-way; or when a poorly lit semi-tractor/trailer becomes disabled, and the driver fails to adequately warn drivers that come along afterward.

This article will provide a primer on the defense, and strategies for overcoming it in the various scenarios outlined above.

Overcoming the Assured Clear Distance Defense: A Primer on ACDA Law

First and foremost, any defense based on comparative negligence must be plead as an affirmative defense, or it is waived. See. Civ. R. 8(C); *Jim's Steakhouse, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20, 688 N.E.2d 506 (1998) ("affirmative defenses other than those listed in Civ. R. 12(B) are waived if not raised in the initial pleadings or in an amendment to the pleadings.")

Since it is an affirmative defense, the defendant bears the burden of proving the plaintiff's negligence that proximately caused the resulting injury. *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E.2d 851 (1946) ("To warrant the submission of the issue of contributory negligence to the jury it is essential that some evidence be adduced tending to show that the plaintiff failed in some respect to exercise the care of an ordinarily prudent person under the same or similar circumstances, and that such failure was a proximate cause of his injury and resulting death.") It is axiomatic that "a person who claims that certain facts exist must prove

them by a preponderance of the evidence." OJI CV 303.03. Accordingly, if a defendant is not able to sustain this burden of proof, the defense – as with any other claim – is subject to being dismissed by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.")

The Assured Clear Distance statute is set forth at R.C. 4511.21(A), and provides in relevant part as follows:

> No person shall operate a motor vehicle … at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle … in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead.

The elements for proving a violation were succinctly summarized in the seminal case of *Pond v. Leslein*, 72 Ohio St.3d 50, 52, 1995-Ohio-193 (1995): A driver violates the ACDA statute if "there is evidence that the driver collided with an object which (1) was ahead of him in his path of travel, (2) was stationary or moving in the same direction as the driver, (3) did not suddenly appear in the driver's path, and (4) was reasonably discernible." All elements must be present in order for a violation to have occurred.

Usually it is the Defendant that has the easy job – to lay in the weeds and throw sticks in our path as we try to prove the many elements of one or more claims. When we set out to undermine an ACDA defense, we have the easy job of simply negating one or more elements the Defendant must prove to get its defense to the jury. It's as easy as proving that the object was neither stationary, or moving in the same direction as the Plaintiff at the time of the collision

(Pond element #2), such as when a truck pulls from a private drive or across an intersection in violation of R.C. 4511.44.

What is required at the front end, is a little forethought and planning as you go into depositions of the parties. It is important to first establish that the plaintiff was not speeding or violating any other statute that would cause her to forfeit her preferred status as the driver with the right of way. Next, plan your questions of the Defendant using the language from *Pond, supra*. For instance,

> "Q. Was your vehicle stationary or moving when your vehicles collided?
> A. It was moving.
> Q. Immediately before the collision, your vehicle was moving in an easterly direction according to the police diagram, do you see that?
> A. I don't know directions.
> Q. Do you have the ability as we sit here today then to dispute that the police sketch is correct.
> A. No.
> Q. Likewise, do you dispute that the Plaintiff's vehicle was moving in a northerly direction immediately before your vehicles collided?
> A. That's what it says.
> Q. So would you agree that your vehicle was not moving in the same direction as the plaintiff immediately before the collision?
> A. I agree."

Depending on the circumstances of your case, you may also be able to undermine *Pond* elements 3 and 4 through careful planning and artful questioning (i.e., establish that the object appeared suddenly in the Plaintiff's path, or that the object was not reasonably discernible). See *Cross v. Krishnan*, 2001-Ohio-1645 ("the assured clear distance statute is not violated when 'such assured clear distance ahead is, without [the driver's] fault, suddenly cut down or lessened by the entrance within such clear distance and into his path or lane of travel an obstruction which renders him unable, in the exercise of ordinary care, to avoid colliding therewith.") *See also Erdman v. Mestrovich*, 155 Ohio St. 85, 92 (1951); *Smiley v. Arrow Spring Bed Co.*, 138 Ohio

St. 81, 88 (1941); *Balas v. Lofland*, No. H-89-50, 1990 Ohio App. LEXIS 4025, at *7 (Ct. App. Sep. 14, 1990).

Obviously, your ability to undermine *Pond* elements 3 and 4 will require much more thought and planning. If discernability is an issue, this process will likely involve consultation with a conspicuity expert. This should take place BEFORE depositions of the parties, so you know what information to bring forth during the depositions. The testimony that is developed through this process will help form the basis of your conspicuity expert's testimony to come later.

All of this requires a strong working knowledge of certain core parts of Chapter 4511, and how each inter-relates with the others. Begin with the fact that your client had the "right of way", and understand that ways it can be forfeited. The law is fairly clear -- the Plaintiff has the absolute right of way as a motorist in *lawful* use of the highway. R.C. 4511.01; OJI CV 411.4.

"Right of way" is defined as "the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path." *Id*.

The phrase "IN A LAWFUL MANNER" is interpreted in the Ohio Jury Instructions to confer *preferred party* status on the driver with the right of way. The Supreme Court held in *Deming v. Osinski*, 24 Ohio St.2d 179, 265 N.E.2d 554 that it is error for a trial court to discount a motorist's "preferred party" status unless he violated a legal requirement imposed on him. Thus, it was error for the trial court to submit the issue of contributory negligence to the jury on a claim that the driver did not "look effectively." Persuaded by this defense, the trial judge had denied Plaintiff's motions and erroneously instructed the jury as follows: "Plaintiff is required to look, look effectively and continue to look and otherwise remain alert…" The Supreme Court

held that such was error. Construing the phrase "in a lawful manner" (from the former General Code), the Supreme Court said this phrase "is the *sine qua non-obligation* placed upon the vehicle upon which the right of way is conferred." The Court held that the preferred party thus has an absolute right of way unless he or she violates another statute. And failing to "look and look effectively" is not a violation of the law. Since there was no evidence that the Plaintiff had done anything to lose his preferential right of way, other than perhaps not looking effectively, it was error for the trial judge to submit the issue of contributory negligence to the jury. *Id* at 182-183. See also *Morris v. Bloomgren*, 127 Ohio St. 147, 158-59, 187 N.E. 2, 6 (1933) (holding that a driver with the right of way does not have a duty to take evasive action until after he discovers and appreciates the danger).

For these reasons, care should be taken to prepare the Plaintiff for questions by the defense attorney as to when he or she first saw the Defendant's vehicle in his or her lane of travel. In this process, it is important to analyze the Plaintiff's conduct in the moments preceding the crash, and insulate the Plaintiff from spurious defense claims that the Plaintiff was violating the law.

Disabled Motor Vehicle Claims

The ACDA defense is a major obstacle in Disabled Motor Vehicle claims. The law in Ohio is that a vehicle left in the roadway does not automatically constitute negligence. In fact, Ohio courts have often held that the disabled motor vehicle in the roadway is a reasonably discernable object and therefore the ACDA defense would apply.

In the case of *Smiley v. Arrow Spring Bed Co.*, 138 Ohio St. 81, 92, 33 N.E.2d 3, 5 (1941) the plaintiff crashed into an "unlighted parked truck" that was just beyond the crest of a hill. The Court in this instance found that even if the truck was parked beyond the crest of the hill and

regardless of oncoming traffic's headlights, the plaintiff should have driven at a speed that allowed him to stop within an assured cleared distance ahead. *Id.* Other states such as Michigan in *Ruth v. Vroom,* 245 Mich. 88, 222 N.W. 155 (1928), Pennsylvania in *Stark v. Fullerton Trucking Co.*, 318 Pa. 541 (1935), and Iowa in *Lindquist v. Thierman*, 216 Iowa 170 (1933) have all interpreted their respective assured cleared distance statutes in a similar fashion.

In examining the plaintiff's case, attention must be paid to the fact that the Ohio Supreme Court has held that as a matter of law, "an automobile, van, or truck stopped on a highway in a driver's path during daylight hours is, in the absence of extraordinary weather conditions, a reasonably discernible object . . . ." *Smiddy v. Wedding Party, Inc.*, 30 Ohio St. 3d 35, 40 (1987). Along the same line, attention must be paid to the Ohio Revised Code Section 4511.66 which precludes persons from parking their vehicle on the highway, however,

> It does not provide for an absolute prohibition against stopping, parking, or leaving a vehicle standing on the traveled portion of a highway. Rather, doing so is prohibited only if it is *practicable* to stop, park, or leave the vehicle off the traveled portion of the highway. Further, the statute exculpates the driver if it is *impossible* to avoid stopping and temporarily leaving the disabled vehicle in such position.

Id. at 37-38.

Plaintiffs' counsel have made the case, and thus courts have recognized, that in some situations, the ACDA defense should not apply. The Ohio Supreme Court held, "[I]n order to enjoy the benefit of the legal excuse and to avoid the legal imputation of negligence *per se*, the motorist must establish that, without his fault, and because of circumstances over which he had no control, compliance with the law was rendered impossible." *Id* at 87. The Plaintiff's attorney should note that most often the assured cleared distance defense is overcome in situations where the plaintiff's lane is cut down suddenly, where an oncoming vehicle cuts down the assured cleared distance, or where the plaintiff comes in contact with an "undiscernible strip or patch of

ice on the pavement immediately in front of the obstacle." *Id.* at 91, *See respectively Matz v. J. L. Curtis Cartage Co.*, 132 Ohio St. 271 (1937), *Hangen v. Hadfield*, 135 Ohio St. 281 (1939), *Diederichs v. Duke*, 234 Mich. 136, 207 N.W. 874 (1926).

For these reasons, case selection is critical. So if the facts don't support the claim, don't take the case. But if you do take the case, insulate the plaintiff's testimony using the approaches suggested above.

Illegal U-Turns

Ohio Revised Code 4511.37 prohibits turns in the roadway unless the vehicle can be seen from 500 feet by vehicles traveling in either direction. While a few exceptions are made for emergency vehicles or as exempted in section 4511.13, generally speaking, most vehicles are subject to this restriction.

A leading case on the use of the ACDA defense in the illegal U-turn context is *Ridenour v. Ohio DOT*, No. 97API05-731, 1997 Ohio App. LEXIS 6003 (Ct. App. Dec. 23, 1997). *Ridenour* struck an ODOT snow plow which was engaged in a U-turn at the county line. *Id.* at 2. The trial court in deciding the case held that the plaintiff in this case was protected from the assured cleared distance defense under the sudden emergency exception as elaborated in *Erdman v. Mestrovich*, 155 Ohio St. 85 (1951).

When examining a case involving an illegal U-turn, plaintiff's negligence in travelling over the indicated speed limit does not necessarily preclude recovery. Ohio Courts have found that "while the evidence of plaintiff's speed (driving 30 miles an hour in a 25-mile-an-hour zone) shows him to have been driving at a prima facie unlawful rate of speed, nevertheless, assuming such driving negligent, the evidence does not justify the drawing of an inference as a matter of law that his negligence proximately caused or contributed to cause the accident." *Tenhunfeld v.*

Parkway Taxi Co., 105 Ohio App. 425, 432 (1957). This case hinged on the facts of whether or not the sudden emergency exception created by a vehicle suddenly pulling out in the path of the plaintiffs vehicle was eliminated due to the plaintiff travelling over the marked speed limit.

CONCLUSION

Overcoming the comparative fault defense based on ACDA statute violations begins at the front end with proper case selection. It requires a thorough understanding of the facts of your case, and the law as cited above. Through proper planning and preparation going into depositions, these defenses can be disposed of through summary judgment, leaving defense counsel unable to fault the plaintiff in causing the crash.