

**ORIGINAL**

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COURT OF CLAIMS  
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2014 SEP 12 PM 3:17

DARLENE LANE FERRARO

Plaintiff

v.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER

Defendant

CASE NO. 2011-10371

JUDGE PATRICK M. McGRATH

MAGISTRATE  
ROBERT VAN SCHOYCK

**DEFENDANT'S POST-TRIAL BRIEF**

Towing a car dolly on a busy highway at night—having failed to ensure that the dolly was properly connected or that its lights and brakes were working—Gary Fury stopped in the middle of dense traffic when the dolly came unhitched, instead of pulling forward or to either side even though its chains were still connected. His passenger, Junior Lane, walked out into the busy night traffic to try to fix it instead of calling for help and waiting. Traffic continued to flow around this hazard. Driving behind a semi-truck that swerved at the last second, Dr. Rolf Barth was unable to perceive the hazard until it was too late— even though he braked and swerved to avoid a collision. As Dr. Barth swerved, Junior Lane jumped *into* his path of travel. As a result, Junior Lane was struck by Dr. Barth's vehicle and died. The Brookpark Police Department's unusually thorough investigation resulted in the prosecutor's decision that Dr. Barth was not at fault for the accident. Instead Gary Fury was charged with two violations. Eyewitnesses also reached the same conclusion—that Gary Fury was at fault in creating the accident.

Through a series of bad decisions, Gary Fury and Junior Lane created a hazard in the roadway— an accident waiting to happen. The Defendant's employee, Dr. Rolf Barth, was not at fault in the accident. Although his car was involved in the collision, it was a collision that was

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bound to happen because the hazard in the roadway was not discernible until it was too late for Dr. Barth's evasive action to be effective. With a truck and dolly parked in the middle of a busy highway during the darkest part of the night, Dr. Barth had no chance to see the hazard in time after a semi-truck swerved at the last second.

Accordingly, judgment must be entered in favor of the Defendant.

**I. Gary Fury's series of bad decisions created an accident waiting to happen.**

The accident leading to Junior Lane's death was the proximate result of a series of bad decisions by Gary Fury, who created a situation where someone was bound to be hurt. His actions violated several traffic laws, and he is therefore responsible as being negligent *per se* as well as simply for acting in a reckless and unreasonable manner in doing the following:

- Choosing to operate a dolly with an incompatible hitch receiver;
- Failing to ensure that the hitch was secure;
- Failing to ensure that the lights on the dolly were operable;
- Failing to ensure that the dolly's brakes were operable;
- Choosing to stop in the middle of traffic on a busy highway at night;
- Deciding not to pull to either berm of the highway;
- Deciding not to pull forward to an easily-accessed berm straight ahead; and
- Allowing or directing his passengers to exit the vehicle on the busy highway at night rather than calling for and waiting for assistance.

This series of reckless decisions started with Gary Fury choosing to use an incompatible hitch system. Timothy Tuttle, the defendant's crash reconstructionist, identified the problem that led to the failure of the dolly. Tr. at 308-310, 399-400. The hitch receiver and pintle hitch were not compatible. Tr. at 308-310, 399-400. The plaintiff offered no alternative explanation.

Next, as he admitted in his trial testimony, Gary Fury recklessly disregarded his duty to ensure that the dolly was securely hitched to his truck before getting on the busy highway.

Transcript of trial deposition of Gary Fury, at 92-93. Even more reckless is his admission that he did not bother to check that the lights and brakes were working. Fury trial depo. at 92-93.

- 5 Q. Okay.  
6 So, when you were under oath and  
7 said, I'm not going to let nobody hook up my  
8 stuff, I'm going to do it myself, was that -- was  
9 that actually the case, or did you, in this case,  
10 let Junior?  
11 A. I didn't hook it back up after it was  
12 at my house.  
13 Q. Okay.  
14 A. I did not hook it back up.  
15 Q. You told Junior to hook it back up?  
16 A. Right.  
17 Q. You didn't watch him hook it back up?  
18 A. No.  
19 Q. You didn't test the lights  
20 afterwards?  
21 A. Not as I recall, no.  
22 Q. You didn't test the brakes  
23 afterwards?  
24 A. No.  
25 Q. Did you check to make sure the hitch

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- 1 was properly hooked up?  
2 A. I just pulled out and I left. Just  
3 got in my truck and left.

Fury trial depo. at 92-93.

The plaintiff's expert asserted that the dolly had no brake system—without actually investigating the question—but Gary Fury admitted that the dolly actually had electric brakes. Compare: Tr. at 190-196; Fury trial depo. at 83, 92-93. He simply neglected to ensure that the brakes were working before getting on the busy highway at night. Fury trial depo. at 83, 92-93, 100-102. And he did not bother to check the lights. Fury trial depo. at 92-93.

Gary Fury has told multiple stories about how this accident happened and has contradicted himself many times. In his police interview, he claimed that Junior Lane hooked up the trailer. Police interview audio, admitted as Defendant's Exhibit A, at 2:26, 4:00-5:00

(Transcript, Defendant's Exhibit B, at 3, 5). Under oath in his discovery deposition, he claimed that he would never let someone else hook up a trailer he was towing. Transcript of discovery deposition of Gary Fury, admitted as Defendant's Exhibit F, at page 62. Also in his police interview, he claimed that the dolly's lights were working just fine. Defendant's Exhibit A, at 25:39 (Defendant's Exhibit B at 18). But in his deposition he admitted that they never worked at all. Fury discovery depo. at 23, 46, 47, 55. The story that Gary Fury went with in his trial testimony was that he just did not bother to check the lights at all after Junior Lane hooked up the trailer. Fury trial depo. at 92-93.

Between his inconsistencies and admissions, it is absolutely clear that one way or another Gary Fury failed to ensure that the dolly was secure and safe. As a driver towing a dolly on the highway, Gary Fury had a duty to ensure that it was secure and safe. R.C. 4513.02(A) (prohibition against operating unsafe vehicle or combination of vehicles). The plaintiff's crash reconstruction expert, James Crawford, admitted as much, and that the failure to comply with that duty can create a hazard. Tr. at 212. And that is exactly what happened in this case.

Even after all of these reckless choices, though, Gary Fury still had options to avoid the catastrophe he was creating. But instead he chose to stop in the middle of a busy highway at night. As several witnesses in this matter observed, there were at least three safer alternatives. He could have pulled to either side of the road, he could have pulled forward just a short distance to an area with easy access to the berm, or he simply could have called and waited for help without anyone exiting the vehicle. According to Sgt. Myron Sulminski of the Brookpark Police Department, who helped investigate the crash scene, the highway split was about 500-800 feet straight ahead of where Gary Fury chose to stop. Transcript of deposition of Sgt. Myron Sulminski (admitted as Plaintiff's Exhibit 3), at 10, 17-18. At that point, the left two lanes split off to continue I-71 northbound. Sulminski depo. at 18; Fury trial depo. at 77-78. Gary Fury

lived nearby and was quite familiar with that stretch of highway. Fury trial depo. at 79. Patrolman Klemenc, a trained reconstructionist who also investigated the crash, was very clear that the safest course of action for Gary Fury was to pull forward to the split. Transcript of deposition of Patrolman Joseph Klemenc, admitted as Plaintiff's Exhibit 2, at 6, 33-34.

With at least three safer options at hand, Gary Fury had a duty not to stop in the middle of the highway. R.C. 4511.22. This opinion was also supported by the defendant's expert. Tr. at 400-403. He agreed that there were much safer options, even after the dolly had experienced trouble. Tr. at 400-403. The plaintiff could offer no evidence that pulling forward would have created more danger (Tr. at 214), and certainly it would have been safer for Junior Lane.

Although Gary Fury asserted that Junior Lane decided on his own to get out of the truck (e.g. Fury trial depo. at 93), that assertion contradicts the observation of objective eyewitness Anthony Angey. Mr. Angey reported that Gary Fury admitted in the aftermath of the accident that he told Junior Lane to get out to work on the dolly. Transcript of deposition of Anthony Angey, admitted as Plaintiff's Exhibit 1, at 33, 35. Mr. Angey was obviously surprised that someone would make such a decision. Angey depo. at 35.

11 A. Yeah. That's I think how it went. And he was,  
12 "There was something wrong with the trailer. I  
13 told him to get out." And that's when I was  
14 like, you gotta be kidding me.

Gary Fury also admitted— though only after being confronted with his prior admission— that he was the one who directed Jesse Fury to waive his shirt around. Fury trial depo. at 93-95.

Gary Fury was criminally charged for his actions leading to and causing this accident. The Brookpark Police Department engaged in an unusually exhaustive investigation as compared to most traffic accidents. Trial Deposition of Detective Emil Walentik, admitted as Plaintiff's Exhibit 4, at 5. Detective Walentik conducted multiple interviews and reviewed the wreckage. Walentik depo. at 5-6. According to Sgt. Sulminski, the decision about bringing

charges was referred to the prosecutor. Sulminski depo. at 36, 66. After considering all the facts uncovered in this investigation, the city prosecutor determined the blame lie with Gary Fury. Traffic Crash Report, Plaintiff's Exhibit 6, at 34. Gary Fury was cited for the accident. Walentik depo. at 22; Klemenc depo. at 43-44. He pled no contest to one of the charges. Walentik depo. at 22. Under the local versions of both of the statutes cited above, he was charged for operating an unsafe vehicle and obstructing the roadway. Klemenc depo. at 43-44.

Eyewitnesses to this accident also believed Gary Fury was at fault. Chad Meeks, who had the best view of the accident itself, firmly believed that it was the result of the unsafe situation created by the truck and dolly stopped in the middle of a busy highway. Transcript of deposition of Chad Meeks (admitted by stipulation, Tr. at 8-9) at 41-47. As he described it:

24 A. I don't see people exit the truck. I immediately  
25 yelled to my girlfriend while she is on her phone

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1 that there is a truck in the other lane stopped  
2 in the middle of the highway, and I'm not sure of  
3 the words I used, but it was kind of like, kind  
4 of moronic, you know, I'm thinking what the hell  
5 are they doing in the middle of the highway.

Meeks depo. at 12-13. Witness Peter Jung, whose statement was admitted in the traffic crash report, stated that "The white truck gave no warning carelessly put their lives and everyone around in danger." Traffic Crash Report, Plaintiffs' Exhibit 6, at 4 (Statement of Peter Jung). He also pointed out that the truck had "no lights" and "no warning." *Id.*

Timothy Tuttle, who headed the Ohio State Highway Patrol's crash investigation unit for almost a decade and sat on the Patrol's crash review board, also found that Gary Fury created a situation where an accident was bound to occur. Tr. at 308-310, 402. Mr. Tuttle's experience includes over twenty years of crash reconstruction and analysis, including almost a decade of heading the Ohio State Highway Patrol's crash reconstruction unit that served all 57 posts. Tr. at 308-311. As he stated, "from my experience as a state highway patrol trooper and in the work

I've done since then, stopping in the roadway like this either intentionally and/or because of a mechanical defect, this is going to be the result." *Id.* He added, "A vehicle is going to strike that vehicle daytime or nighttime on an interstate highway in this situation. So stopping as he did, in my opinion, was a certainty that this was -- crash was going to happen." *Id.*

## II. Junior Lane's actions contributed to the accident resulting in his death.

Gary Fury's multiple poor choices were exacerbated by Junior Lane's decision to exit the pickup truck on that busy highway to work on the dolly, followed by his decision to jump *into* the path of Dr. Barth's swerving vehicle at the last moment.

Junior Lane is the one who hooked up the dolly before it entered the busy highway that night, according to one of the versions of events that Gary Fury presented. If that is in fact the truth, then Junior Lane bears responsibility for the creation of the hazard in the roadway. But regardless of that, he bears the ultimate responsibility for his decision to get out of the truck, in the middle of traffic on the busy highway that night when safer options were available. Under R.C. 4511.051 he had a duty not to occupy the lanes of travel on the highway, and that duty was not relieved even if he did so at Gary Fury's direction.

With at least three safer options available, it was as reckless of him to get out as it was for Gary Fury to create the dangerous combination of circumstances in the first place. The coroner found that Junior Lane had drugs in his system. Gary Fury was with him the whole day before that—and his response to questions in that regard were remarkably evasive. Fury trial depo. at 105-106. The presence of drugs in Junior Lane's system would certainly go a long way to explain why he would make the reckless decision to exit the vehicle and try to work on the dolly in the middle of traffic when safer options were at hand. It would also explain his decision to jump *into* the path of Dr. Barth's vehicle while it was taking evasive action to the side.

Just like Gary Fury, Junior Lane chose the most dangerous option possible when he got out of the truck and moved into the path of an oncoming vehicle. These reckless decisions resulted in his death from an accident that was bound to happen under these circumstances.

**III. Dr. Barth was not at fault in encountering the hazard.**

Dr. Barth was driving from Columbus to Cleveland for a work-related conference when he approached the hazard Gary Fury created on the highway. Tr. at. 42. There is no dispute that the accident happened when there was no natural light; the sun had long since set and the moon had not risen. Tr. at 102; 345. Traffic was heavy, and did not stop for Gary Fury's vehicle in the middle of the highway. Angey depo. at 10-12; Meeks depo. at 14-16. At the last second, a semi-truck swerved violently to avoid Gary Fury's vehicle. Meeks depo. at. 41-42; Tr. at 47. Without enough time to perceived and react to avoid the hazard—two seconds or less—Dr. Barth braked and swerved but was unable to avoid the collision. Meeks depo. at 18-19; 41-42.

Dr. Barth's memory of the moments before the accident is not absolute, and quite frankly understandable considering the traumatic and sudden events. In fact, eyewitness Anthony Angey observed that that Dr. Barth appeared to be in shock immediately following the impact of the collision. Angey depo. at 20, 31. But Dr. Barth does recall, consistent with other witnesses in this matter, that there was a vehicle ahead of him that quickly moved out of the way. Tr. at 47. Though he does not recall exactly what it was he saw to cause him to react, he took evasive action including "slamming" on his breaks. Tr. at 47-52.

Chad Meeks was driving southbound on I-71 and had a view of the whole scene immediately before the accident because of the way the road dips. Meeks depo. at 10. Because of the way the road sloped down and back up as he approached the area, he could see everything happening on the other side of the road. Meeks depo. at 14-15. He described the scene as he approached it this way:

24 A. No. Once again, the traffic, I don't know if  
25 there was a game that night or I have no idea why

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1 it was so busy. Maybe it was just a little  
2 cluster there because of the incident but I did  
3 see vehicles -- as you're coming north on 71  
4 there as you go down the hill, so as you're  
5 coming up you don't really see what's too far  
6 past, then you slowly come down and you get to  
7 see the whole view. There's a dip right there,  
8 like I said, and it lasts probably about an  
9 eighth of a mile, a quarter of a mile, but  
10 vehicles were merging either into the fast  
11 speeding lane, the first lane, or to the right  
12 lane. A couple of them, I had my window down,  
13 and a couple of them were beeping their horns.

Meeks depo. at 12-13. He noticed that there was heavy traffic around a stopped truck. Meeks depo. at 11-13, 16. The traffic was not stopping for the truck. Meeks depo. at 16-18, 25. The cars were flying past. Meeks depo. at 18.

Mr. Meeks also saw that there was traffic in every lane of the highway near where Gary Fury had stopped the truck and dolly. Meeks depo. at 15. No one was stopping. Meeks depo. at 15-16. Traffic was busy. Meeks depo. at 16. Driving towards the area where the accident happened, Mr. Meeks saw the whole thing unfold. Meeks depo. at 18. He described it as follows:

10 Q. What happens then?  
11 A. Just as I'm passing by I'm looking to my left and  
12 I realize a semi truck is approaching. I'm not  
13 for sure if it was in his lane or in another lane  
14 but it was -- there was complete commotion.  
15 There were cars flying to the right, flying to  
16 the left, hitting their brakes, and then I'm not  
17 even sure what lane the semi was in but I do  
18 remember a semi approaching and I do remember  
19 loud horns. I'm not sure if it was from the  
20 semi, from some the vehicles, but the semi was  
21 able to merge and get around him, and the next  
22 thing I notice is at this point I'm startled, and  
23 I'm just now passing that vehicle, I notice the  
24 Mercedes approaching and I believe the Mercedes  
25 was in the same lane as a semi right behind him,

19

1 and I'm not going to say the Mercedes was  
2 speeding or following the guy too close. It's  
3 just he was there. He was there at the wrong  
4 time, but I did notice a loud cloud of white  
5 smoke and loud braking and I'm assuming that was  
6 coming from the Mercedes and I mean it happened  
7 so quickly. There was dust, debris, everything.  
8 The Mercedes. I don't remember seeing what  
9 happened to the guy with the white shirt waving.  
10 Obviously I'm not for sure what happened to him,  
11 but obviously the Mercedes didn't have enough  
12 time to react. I'm not sure there was cars in  
13 the way, the guy with the white shirt in the way,  
14 but he smashed into the truck.

Meeks depo. at 18-19.

The semi-truck swerved to avoid the Fury vehicle and then Dr. Barth's vehicle, right behind the swerving semi, came into contact with the Fury vehicle. Meeks depo. at 18. The semi did not merge over slowly, but instead swerved so hard that its trailer was leaning. Meeks depo. at 30, 41. The semi-truck had to get over very abruptly, "flying to get over." Meeks depo. at 30-31, 41. Immediately behind the truck was Dr. Barth's vehicle, and it looked like it was braking. Meeks depo. at 31, 41-42. After the semi-truck swerved, it was only one to two seconds— less than the average perception/reaction time used by plaintiff's expert (Tr. at 163, 219-220)— until the collision occurred. Meeks depo. at 29-30. Even so, Dr. Barth braked so hard there was white smoke *before* the vehicles made contact. Meeks depo. at 31.

19 A. Oh, it looked like it was braking. Absolutely.  
20 He immediately hit his brakes. There was white  
21 smoke all the way through and then he smashed  
22 into that truck. I mean that had to have  
23 lasted -- that was so quick, one, two seconds,  
24 boom.

Meeks depo. at 31. Mr. Meeks was adamant that the accident was not the fault of the driver of the Mercedes, Dr. Barth. Meeks depo. at 43-45, 50. Dr. Barth simply had no time to react in the situation. Meeks depo. at 51-52.

Eyewitness Anthony Angey was driving right behind Dr. Barth and, like Dr. Barth, he did not see anything amiss ahead until the accident happened. Angey depo. at 9-10; 23-24. His testimony is consistent with what he reported to the police as included in the traffic crash report. Angey depo. at 28-30. Contrary to the argument presented by plaintiff's counsel, Mr. Angey did *not* see anyone waving a shirt around until after the accident. Angey depo. at 25. Neither did he see the Fury vehicle stopped in the road until after the collision. Angey depo. at 30, 32-33. But he did observe that there was a lot of northbound traffic that evening. Angey depo. at 30.

15 Q. You then indicate that there was a lot of traffic  
16 northbound but at no time did you ever see that  
17 the truck had stopped in the highway before the  
18 accident; correct?  
19 A. Right.

Angey depo. at 30. See, also, Sulminski depo. at 43.

These accounts by unbiased eyewitnesses contradict the picture Gary Fury tried to paint of that evening. In an attempt to shift blame on Dr. Barth, Gary Fury and Jesse Fury make self-serving claims regarding the flow of traffic. They claim that all of the traffic came to a stop except for one lane, where there were no cars at all. But all other accounts—by *disinterested* parties—describe a highway heavy with fast-moving traffic, and wildly swerving vehicles narrowly missing the Fury vehicle hazard. Even *after* the accident that ended Junior Lane's life, the traffic did not come to a stop until the police shut down the road. Angey depo. at 38.

Following his investigation, Patrolman Klemenc also concluded that there was in fact a vehicle interposed between Dr. Barth's and the Fury vehicle stopped in the middle of traffic, which obscured Dr. Barth's view until the accident was unavoidable. Klemenc depo. at 52-53. With his background in crash reconstruction, he found it difficult to pin fault on Dr. Barth in these circumstances. Klemenc depo. at 34-35, 53. (Defendant hereby waives the objections to the questions put to him at pages 34 and 35 of his deposition.) Sgt. Sulminski was also very clear

that he disagrees with plaintiff's assertion that the accident was the proximate result of Dr. Barth's alleged failure to maintain an assured clear distance, because of the many other factors involved. Sulminski depo. at 31, 66-67. Most telling and most important is that after this thorough investigation, Dr. Barth was not cited in the accident. Klemenc depo. at 32.

The plaintiff's argument that that Dr. Barth is at fault in this accident for failure to maintain an assured clear distance is wrong for two reasons: because the Fury vehicle was not discernable in time under the circumstances, and second because this case is not about a collision with a truck.

First, despite all that Mr. Crawford had to say about what may or may not have been visible, all of his opinions rest on a faulty assumption: that there was no vehicle interposed between Dr. Barth's and the Fury vehicle. Tr. At 214. In fact, though, there was a semi-truck just ahead of Dr. Barth that swerved wildly at the last second. Gary Fury asserted that there was not, but his own stories about the flow of traffic that evening are contradicting and malleable depending on which story he is telling. When Gary Fury wants to show this accident was avoidable, he talks about three lanes of stopped traffic and one lane completely clear behind him. But when he wants an excuse for why he didn't pull over to the berm of the highway to avoid a collision, he claims that traffic was moving so fast and so heavy, it prevented him from pulling over. Gary Fury's description of the traffic that night is unreliable, ever-changing and self-serving. It is no surprise that he testifies that he didn't see a semi-truck in front of Dr. Barth.

In order for Dr. Barth to be at fault for failing to maintain an assured clear distance, the object in question must be discernable. *Sauer v Crevas*, 10th Dist. No. 10AP-834, 2011-Ohio-3310. "The word 'discernible' ordinary implies something more than 'visible.'" *Id.* at ¶ 23 (quoting *McFadden v Elmer C. Brewer Transp. Co.*, 156 Ohio St. 430, 442, 103 N.E.2d 385 (1952)). "Discernible' connotes cognitive awareness and describes an object that is mentally perceptible

or distinguishable, while ‘visible’ means merely capable of being seen.” *Id.* Mr. Crawford’s testimony concerned “visibility” factors, but his testimony did not establish the important factor of “discernibility.” And it was all based on an assumption unsupported by the facts. The Fury vehicle was never a discernible object to Dr. Barth. Once the semi-truck urgently swerved at the last second, Dr. Barth did not have enough time to perceive and evade the Fury vehicle hazard.

The witness testimony also establishes that Dr. Barth did, in fact, take evasive action including braking and swerving after the semi-truck swerved away at the last second. Despite what the plaintiff’s expert tried to present, all of the eye-witnesses agree that Dr. Barth took actions to avoid a collision. Dr. Barth testified that he slammed on the brakes. Tr. 48-54. Chad Meeks testified that Dr. Barth’s vehicle looked like it was braking so hard that white smoke came out before the collision with the Fury vehicle. Meeks depo. at 31, 41-42. Anthony. Angey, driving right behind Dr. Barth, testified that he saw Dr. Barth’s vehicle swerve. Angey depo. at 15. Sgt. Sulminski indicated that the marks left by Dr. Barth’s vehicle showed a swerve. Sulminski depo. at 23. Angey depo. at 38. Mr. Angey also testified that he saw Dr. Barth try to swerve because of the angle of the collision. Angey depo. at 15. And even Mr. Fury himself admitted that Dr. Barth’s vehicle “swerved” to avoid a collision—at least up until plaintiff’s counsel suggested he should use a different word. Fury trial depo. at 80-81, 108.

Although the plaintiff’s expert opined that Dr. Barth took no evasive action, that testimony need not be accepted where it is contradicted by multiple eyewitness accounts and other evidence. *Bickerstaff v Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-1028, 2014-Ohio-2364, ¶ 23. As noted at trial, Dr. Barth’s vehicle had anti-lock brakes. Tr. at 222. Mr. Crawford admitted that anti-lock brakes do not leave the same kinds of marks as regular brakes. Tr. at 222. He also admitted that he could not say with certainty whether Dr. Barth was braking at the time of impact or not. Tr. 112: 18-22. As Sgt. Sulminski explained, with a background in traffic crash

investigation, anti-lock brakes either leave lighter marks or none at all. Sulminksi depo. at 65. Therefore the fact that none were visible earlier does not prove that Dr. Barth was not braking. What is even harder to believe, though, is Mr. Crawford's explanation that a brake mark clearly moving to one side is consistent only with straight-forward motion.

The plaintiff also seeks to establish that Dr. Barth's speed had not been reduced from his travelling speed at the point of impact, but there is no foundation for that argument. Mr. Crawford did not himself determine a "point of impact" to set a foundation for his speed calculations and other opinions. Tr. at 105-108, 121. Rather, it appears that he assumed the investigating officers had determined a point of impact—although it was more counsel's argument than Mr. Crawford's testimony that was presented to the court on that point. Tr. at 105-107. But the truth is that the investigating officers did no such thing—a point about which Sgt. Sulminski is absolutely clear. Sulminski depo. at 24-25. Patrolman Klemenc did not establish any point of impact, either. Klemenc depo. at 20. No one ever identified a point of impact as the foundation for Mr. Crawford's speed opinion. Therefore his opinions regarding speed and pre- or post-impact actions are without the proper foundation, and are unreliable.

Second, the claim of liability in this case is not based on Dr. Barth's alleged failure to maintain an assured clear distance from a truck. Neither is it about whether Dr. Barth failed to maintain an assured clear distance from the first object his car struck, an unlighted dolly in the middle of the road that not even the plaintiff's expert said was discernable. Rather, the claim in this case is for striking a pedestrian who was in the roadway at the time, and there is absolutely no evidence to establish that Junior Lane was discernible at the time. Mr. Crawford did not testify about that question at all, while Mr. Tuttle's testimony establishes that Junior Lane himself would not have been readily discernable. E.g., Tr. at 456.

In fact, Dr. Barth's vehicle swerved away from Jesse Fury, who was waiving his shirt to alert traffic, indicating that Dr. Barth perceived and reacted to that stimulus as well after the truck swerved out of his way. But unfortunately that is also the direction that Junior Lane moved, away from his position bending over between the Fury vehicle and the dolly in the roadway. Whatever liability there may be for Dr. Barth's having struck the truck—and there is none because it was not discernible in time for a number of reasons—that still does not establish his fault for hitting a pedestrian who moved into his path of travel at the last second as Dr. Barth braked and swerved to avoid the truck.

The plaintiff in this case is asking this Court to contravene the observations of impartial eyewitnesses and the findings of multiple investigative professionals in order to blame Dr. Barth for this accident. The plaintiff is trying to do so with expert testimony that contradicts what the eyewitnesses report they observed. And to do so, the plaintiff requires this Court to accept a story woven together Gary Fury's multiple, contradictory versions of the events—relying sometimes on what he told the police in one version of events, and at other times on two stories he told under oath that do not match up with each other. But it is clear that he has neither been consistent nor completely truthful about how this accident occurred, to avoid the responsibility for creating an accident that was waiting to happen.

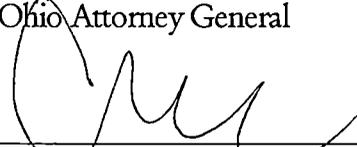
In truth, the fact is there was a hazard in the roadway that Dr. Barth could not see until a truck swerved violently out of the way at the last second, and Dr. Barth was unable to avoid a collision despite taking evasive action. The fault lies with those who recklessly created that hazard.

#### **IV. Conclusion.**

Based on the evidence and law applying to this case, judgment must be entered in favor of the defendant.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



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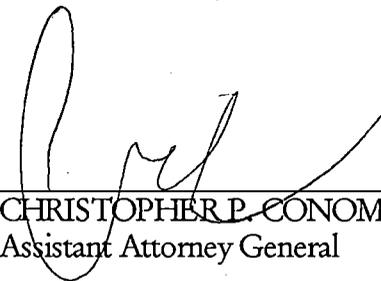
JEFFREY L. MALOON (0007003)  
Jeffrey.Maloon@OhioAttorneyGeneral.gov  
CHRISTOPHER P. CONOMY (0072094)  
Christopher.Conomy@OhioAttorneyGeneral.gov  
Assistant Attorneys General  
Court of Claims Defense  
150 East Gay Street, 18th Floor  
Columbus, Ohio 43215-3130  
Telephone: 614-466-7447  
Facsimile: 866-452-9957  
COUNSEL FOR DEFENDANT

### CERTIFICATE OF SERVICE

On September 12, 2014, a copy of this document was served via regular mail on the following:

W. Craig Bashein  
Thomas J. Sheehan  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113

Counsel for Plaintiff



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CHRISTOPHER P. CONOMY (0072094)  
Assistant Attorney General