

[Cite as *Smith v. Ohio Dept. of Transp.*, 2003-Ohio-2998.]

IN THE COURT OF CLAIMS OF OHIO

CASEY L. SMITH :
Plaintiff : CASE NO. 2001-09877
v. : DECISION
DEPARTMENT OF TRANSPORTATION, : Judge Fred J. Shoemaker
et al. :
Defendants :
: :

{¶1} Plaintiff brought this action against defendants alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. At the close of plaintiff's case, defendants moved for dismissal pursuant to Civ.R. 41(B)(2). The court took the motion under advisement.

{¶2} On October 6, 1999, at approximately 10:30 a.m., plaintiff was operating his motor vehicle eastbound on US Route 250 in Tuscarawas County, Ohio. US Route 250 is a four-lane highway, with two eastbound lanes and two westbound lanes separated by a grassy median. Arthur Fondriest, an employee of defendant Ohio Department of Transportation (ODOT), was driving a front-end loader at a slow rate of speed in the right eastbound lane of US Route 250 on his way to the district headquarters. The weather conditions were bright and clear. The maximum speed limit was 65 miles per hour (mph) for cars and 55 mph for trucks. No minimum speed limit was posted. Plaintiff was also traveling in the right eastbound lane when his vehicle struck the front-end loader from behind at a speed of approximately 65 mph. Plaintiff's passenger, Shannon

Gopp, was killed in the collision. Plaintiff sustained severe injuries.

{¶3} The area where the collision occurred was a level stretch of highway. The Ohio State Highway Patrol (OSHP) accident investigation revealed that there were no brake marks or skid marks prior to the point of impact between plaintiff's vehicle and the loader. Fondriest estimated that he was operating the loader at a speed of 40 mph, but a speed test conducted on the loader using OSHP radar equipment revealed a maximum speed of 32 mph. A sign on the rear of the loader displayed a large white triangle with red trim used to designate a slow-moving vehicle. Plaintiff testified that he did not see the loader because of sun glare.

{¶4} Plaintiff alleges that defendant¹ was negligent per se in violating the slow-moving vehicle statute, R.C. 4511.22. Plaintiff further alleges that defendant's employee was negligent in both operating the front-end loader at a speed that was slower than reasonable for the conditions of the road and not using flashers, and that safer alternatives were available to transport the loader; i.e., towing the loader or driving on the berm of the highway.

{¶5} Defendant denies liability and asserts that plaintiff's failure to maintain an assured clear distance ahead of his vehicle pursuant to R.C. 4511.21 was the sole cause of the collision.

{¶6} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

1

"Defendant" shall be used to refer to the Ohio Department of Transportation throughout this decision.

{¶7} Stephen Baker, an OSHP Trooper, testified that he was called to the scene of the accident and that the loader's strobe light was on when he arrived at the scene. He further stated that the strobe light and two taillights were removed from the loader and sent away for testing, but that the results were inconclusive as to whether the lights were operating at the time of the crash.

{¶8} Barry Miner, a transportation administrator for ODOT in Tuscarawas County, was notified of the collision on the day it occurred. He testified that there is no ODOT policy requiring transportation of a front-end loader by trailer or requiring a vehicle's lights to be illuminated during daylight hours. He further stated that ODOT does not have enough trailers to move all of its equipment, and that its common practice is to transport equipment on the roadway when a short distance is to be traveled. He further testified that on the day of the collision, two separate loaders were driven on the highway in the same manner; that the first loader was driven 8 to 10 miles to the Denison outpost on US Route 250, and that the loader involved in the accident was traveling approximately three miles to district headquarters.

{¶9} R.C. 4511.22(A) states:

{¶10} "No person shall stop or operate a vehicle, trackless trolley, or street car at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when stopping or reduced speed is necessary for safe operation or to comply with law."

{¶11} In this case, the evidence reveals that Fondriest was operating the front-end loader at its maximum speed, 32 mph, in the right lane of the highway. Since there were two lanes available for eastbound traffic, the court finds that defendant's vehicle was not impeding or blocking the normal and reasonable movement of

traffic. Therefore, the court finds that defendant did not violate R.C. 4511.22.

{¶12} Although plaintiff maintains that defendant was negligent in failing to activate the vehicle's flashers, he points to no legal requirement that a vehicle such as a front-end loader must have its flashers turned on when it is operating during daylight hours. Moreover, Baker and Miner both testified that there is no such requirement. Based upon the above, the court finds that plaintiff has failed to prove by a preponderance of the evidence that defendant owed any duty to turn on flashers during daylight hours.

{¶13} Plaintiff has also alleged that safer alternatives were available to transport the loader. However, Miner testified that the berm was too narrow in various locations of the roadway to operate the loader, and that if the loader were driven in the berm, it would interfere with traffic exiting and entering the highway ramps. In addition, plaintiff points to no requirement for using a trailer to haul this type of equipment. Therefore, plaintiff has again failed to prove a duty owed to him by defendant.

{¶14} R.C. 4511.21(A) states, in relevant part: "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."

{¶15} "Ohio case law has consistently held that a person violates the assured clear distance ahead 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.'" *Pond v. Leslein*, 72 Ohio St.3d 50, 52, 1995-Ohio-193 (quoting *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 7). "[A]n 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 as a matter of law." *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, paragraph two of the syllabus.

{¶16} The evidence shows that defendant's loader was ahead of plaintiff in his lane of travel, was moving in the same direction as plaintiff, and did not suddenly appear in plaintiff's path. Plaintiff alleges that the loader was not reasonably discernible because of sun glare, and because its flashers were not activated.

However, as previously addressed, defendant was not obligated to activate flashers during daylight hours. In addition, sun glare is not an extraordinary condition. "[S]un glare is something any driver faces at certain times on sunny days when the road is angled directly east or west. *** If drivers are excused under these circumstances, no driver would have to exercise reasonable care." *Pleimann v. Coots*, Greene App. No. 2002-CA-54, 2003-Ohio-316 at paragraph 15. The driver of an automobile has a duty to "stop his machine whenever he is so blinded as to be unable to see the way in front of him." *Pleimann*, supra, at paragraph 17, quoting *Parnell v. Bell* (1962), 117 Ohio App. 125, 129-130.

{¶17} Raymond Davidson, a witness to the collision, testified that the sun was bright but that he could see after adjusting his visor. He further testified that he moved into the left lane to pass the loader but that he also slowed down to allow plaintiff the opportunity to move into the left lane ahead of him. Plaintiff, however, did not take the opportunity to move into the left lane and collided with the loader.

{¶18} Another witness to the collision, Jack Temcza, testified that he was also in the left lane and had allowed for plaintiff to move into the left lane to pass the loader but that plaintiff did not change lanes. Both Davidson and Temcza were traveling behind the loader and both of them saw it despite the sun glare. Thus, based upon the facts and the law, the court finds that the loader was a reasonably discernible object. The court further finds that plaintiff was negligent per se pursuant to R.C. 4511.21(A), and that plaintiff's negligence was the sole cause of the collision.

{¶19} In the final analysis, plaintiff has failed to prove any of his claims by a preponderance of the evidence. Judgment is rendered in favor of defendants. In light of this decision, defendants' motion to dismiss pursuant to Civ.R. 41(B) is DENIED as moot.

{¶20} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendants. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

FRED J. SHOEMAKER
Judge

Entry cc:

Stanley B. Dritz
50 West Broad Street, Suite 2200
Columbus, Ohio 43215

Attorney for Plaintiff

Velda K. Hofacker-Carr
Assistant Attorney General
65 East State St., 16th Fl.
Columbus, Ohio 43215

Attorney for Defendants

To S.C. reporter 6-12-2003