[Cite as *Dillon v. Ohio Dept. of Transp.*, 2004-Ohio-6582.]

IN THE COURT OF CLAIMS OF OHIO

JAMES E. DILLON, JR. :

Plaintiff : CASE NO. 2003-02675
Judge J. Warren Bettis

v. :
DECISION

DEPARTMENT OF TRANSPORTATION :

Defendant :
: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant alleging a claim of negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} On January 1, 2003, at approximately 11:00 a.m., plaintiff was traveling on State Route 155 in Perry County, Ohio when he encountered two trees that were completely blocking the roadway. The trees had fallen from an adjacent hill that had become saturated with rainwater. Plaintiff attempted to call 911 on his cell phone, but he was unable to get a signal in the rural area. The occupants of a black car informed plaintiff that they would return to town to call for assistance. Plaintiff tried to move the trees to the side of the road, but he was unsuccessful. Plaintiff's brother came upon the scene of the incident and decided to return to his home to get a chainsaw.

{¶ 3} Another motorist, Thomas Talbert, arrived at the scene and used a chain that was attached to his truck to drag one of the trees away from the roadway. Plaintiff assisted Talbert by pushing on the tree as it was being pulled by the truck. While the tree was being pulled across the wet pavement, the chain broke, allowing the tree limbs to swing back and strike plaintiff's chest and left leg. The force of the blow caused plaintiff to fall to the ground. When plaintiff tried to stand up, he discovered that he could not move his left leg. Talbert and another man carried plaintiff to a guardrail. Plaintiff sat on the guardrail as he fashioned a splint for his leg using small tree limbs.

Plaintiff's brother returned with his chainsaw and helped Talbert remove the remaining tree limbs from the roadway. Once the road was clear, plaintiff drove himself to the Lancaster hospital where he was diagnosed with a fractured left tibia and fibula.

{¶ 4} Plaintiff claims that defendant's negligence caused him to suffer damages that include physical injuries, lost wages, and medical expenses. Plaintiff also seeks reimbursement for a pair of eyeglasses and a hat that he lost during the incident.

{¶ 5} 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. As a general rule, defendant has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transportation* (1976), 49 Ohio App.2d 335. See, also, *Rhodus v. Ohio Dept. of Transportation* (1990), 67 Ohio App.3d 723. However, defendant is not an insurer of the safety of state highways. Id. at 730. In order for liability to attach to defendant for damages caused by hazards upon the roadway, plaintiff must demonstrate that defendant had actual or constructive notice of the existence of such hazard. See *McClellan v. Ohio Dept. of Transportation* (1986), 34 Ohio App.3d 247; *Knickel*, supra; *Pearson v. Ohio Dept. of Transportation* (Nov. 6, 1997), Court of Claims No. 96-06773.

{¶ 6} With regard to notice, plaintiff's testimony established the approximate time that the trees fell onto the roadway. Plaintiff testified that when he first traveled across the area around 10:40 a.m., the roadway was unobstructed. However, approximately 20 minutes later, he returned to the area and encountered the fallen trees. Neither plaintiff nor the occupants of the black car that arrived shortly after plaintiff were able to report the hazard using their cell phones. Plaintiff testified that the occupants of the black car left the scene and then returned some time later to inform him that they had called for help.

{¶ 7} Talbert testified that he received a letter from Julie Brogan, defendant's Highway Management Administrator, wherein Brogan informed him that the Perry County Sheriff's Department had been notified of the downed trees at 11:26 a.m. According to Talbert, at approximately 11:45 a.m., the sheriff's department contacted Jim Dennis, defendant's Perry County Manager, and requested his assistance to clear the roadway. Dennis determined that he could

respond to the location quicker by traveling to the location himself and by using his personal chainsaw rather than by dispatching a work crew or by traveling to the county garage to obtain one of defendant's chainsaws. Talbert testified that Dennis arrived at approximately 1:00 p.m., after the trees had already been cleared from the roadway.

{¶ 8} Plaintiff does not allege that the fallen trees were rotted, decayed, deteriorated in some way, or that the root structure was otherwise damaged for such a period of time as to place defendant on constructive notice of the hazardous condition. Indeed, testimony at trial established that heavy rain had saturated the ground. Accordingly, the court finds by a preponderance of the evidence that the condition of the ground in addition to strong winds caused the trees to fall from the adjacent hill onto the roadway.

{¶ 9} Based upon the trial testimony, the court finds that defendant had no prior notice of the fallen trees that allegedly caused plaintiff's injuries. Therefore, defendant cannot be held liable for any damages that plaintiff alleges were caused by the roadway hazard.

{¶ 10} Furthermore, plaintiff failed to prove that defendant's response to the hazard posed by the blocked roadway was unreasonable. Dean Colborne, a transportation manager who worked for defendant, explained defendant's procedure for responding to roadway hazard calls. According to Colborne, defendant maintained a "call-out list" that included the home telephone and pager numbers for defendant's employees who were on duty. Colborne explained that the county sheriff used the list to notify defendant's employees whenever assistance was needed to respond to a hazard on a state road. Colborne testified that defendant would typically send a work crew to respond to an emergency maintenance call. However, Colborne testified that, in this case, Jim Dennis responded directly to the scene rather than having to travel to defendant's garage, since his residence was only 15 to 20 miles from the accident location. Colborne testified that it was proper for Dennis to have handled the call for assistance by himself and that the time it took Dennis to arrive at the scene was reasonable under the circumstances.

{¶ 11} Based on the foregoing, the court concludes that plaintiff failed to prove that defendant breached its duty to maintain the highway in a reasonably safe condition**.**

{¶ 12} Moreover, the court is convinced that plaintiff's own negligent conduct was the proximate cause of his injuries under the circumstances of this case. As stated above, plaintiff

decided to help clear the roadway by pushing the tree limbs while they were being pulled by Talbert's truck. The court finds that plaintiff voluntarily participated in an attempt to remove the trees and that he should have recognized the dangers inherent in such activity.

{¶ 13} Plaintiff's failure to take the necessary precautions to avoid a dangerous condition about which he was fully aware constitutes contributory negligence. Even assuming, arguendo, that defendant were negligent, the court concludes that plaintiff's faulty conduct was greater than any fault that could be attributed to defendant's actions. Consequently, plaintiff is barred from recovery by operation of Ohio's comparative negligence statute. See R.C. 2315.19.[1]

{¶ 14} Accordingly, judgment shall be rendered in favor of defendant.

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v. :
JUDGMENT ENTRY

DEPARTMENT OF TRANSPORTATION :

Defendant :
: : : : : : : : : : : : : : : : :

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 defendant. 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.

_____
J. WARREN BETTIS
Judge

[1] R.C. 2315.19 was repealed effective April 9, 2003; however, the statute applies to causes of action that accrued before its repeal.

Entry cc:

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