[Cite as *Fede v. Ohio Dept. of Transp.*, 2008-Ohio-7119.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MICHAEL FEDE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-09147-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Michael Fede, related he was traveling west on Interstate 70 through a construction zone when his automobile tire was punctured by "a piece of debris" laying on the traveled portion of the roadway. Plaintiff recalled the damage incident occurred on July 29, 2008 at approximately 12:30 a.m. during a time when construction crews were operating equipment "on the southbound shoulder of the interstate." Plaintiff recorded that immediately before his damage occurrence he observed dust and debris "floating upward from the large construction equipment" and "noted some debris landing at the left shoulder of the road." Plaintiff stated the debris that punctured his automobile tire was laying in the left westbound lane of Interstate 70, "just east of the I-675 junction."

{¶ 2} Plaintiff implied the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous debris conditions in a construction zone. Plaintiff filed this complaint seeking to recover $654.79, the cost of a replacement tire and related expenses resulting from the described incident. The filing fee was paid.

{¶ 3} From plaintiff's description regarding the location of the incident on Interstate 70 east of the Interstate 675 junction, defendant located the damage occurrence between county mileposts 3.10 to 4.0 on Interstate 70 in Clark County. Defendant explained this location was near a construction zone work area but not within the limits of a particular construction project maintained by DOT contractor, John R. Jurgensen Company ("Jurgensen"). Defendant related the portion of Interstate 70 in Clark County under construction was between county mileposts 6.27 to 35.7. Defendant acknowledged Jurgensen was working two night projects "in the eastbound direction of I-70" during the time of plaintiff's damage event, approximately 12:30 a.m. on July 29, 2008. Defendant asserted plaintiff failed to produce evidence to establish the debris that damaged his vehicle emanated from construction activity by Jurgensen or work performed attributable to DOT.

{¶ 4} Defendant denied liability based on the contention that no DOT personnel had any knowledge of debris on Interstate 70 between county mileposts 3.10 to 4.0 prior to plaintiff's July 29, 2008 damage occurrence. Defendant suggested "the debris existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant reported the DOT Clark County Manager conducts inspections of all state roadways within the county "at least two times a month." Apparently no debris was discovered between mileposts 3.10 to 4.00 on Interstate 70 the last time that particular section of roadway was inspected prior to July 29, 2008. Defendant asserted if debris had been discovered "it would have been picked up" by DOT personnel. Defendant argued plaintiff failed to prove his car was damaged as a proximate cause of any negligence on the part of DOT.

{¶ 5} Plaintiff filed a response insisting his car was damaged by debris emanating from construction activity being performed along Interstate 70 on July 29, 2008. Plaintiff noted, "[s]everal miles East of the I-675 junction a Kokosing construction crew was working in the center median" of Interstate 70. As previously reported, plaintiff related "big (plumes) of smoke and debris cloud (were emanating) from the site." Plaintiff further related, "[w]hile driving directly parallel to the (site) an unknown piece of sharp debris punctured my left front tire." Plaintiff recorded in his complaint that his left rear tire was damaged. Plaintiff wrote, "[t]here is no doubt that the debris was along the highway and due as a direct result of the construction being performed at that

time." In this response, plaintiff pointed out the construction activity occurred in the "center median" of Interstate 70 and was being conducted by "a Kokosing construction crew."

{¶ 6} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶ 7} For plaintiff to prevail on a 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. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶ 8} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247, 517 N.E. 2d 1388. Defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such conditions. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. In the instant claim, evidence is inconclusive

regarding the origin of the debris which damaged plaintiff's vehicle. Defendant insisted the debris condition was not caused by maintenance or construction activity.

{¶ 9} Generally, in order to recover in any suit involving injury proximately caused by roadway conditions including debris, plaintiff must prove either: 1) defendant had actual or constructive notice of the debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the debris condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the debris. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Therefore, defendant is not liable for any damage plaintiff may have suffered from the roadway debris.

{¶ 10} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove his property damage was connected to any conduct under the control of defendant, that defendant or its agents were negligent in maintaining the roadway area, or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

MICHAEL FEDE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-09147-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

_____

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Michael Fede
14515 London-Urbana Road
London, Ohio 43140

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
11/20
Filed 12/18/08
Sent to S.C. reporter 3/6/09