[Cite as *Toms v. Ohio Dept. of Transp.*, 2006-Ohio-7288.]

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

JEFFREY TOMS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2005-11710-AD
Daniel R. Borchert
Deputy Clerk

MEMORANDUM DECISION

{¶ 1} On Thursday, September 8, 2005, employees of defendant, Department of Transportation ("DOT"), performed roadway maintenance on State Route 503 in Darke County. This roadway maintenance described as a "chip and seal operation" was completed the following day, September 9, 2005. The chip and seal operation, according to DOT's Performance Standard guideline, involved the application of "a chip, sand or fog coat to sections of bituminous surfaces to seal cracks or rejuvenate dry weathered surfaces to prevent further surface deterioration." To perform and complete this work involved the following steps: "(1) Place signs and other safety devices; (2) Clean surface of all foreign material; (3) Apply uniform application of liquid asphalt; (4) Place uniform application of cover aggregate; (5) Roll and sealed area; (6) Clean up work area; (7) Remove signs and other safety devices." The first step concerning the placement of signs was performed on September 1, 2005, one week before work actually began. Signs reading "Loose Stone and Fresh Tar" were posted along State Route 503 as advanced warning to motorists. The signs were removed on September 27, 2005, eighteen days after the chip and seal operation was completed.

{¶ 2} On Saturday, September 10, or Saturday, September 17, 2005, plaintiff, Jeffrey Toms, noted he was traveling on State Route 503 towing another vehicle on a trailer when his trailer was damaged as a result of being pelted by stone debris laying on

the roadway. Plaintiff wrote of the incident stating: "I was still heading [n]orth towards SR 127. Just past Ithaca the road had been repaired and signs were posted that stated 'loose stone.' There was no change in speed limit sign posted but I slowed to 35 miles per hour because I didn't feel comfortable driving that fast over loose stone, especially when I am towing my show car. Even going that fast I could tell that the loose stone was hitting my trailer and car." After driving through this area, plaintiff pointed out he stopped his vehicle and inspected his trailer and towed car discovering broken lenses and paint chipped from the fenders and front frame section of the trailer.

{¶ 3} Plaintiff filed this complaint asserting defendant, Department of Transportation ("DOT"), should bear liability for the damage to his trailer. Plaintiff contended DOT placed gravel on State Route 503, thereby creating a hazardous condition for motorists. Plaintiff seeks damages in the amount of $371.62 for trailer repair costs, plus $25.00 for filing fee reimbursement. The filing fee was paid. Plaintiff submitted photographs depicting the damage to his trailer. These photographs show paint chip damage and broken plastic reflectors. It has not been determined the approximate date these photographs were taken.

{¶ 4} Defendant denied receiving any other complaints of loose stone or damage to vehicles in this area as a result of DOT's roadway maintenance activity of September 8, and September 9, 2005. Defendant denied having any knowledge of any dangerous condition on State Route 503. DOT denied the roadway maintenance was performed in a negligent manner.

{¶ 5} Defendant acknowledged DOT crews performed "preventive maintenance" on the section of State Route 503 where plaintiff claimed his property damage incident occurred. This roadway section that defendant located at "milepost 7.70 on SR 503 @ US 127 in Darke County . . . has an average daily traffic count in excess of 600 vehicles." Defendant explained all due care was exercised in performing the roadway maintenance to protect all motorists using State Route 503 from any hazards associated

with applying tar and stone to the roadway surface. Defendant suggested any debris that damaged plaintiff's trailer "could have been normal roadway surface stone" and not stone debris created by DOT's September 8, and September 9, 2005, maintenance operation. Defendant again asserted DOT conducted the maintenance operation with due diligence and was unaware of any debris condition on the roadway on either September 10, 2005, or September 17, 2005.

{¶ 6} Plaintiff responded stating "[t]his is the most ridiculous excuse for not paying a claim that I ever heard of." Plaintiff insisted his damage was caused by loose stone left on the roadway by DOT crews performing maintenance operations on September 8, and September 9, 2005. Plaintiff asserted the fact he was the only motorist to complain of stone debris property damage is irrelevant to the present issue. Plaintiff did not offer any proof other than his own assertion to establish his property damage was caused by aggregate remnants left from DOT's maintenance operation.

{¶ 7} Defendant denied any liability in this matter. Defendant explained DOT workers placed "Loose Stone and Fresh Tar" signs along State Route 503 on September 1, 2005, in preparation for maintenance work scheduled to begin on September 8, 2005.

{¶ 8} Defendant asserted all proper safety precautions were utilized when road maintenance work actually began on September 8, 2005.

{¶ 9} 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. However, defendant is not an insurer of the safety of its highways. See

{¶ 10} *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 11} In order to prove a breach of 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. Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. Plaintiff, in the instant claim, has failed to prove the damage-causing debris emanated from DOT's activity on September 8, and September 9, 2005. Plaintiff has failed to show DOT had notice of the debris on the roadway that damaged his trailer.

{¶ 12} 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, 81, 2003-Ohio-2573, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. 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, approved and followed.

{¶ 13}Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was

proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing debris was connected to any conduct under the control of defendant or any negligence on the part of defendant. *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.

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jeffrey Toms
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For Defendant

RDK/laa
8/30
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