[Cite as *Blausey v. Ohio Dept. of Transp.*, 2005-Ohio-1807.]

IN THE COURT OF CLAIMS OF OHIO

BEVERLY ANN BLAUSEY, Executrix :

Plaintiff : CASE NO. 91-13003
Judge John W. McCormac

v. :

DECISION

DEPARTMENT OF TRANSPORTATION, et al. :

:

Defendants

: : : : : : : : : : : : : : : : :

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

{¶ 2} Prior to the commencement of the trial, the parties filed stipulations of fact that addressed joint exhibits, the location of the incident, and the wind conditions at the time of the incident. Upon consideration of the testimony, evidence and stipulations, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

{¶ 3} 1) On November 20, 1989, Dale Blausey was killed while traveling southbound on US Route 250 in Huron County, Ohio when the car he was driving was struck by a falling Norway spruce tree;

{¶ 4} 2) At the time of the incident, wind gusts were reported between 35 and 52 miles per hour;

{¶ 5} 3) The tree had been growing in a roadside right-of-way obtained by defendant on land that was owned by Joe Henry but occupied by a tenant;

{¶ 6} 4) The fallen tree was one of a pair of spruce trees that had been planted approximately 30 feet apart and were similar in size;

{¶ 7} 5) The fallen tree was approximately 88 feet in height and 34 inches in diameter at the base;

{¶ 8} 6) The primary proximate cause of the fall was the severe deterioration of the roots on the east side of the tree and the high wind that blew the tree onto the highway;

{¶ 9} 7) The tree had been struck by lightning in 1973. The damage caused by the lightning led to interior rotting and an infestation of carpenter ants, the combination of which destroyed much of the root system;

{¶ 10} 8) The deterioration had existed for as long as ten years, gradually weakening the tree to the extent that it became a hazard;

{¶ 11} 9) The wind was not of sufficient force to cause a healthy tree to fall. The remaining Norway spruce withstood the wind without damage;

{¶ 12} 10) Before it fell, the east side of tree that faced the highway showed little, if any, evidence of decay. Dead limbs were not clearly visible from the highway. Limbs had been removed from the lower part of the tree, which was not uncommon as landowners sought to mow, decorate, or otherwise use the land. Additionally, the lower part of the tree was obscured by bushes and vegetation;

{¶ 13} 11) The upper growth of both the healthy and the diseased spruce trees was green and quite similar, although on close inspection, the growth on the healthy spruce appeared to be slightly more dense. Cone growth was normal on both trees. Although the 1973 lightning strike had caused the tree to lose its

"Christmas tree" shape at the top, the loss was not very noticeable;

{¶ 14} 12) An inspection of the west side of the tree would have revealed evidence of deterioration and of a potential hazard;

{¶ 15} 13) Defendant's employees did not inspect the west side of the tree because defendant did not receive notice from the landowner of any defect and a visual inspection from the highway did not raise any concern that would warrant further inspection;

{¶ 16} 14) Defendant maintains approximately 40,000 miles of highway in Ohio and it regularly inspects these roadways, the adjacent right-of-ways, and areas outside the right-of-way for conditions that could present a hazard to the traveling public. Trees that could fall onto the highway are visually inspected from the roadway. Trees are individually inspected when a potential hazard is reported to defendant or observed by its highway inspectors;

{¶ 17} 15) Defendant's inspectors do not receive special training to recognize damaged or diseased trees, rather, they use a "common sense" approach. Plaintiff's expert essentially agreed with this approach and characterized the standard used by defendant as being slightly more stringent than that used by a typical landowner;

{¶ 18} 16) David Moelenkamp, a horticulturist who worked for defendant at the time of the incident, had traveled the area and was familiar with the spruce trees but had never observed any evidence to suggest that they posed a hazard;

{¶ 19} 17) The court finds that there was insufficient discernible evidence available to defendant's inspectors to warrant further investigation of the damaged tree or to determine that it was hazardous prior to the accident. The court further finds that

plaintiff's expert had the advantage of hindsight because he was not involved in this case until 1998.

CONCLUSIONS OF LAW

{¶ 20} 1) In order for plaintiff to prevail upon her claims of negligence, she must prove by a preponderance of the evidence that defendant owed the decedent a duty, that it breached that duty, and that the breach proximately caused the decedent's death. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285;

{¶ 21} 2) Defendant has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335; *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42; R.C. 5501.11. However, defendant is not an insurer of the safety of state highways. *Rhodus v. Ohio Dept. of Transportation* (1990), 67 Ohio App.3d 723, 730;

{¶ 22} 3) To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause physical discomfort to such person. *Dorrow v. Kendrick* (1987), 30 Ohio Misc.2d 40;

{¶ 23} 4) "[A] civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition, which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St.2d 176, 180;

{¶ 24} 5) Under a claim of qualified nuisance, the allegations of nuisance and negligence merge to become a negligence action.

Allen Freight Lines, Inc. v. Consol. Rail Corp. (1992), 64 Ohio St.3d 274;

{¶ 25} 6) 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;

{¶ 26} 7) The legal concept of notice is of two distinguishable types, actual and constructive. The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *In re Estate of Fahle* (1950), 90 Ohio App. 195, paragraph two of the syllabus;

{¶ 27} 8) To establish that defendant had constructive notice of a nuisance or defect in the highway, the hazard "must have existed for such length of time as to impute knowledge or notice." *McClellan*, supra, at 250;

{¶ 28} 9) Based upon the testimony and evidence, the court finds that plaintiff has failed to prove by a preponderance of the evidence that defendant had either actual or constructive notice of any defect or hazard concerning the tree that struck decedent's vehicle;

{¶ 29} 10) The court concludes that plaintiff has failed to prove that defendant breached its duty to maintain the highway in a reasonably safe condition. Therefore, defendant cannot be held liable for any damages that plaintiff alleges were caused by a dangerous highway condition.

IN THE COURT OF CLAIMS OF OHIO

BEVERLY ANN BLAUSEY, Executrix :

Plaintiff : CASE NO. 91-13003
Judge John W. McCormac

v. :

JUDGMENT ENTRY

DEPARTMENT OF TRANSPORTATION, et al. :

:

Defendants

: : : : : : : : : : : : : : : : :

{¶ 30} 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.

_____
JOHN W. MCCORMAC
Judge

Entry cc:

Edward A. Van Gunten — Attorney for Plaintiff
6545 W. Central Avenue, Suite 209
Toledo, Ohio 43617-1034

Velda K. Hofacker Carr — Attorney for Defendants
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

AMR/cmd
Filed March 22, 2005
To S.C. reporter April 18, 2005