

[Cite as *Dagy v. Ohio Dept. of Transp.*, 2004-Ohio-5905.]

IN THE COURT OF CLAIMS OF OHIO

BERYL E. DAGY :

Plaintiff :

v. :

CASE NO. 2004-06062-AD

OHIO DEPARTMENT OF :
TRANSPORTATION :

MEMORANDUM DECISION

Defendant :

.....

{¶ 1} Plaintiff, Beryl E. Dagy, is the owner of a residence located at 1635-30th NE in Canton, Ohio. Plaintiff’s residence is set adjacent to US Route 62. On May 12, 2004, an unidentified motorist traveling on U.S. Route 62 struck a pothole in the roadway which caused the hubcap of the motorist’s vehicle to dislodge, become airborne, and strike the side of plaintiff’s house. Plaintiff asserted the May 12, 2004, incident was the second occurrence within a one-week span. Plaintiff did not specify if both instances involving flying hubcaps were proximately caused by the same pothole. Plaintiff did note there were various “potholes and uneven surfaces on Rt 62.” According to plaintiff, the vinyl siding on his home was damaged by the May 12, 2004 incident and earlier occurrence. Consequently, plaintiff filed this complaint seeking to recover \$170.00, the cost of replacing the vinyl siding on his home. Plaintiff contended his property damage was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to adequately maintain the roadway and timely repair known defects. The requisite material filing fee was paid.

{¶ 2} Defendant denied any liability in this matter. Defendant denied plaintiff’s property damage was proximately caused by inadequate highway maintenance or failure to repair known defects. Defendant submitted records noting no pothole patching operations were performed on US Route 62 in the vicinity of plaintiff’s residence from May 1, 2003, to May 12, 2004, the date of

plaintiff's second property damage occurrence. Defendant asserted plaintiff has failed to prove his home damage was proximately caused by any negligent act or omission on the part of DOT personnel. Defendant submitted photographic evidence depicting the area of US Route 62 in the vicinity of plaintiff's residence. These photographs taken on May 14, 2004, do not depict defective roadway conditions, although it appears the roadway surface adjacent to plaintiff's home is not totally smooth.

{¶ 3} Plaintiff filed a response.¹ Plaintiff did not offer any proof to establish the damage to his home was proximately caused by DOT's maintenance of US Route 62.

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

{¶ 5} Further, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance of construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Plaintiff, in this instant claim, has failed to prove defendant negligently maintained the roadway.

{¶ 6} 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. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. 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 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198,

¹ The response was filed on September 14, 2004.

approved and followed.

{¶ 7} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his damage was proximately caused by defendant's negligence. Plaintiff failed to show the damage to his home 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.

IN THE COURT OF CLAIMS OF OHIO

BERYL E. DAGY	:	
Plaintiff	:	
v.	:	CASE NO. 2007-06062-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>ENTRY OF ADMINISTRATIVE DETERMINATION</u>
Defendant	:	
	:	

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:

Beryl E. Dagy

Plaintiff, Pro se

1635-30th NE
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For Defendant

RDK/laa
9/24
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