

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

LORRI TURNER, Admx., etc.

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2005-09626

Judge J. Craig Wright

DECISION

{¶ 1} On April 30, 2009, defendant the Ohio Department of Transportation (ODOT) filed a motion for summary judgment pursuant to Civ.R. 56(B). On May 29, 2009, plaintiff filed a response. Defendant's June 4, 2009 motion for leave to file a reply to plaintiff's response is GRANTED instanter. On June 16, 2009, the court conducted an oral hearing on the motion for summary judgment. At the conclusion of the proceedings, the court announced its decision to render judgment in favor of defendant.

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party

against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} This case arises from a single-vehicle accident. The facts surrounding the accident were summarized in an opinion issued by the Supreme Court of Ohio in a related action, as follows:

{¶ 5} "The facts of this case are undisputed. In the early morning of September 10, 2003, Bryan Hittle and his passenger, Robert Turner, were on their way to work at Layton Excavating, Inc., driving south on State Route 188 in Pleasant Township, Ohio. Hittle had trouble seeing oncoming traffic or the center and edge lines of the road because of the darkness and fog. Due to the poor visibility, he followed the taillights of a truck immediately in front of him. While negotiating a curve, Hittle drove his car off the road, striking a utility pole and killing Turner. The utility pole was located in a grassy area two feet five inches from the berm and three feet nine inches from the white edge line of the road. * * * It was estimated that the speed of Hittle's Ford Mustang at impact was between 55 and 59 m.p.h. in a posted 45-m.p.h. zone. Hittle was convicted of vehicular manslaughter.

{¶ 6} "[Plaintiff] Lorri Turner, individually and as administrator of the estate of Robert Turner, instituted this action on February 22, 2005 against [the utility companies], Ohio Bell Telephone Company, d.b.a. SBC Ohio, and South Central Power Company. The complaint alleged (1) that [the utility companies]'were negligent in placing, maintaining and continuing to utilize the utility pole in such close proximity to the traveled portion of State Route 188,' (2) that '[t]he presence of the utility pole in such close proximity to the traveled portion of State Route 188 constituted a violation of Ohio Revised Code Section 4931.01 for which [the utility companies] are negligent per se,' and (3) that '[t]he presence of the utility pole in such close proximity to the traveled portion of State Route 188 constituted an absolute and/or qualified nuisance.'" *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, ¶ 1,2.

{¶ 7} In her September 9, 2005 complaint, plaintiff alleges that defendant was "negligent in allowing the utility pole to be installed and maintained in such close proximity to the traveled portion of the roadway" and that "[t]he existence of the

improper and inadequate berm/shoulder area coupled with the presence of utility pole in such close proximity to the traveled portion of State Route 188 constituted an absolute and/or qualified nuisance.” (Complaint, ¶ 4,7.)

{¶ 8} In plaintiff’s action against the utility company, the Supreme Court of Ohio determined that “there is no evidence that the utility pole, which was located in a grassy area two feet five inches from the berm and three feet nine inches from the white edge line of the road, interfered with the ordinarily and usually traversed portion of State Route 188.” *Turner v. Ohio Bell Tel. Co.*, supra, ¶ 24. Although there was a dispute as to whether Ohio Bell Telephone Company or South Central Power Company had responsibility for placement of the pole, the evidence showed that ODOT issued a permit for installing the pole in 1977. *Id.* at fn. 1.

{¶ 9} Defendant asserts that the holding in *Turner*, supra, is entitled to preclusive effect under the doctrine of collateral estoppel inasmuch as both cases arise out of the same nucleus of operative facts.

{¶ 10} The doctrine of collateral estoppel precludes the relitigation of an issue or fact that has been litigated and determined by a court of competent jurisdiction in a prior action. *LaBonte v. LaBonte* (1988), 61 Ohio App.3d 209, 216, citing Restatement of the Law, Judgments, Section 45, comment (c), and Section 68(2); *Norwood v. McDonald* (1943), 142 Ohio St. 299. To successfully assert collateral estoppel, defendant must prove that: “(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit.” *Id.*

{¶ 11} It is undisputed that both *Turner*, supra, and the instant action arose out of the same nucleus of operative facts and that a court of competent jurisdiction determined the point of fact or law in question. Specifically, the *Turner* court found that “[t]he evidence in this case indicates that the utility pole was erected pursuant to a permit issued by the Ohio Department of Transportation. Because the utility pole is located in the right-of-way but off the improved portion of the road and because a motorist properly using the usual and ordinary course of travel would not come into contact with the utility pole, we conclude that the utility pole did not incommode or

interfere with the public's use of the highway, and therefore [the utility companies] are not liable as a matter of law." *Turner*, supra, at ¶ 26.

{¶ 12} In addressing ODOT's duty to the motoring public, the Tenth District Court of Appeals has held that ODOT is not liable for injuries that occur when a vehicle leaves the highway. *Steele v. DOT*, 162 Ohio App.3d 30, 2005-Ohio-3276. "Obviously, when an operator loses control of a vehicle, the vehicle and its occupants can leave the traveled portion of the road, sometimes striking fixtures or coming to rest far from the roadway. It would be unreasonable to expect ODOT to remove all structures, trees, utility poles, and other obstacles from areas distant from the roadway, and the law does not so require. Instead, the test is whether ODOT is responsible for maintaining a condition that renders the regularly traveled portions of the highway unsafe for the usual and ordinary course of travel." *Id.* at ¶ 15.

{¶ 13} The court finds that the determination that the utility pole did not interfere with the public's use of the highway is binding against plaintiff under the doctrine of collateral estoppel and that such finding is dispositive of this case.

{¶ 14} Upon consideration of the evidence and arguments presented by the parties, the court finds that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment shall be granted.

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JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and 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. CRAIG WRIGHT
Judge

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AMR/cmd
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