[Cite as *Davis v. Ohio Dept. of Transp.*, 2009-Ohio-3580.]

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

JAMES DAVIS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-10609-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} On July 19, 2008, at approximately 10:30 a.m., plaintiff, James Davis, was traveling south on Interstate 75 near milemarker 8 in Hamilton County, when his 2008 Nissan Altima was struck by a large sign that had been moved into the path of his car by a preceding motorist. Plaintiff stated that "I assume the sign was getting run over car after car as none of us had anywhere to go to avoid it." Plaintiff further stated that, "[t]he sign tumbled out from under the driver side tires of the vehicle in front of us (and) struck the front driver side of our 2008 Nissan Altima." Plaintiff's car received headlight and bumper damage from being struck by the sign which plaintiff described as "some kind of temp. highway sign (the type that stands about 4 ft. high with several posts that extend from the bottom to stay upright)."

{¶ 2} Plaintiff implied that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to keep the roadway free of debris. Plaintiff filed this complaint seeking to recover

$788.46, the cost of replacement parts and repair expenses incurred resulting from the described incident. The filing fee was paid.

{¶ 3} Defendant denied any liability in this matter based on the contention that no DOT personnel had any knowledge of a downed sign laying on the roadway prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints regarding signs on the particular roadway area which DOT located between mileposts 8.0 and 10.0 on Interstate 75 in Hamilton County. Defendant cannot determine the length of time the damage-causing debris condition existed on the roadway prior to 10:30 a.m. on July 19, 2008. Defendant suggested that, "the debris existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant explained that the DOT Hamilton County Manager "conducts roadway inspections on all state roadways within the county on a routine basis, as least one to two times a month." Defendant further explained DOT personnel conduct frequent maintenance operations and litter pick-ups on Interstate 75 and DOT work crews would have promptly removed any debris found on the roadway in the course of work related duties. Defendant denied that the roadway was negligently maintained.

CONCLUSIONS OF LAW

{¶ 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, 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.

{¶ 5} 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 debris 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 reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. 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.

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, 138 N.E. 526, at paragraph one of the syllabus. There is no evidence that defendant created the damage-causing sign condition.

{¶ 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. *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. 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.

{¶ 7} Evidence in the instant action tends to show that plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise that it had no duty to control the conduct of a third person except in cases where a special relationship exists between defendant and either plaintiff or the person whose conducts needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171, 543 N.E. 2d 769. However, defendant may still bear liability if it can be established that some act or omission on the part of DOT was the proximate cause of plaintiff's injury. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

{¶ 8} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171

N.E. 327.

{¶ 9} Plaintiff has failed to establish that his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, it appears that the cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. 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 object at the time of the damage incident was connected to any conduct under the control of defendant or any negligence on the part of defendant proximately caused the damage. *Herman v. Ohio Dept. of Transportation* (2006), 2006-05730-AD; *Mann v. Dept. of Transp.*, Ct. of Cl. No. 2007-07531-AD, 2008-Ohio-1607.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

James Davis
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RDK/laa
3/25
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