[Cite as *Barkimer v. Ohio Dept. of Transp.*, 2009-Ohio-3782.]

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

CHRISTINE J. BARKIMER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11443-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Christine J. Barkimer, related that she sustained tire and rim damage to her automobile when the vehicle struck a large rock laying on the traveled portion of US Route 68 North in Brown County. Plaintiff recalled that the property damage incident occurred at approximately 10:00 a.m. on October 21, 2008. Plaintiff offered a narrative description of the incident noting that she had stopped at the intersection of Mount Orab Pike and US Route 68 and then as she turned onto US Route 68 her automobile "hit a large rock sitting in the road (approximately) 2-3 feet from the median line."

{¶ 2} 2) Plaintiff implied that the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to keep the roadway free of debris such as the large rock. Consequently, plaintiff filed this complaint seeking to recover $762.20, the cost of replacement parts and repair expenses resulting from the described incident. The $25.00 filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT

personnel had any knowledge of rock debris on the roadway prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints from any entity concerning a rock on the roadway which DOT located at milepost 22.81 on US Route 68 in Brown County. Defendant suggested that, "the debris existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Furthermore, defendant asserted that plaintiff failed to offer evidence to prove that the roadway was negligently maintained. Defendant related that the DOT "Brown County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no rock debris was discovered at milepost 22.81 on US Route 68 the last time that section of roadway was inspected prior to October 21, 2008. Defendant stated that "if any ODOT personnel had found any debris it would have been picked up." DOT records indicate that litter patrol operations were conducted in the vicinity of plaintiff's incident on October 20, 2008.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} 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 precise condition or defect 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.

{¶ 7} In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (debris) and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of*

Transportation (1976), 75-0287-AD. For constructive notice to be proven, plaintiff must show that sufficient time has elapsed after the dangerous condition (debris) appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD. 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 (debris) appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. Evidence has shown defendant did not have any notice, either actual or constructive, of the damage-causing debris.

{¶ 8} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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. Plaintiff has the burden of proving, by a preponderance of the evidence, that she 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, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶ 9} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing object was connected to any conduct under the control of defendant, or any negligence on the part of defendant. *Taylor v. Transp. 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.

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MILES C. DURFEY

Entry cc:

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RDK/laa
3/25
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