[Cite as *Peters v. Dept. of Transp.*, 2009-Ohio-3031.]

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
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KEVIN L. PETERS

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11630-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On December 6, 2008, plaintiff, Kevin L. Peters, was traveling on State Route 170 in Calcutta, Ohio, when his 2008 Jeep Liberty struck a loose manhole cover laying on the roadway. Plaintiff stated, "I struck the cover with my left front tire, and the cover flipped up and hit the left side of my 2008 Jeep Liberty." Plaintiff pointed out that at the time of his damage incident State Route 170 was snow covered and snow removal work crews employed by defendant, Department of Transportation ("DOT"), were actively engaged in plowing the roadway. Plaintiff asserted that a DOT plow truck "had caught a manhole cover and lifted it from the manhole." There is no indication plaintiff actually witnessed a DOT snow plow loosen a manhole cover on State Route 170 in Calcutta, Ohio. Plaintiff related, "[a]t the time I struck the cover, (he did notice a DOT) truck had pulled off onto a side road and stopped." Plaintiff contended the damage to his vehicle from striking the loose manhole cover was proximately caused by negligence on the part of defendant in conducting snow removal operations on State Route 170 in Columbiana County. Consequently, plaintiff filed this complaint seeking to recover $736.75, the total cost of automotive repair he incurred resulting from the December 6, 2008 damage occurrence. The filing fee was paid.

{¶ 2} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of a loose manhole cover on the roadway prior to plaintiff's property damage event. Defendant stated DOT "records indicate that no calls or complaints were received from the State Highway Patrol, Columbiana County Sheriff's Department or a person from the traveling public regarding" the particular loose manhole cover which defendant located at approximately milepost 0.44 on State Route 170 in Columbiana County. Defendant suggested "the cover existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant asserted plaintiff has failed to produce any evidence to establish the length of time the loose manhole cover was on the roadway prior to his December 6, 2008 property damage event.

{¶ 3} Defendant contended plaintiff failed to offer any evidence "which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of ODOT was the cause of his incident." Defendant explained DOT crews were working on State Route 170 in the vicinity of milepost 0.44 on December 2, 2008 and no loose manhole cover was detected. Defendant acknowledged DOT maintenance crews were performing snow plowing activities on State Route 170 on the day of plaintiff's incident, December 6, 2008. Defendant seemingly agreed that if this court finds DOT snow plowing uprooted the manhole cover on the roadway and proximately caused plaintiff's property damage, DOT should be immune from liability. Defendant further argued that snow plowing that results in hazardous conditions such as loose manhole covers being deposited on the roadway "was necessary and reasonable for the safety of the traveling public and done in a manner consistent with normal standards." Defendant stated R.C. 5501.41[1] grants DOT "the right to remove ice and snow from state highways and the authority to do whatever is necessary to conduct such removal activities." Defendant related, "assuming a snowplow of Defendant did cause a manhole cover to become dislodged, Defendant contends that it is given statutory authority to do whatever is reasonable and necessary to remove snow." Contrary to defendant's argument concerning "whatever is reasonable and necessary," the court finds it neither reasonable nor necessary to create a dangerous roadway hazard while in the course of performing snow removal activities. Defendant contended plaintiff failed to offer sufficient proof to show his property damage was proximately caused by any negligent conduct on the part of DOT in performing snow removal operations on State Route 170 on December 6, 2008.

{¶ 4} Plaintiff filed a response admitting he has no way of providing proof of how long the manhole cover condition existed prior to his property damage occurrence. Plaintiff expressed the belief the manhole cover was loose for only a brief time period. Plaintiff submitted photographs depicting the manhole cover after it had been

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[1] R.C. 5501.41 covering DOT's discretionary authority to remove snow and ice states:

"The director of transportation may remove snow and ice from state highways, purchase the necessary equipment including snow fences, employ the necessary labor, and make all contracts necessary to enable such removal. The director may remove snow and ice from the state highways within municipal corporations, but before doing so he must obtain the consent of the legislative authority of such municipal corporation. The board of county commissioners of county highways, and the board of township trustees on township road, shall have the same authority to purchase equipment for the removal

repositioned in the roadway. In referencing the photographs plaintiff noted, "[a]s shown in the pictures, there still appears to be (an) edge that the (DOT) plow could have easily caught." From a review of the photographs, the trier of fact agrees with plaintiff's assessment.

{¶ 5} Plaintiff also submitted a statement signed by William A. Simms and Phoebe A. Simms regarding their observations about the manhole cover on December 6, 2008. The statement was apparently drafted by William A. Simms and is included in its entirety. Simms wrote: "On Dec. 6, 2008 my wife and I William A. Simms witnessed a manhole cover on St. Rte. 170 in the middle of the road near Wendy's. A state truck was sitting in front of Big Lots, off on the (berm). St. Clair Twp. police jeep was in the middle lane of traffic near the cover. The cover come from in front of Burger King, there was a 3rd (vehicle) near the hole. The state truck did have a plow on. The manhole cover has been black topped around since then and leveled with the rest of the pavement."

{¶ 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. 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 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. 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.

{¶ 7} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976),

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of and to remove snow and ice as the director has on the state highway system."

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. Additionally, defendant has a duty to exercise reasonable care for the motoring public when conducting snow removal operations. *Andrews v. Ohio Department of Transportation* (1998), 97-07277-AD.

{¶ 8} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition 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.

{¶ 9} 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. 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 developed. *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. *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. In the instant claim plaintiff has offered sufficient proof to establish the damage to his vehicle was proximately caused by the acts of defendant's personnel in conducting snow removal operations. See *McFadden v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-02881-AD, 2004-Ohio-3756; also *Ruminski v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-05213-AD, 2005-Ohio-4223.

{¶ 10} "If any 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 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.

{¶ 11} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. In the instant action, the trier of fact finds the statements offered by plaintiff concerning the origin of the damage-causing manhole to be persuasive. The trier of fact finds plaintiff's car was damaged by a manhole that was swept about by a DOT truck. Sufficient evidence has been presented to establish defendant breached its duty of care to protect motorists from hazards arising out of DOT maintenance activities. Plaintiff has proven his property damage was caused by the acts of DOT personnel. See *Vitek v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-09258-AD, jud, 2005-Ohio-1071; *Zhang v. Ohio Dept. of Transp*., Ct. of Cl. No. 2008-07811-AD, 2008-Ohio-7077; *Barnett v. Ohio Dept. of Transp.* (2009), 2008-08809-AD. Consequently, defendant is liable to plaintiff for the damages claimed, $736.75, plus the $25.00 filing fee which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $761.75, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Kevin L. Peters
46215 Wyoming Avenue
East Liverpool, Ohio 43920

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
3/13
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