[Cite as *Watkins v. Ohio Dept. of Transp.*, 2009-Ohio-6356.]

Court of Claims of Ohio

The Ohio Judicial Center
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PRESTON L. WATKINS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11770-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On December 6, 2008, at approximately 12:30 p.m., plaintiff, Preston L. Watkins, was traveling north on Interstate 270 near milemarker 37 in Franklin County, when his 1995 Lincoln Continental ran over an object described as "a piece of iron" which caused substantial damage to the vehicle.

{¶ 2} 2) Plaintiff implied his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover damages in the amount of $500.00, his insurance coverage deductible for automotive repair. Plaintiff paid the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 3} 3) Defendant suggested the object plaintiff's car ran over from his "description of the object sounds like a reflector." Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of a loose road reflector or piece of iron prior to plaintiff's December 6, 2008 property damage

occurrence. Defendant denied receiving any calls or complaints from any entity regarding a loose road reflector or other debris on the roadway which DOT located "at milepost 37.0 on I-270 in Franklin County." Defendant asserted plaintiff did not produce any evidence to establish the length of time the hazardous debris condition was on the roadway prior to 12:30 p.m. on December 6, 2008. Defendant stated "ODOT believes that the debris existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant argued plaintiff did not offer evidence to prove his property damage was proximately caused by conduct attributable to DOT personnel. Defendant explained DOT crews conducted various maintenance operations on the particular section of Interstate 270 during the six-month period preceding December 6, 2008. Defendant expressed the opinion that DOT "does not believe that it breached its duty of care to the traveling public and, therefore did not act negligently toward plaintiff." Defendant stated that if any DOT "work crews were doing activities such that if there was a noticeable defect with any raised or loosened pavement markers it would have immediately been repaired."

CONCLUSIONS OF LAW

{¶ 5} 1) 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} 2) 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} 3) "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate*

of Fahle (1950), 90 Ohio App. 195, 197-198, 48 O.O. 231, 105 N.E. 2d 429. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set time standard for the discovery of certain road hazards." *Bussard*, at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. 92AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gelarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 8} 4) Plaintiff has not produced any evidence to indicate the length of time the particular loosened road reflector or other debris condition was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the object. Additionally, 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 loosened road reflector appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the dislodged reflector. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition or conditions. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶ 9} 5) 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 79, 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, the 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. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard*, 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. 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; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. Plaintiff has failed to produce sufficient evidence to prove that his property damage was caused by DOT engaging in any maintenance operation at sometime prior to December 6, 2008.

{¶ 10} 6) Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing condition was created by conduct under the control of defendant, or negligent maintenance 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. Plaintiff has failed to provide sufficient evidence to prove that defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his vehicle. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD.

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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:

Preston L. Watkins
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Cincinnati, Ohio 45241

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RDK/laa
7/14
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