[Cite as *Hakos v. Ohio Dept. of Transp., Dist. 3*, 2009-Ohio-6611.]

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

DAVID HAKOS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DIST. #3

Defendant

Case No. 2009-04491-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On April 4, 2009, at approximately 8:00 p.m., plaintiff, David Hakos, was traveling north on Interstate 271 near milepost 1.00 in Medina County, when his 2009 Chevrolet Malibu struck a road reflector laying on the roadway puncturing the right rear tire of his vehicle.

{¶ 2} 2) Plaintiff asserted the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazards. Plaintiff filed this complaint seeking to recover $171.91, the cost of a replacement tire. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of a loose road reflector on the roadway prior to plaintiff's April 4, 2009 property damage occurrence. Defendant related that DOT records indicate no previous calls or complaints were received from any entity regarding the particular dislodged reflector which DOT located at milepost 1.00 on Interstate 271 in Medina County. Defendant contended plaintiff failed to produce any evidence to

establish how long the dislodged reflector existed on the roadway prior to 8:00 p.m. on April 4, 2009. Defendant suggested that the loose reflector condition "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant asserted plaintiff did not produce evidence to prove his property damage was attributable to negligent maintenance on the part of DOT. Defendant explained that DOT regularly maintains the roadway in the vicinity of plaintiff's damage event and pointed out DOT personnel mounted signs in the area on April 1, 2009, three days prior to the incident forming the basis of this claim. Apparently no defective condition was discovered at the time sign maintenance was conducted. Defendant noted that "ODOT 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." Defendant argued plaintiff has failed to prove DOT breached any duty owed to him that resulted in the damage claimed.

{¶ 5} 5) Plaintiff filed a response disputing defendant's claim that Interstate 271 in Medina County is regularly maintained. Plaintiff related he travels on the particular section of Interstate 271 more than once a day and has noticed "approximately thirty (30) missing pavement markers between mile post 0 and 3." Plaintiff stated "[t]his excessive number of missing markers is an obvious indication that pavement markers in this area of I-271 are coming loose and dislodge at an inordinate rate." Seemingly plaintiff is asserting the number of missing pavement markers constitutes proof of general notice of problems with the area and negligent maintenance. Furthermore, plaintiff observed the specific roadway areas where pavement markers have been dislodged have formed into hazardous potholes that DOT crews have neglected to repair. Plaintiff suggested the pavement markers between milepost 1.00 and 3.00 on Interstate 271 loosened and were dislodged by vehicles traveling on the roadway.

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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, 47 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 conditions appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 9} 4) Plaintiff has not produced any evidence to indicate the length of time the loosened road reflector 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 uprooted reflector. 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 that defendant had constructive notice of the dislodged reflector. Plaintiff has not produced any evidence to infer that defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶ 10} 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 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. 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*. However, proof 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 any evidence to prove that his property damage was caused by a defective condition created by DOT or that defendant knew about the particular loosened reflector prior to 8:00 p.m. on April 4, 2009.

{¶ 11} 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 any 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 his property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that any DOT roadway maintenance activity created a nuisance. Plaintiff has not submitted 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), 99-12963-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:

David Hakos
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RDK/laa
7/21
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