[Cite as *Burnside v. Ohio Dept. of Transp.*, 2009-Ohio-6612.]

Court of Claims of Ohio

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CHERYL A. BURNSIDE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2009-05145-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 12, 2009, at approximately 7:30 a.m., plaintiff, Cheryl A. Burnside, was traveling on the Interstate 270 East entrance ramp from Cleveland Avenue in Franklin County, when her 2002 Honda Civic struck a tree limb laying on the traveled portion of the roadway. Plaintiff pointed out the tree limb was located on a curve on the entrance ramp roadway and she could not stop to avoid striking the object due to traffic following behind her vehicle. The tree limb caused substantial damage to the bumper and under carriage of plaintiff's car.

{¶ 2} 2) Plaintiff contended the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous conditions such as the fallen tree limb. Plaintiff filed this complaint seeking to recover $500.00, her insurance coverage deductible for automotive repair. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention no DOT personnel had any knowledge of the tree limb on the roadway prior to plaintiff's property damage

occurrence. Defendant denied receiving any calls or complaints about the particular damage-causing tree limb, which DOT located at milepost 27.38 on Interstate 270 in Franklin County. Defendant stated "ODOT believes that the tree debris 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 her property damage was caused by DOT breaching any duty of care owed to her.

{¶ 4} 4) Defendant reported a DOT representative contacted plaintiff to obtain a description of the damage-causing tree limb. According to defendant, plaintiff recalled the tree limb was four to five inches in diameter, approximately three to four yards long with leaves intact. From the information obtained from plaintiff defendant suggested the tree limb was deposited on the roadway by an unidentified third party motorist. Defendant argued DOT can not be generally held liable for the acts of unidentified third parties.

{¶ 5} 5) Defendant contended plaintiff has failed to prove her property damage was the result of negligent maintenance. Defendant explained the DOT "Franklin 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 fallen tree limb was discovered at milepost 27.38 on Interstate 270 the last time that particular section of roadway was inspected prior to May 12, 2009. Defendant further explained DOT personnel conduct frequent litter pick-up operations and other maintenance tasks and "if ODOT personnel had found any tree debris it would have been picked up."

{¶ 6} 6) Despite filing a response, plaintiff did not offer any evidence to indicate the length of time the tree limb was on the roadway prior to 7:30 a.m. on May 12, 2009. Plaintiff related the tree limb "could have fallen from above since trees line that entrance to 270 and I do not know how long it was there." Plaintiff observed she did not believe the tree limb was laying on the roadway for any extended period of time prior to her property damage event. Plaintiff recalled the tree limb was actually four to five inches in diameter, three to four feet in length, and "very bushy and leafy."

CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 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. No evidence has been submitted to prove defendant had actual notice of the tree limb.

{¶ 9} Plaintiff has not produced any evidence to indicate the length of time the particular tree limb 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 limb condition. 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 tree limb 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 tree limb. 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. Plaintiff has not provided any evidence to establish the particular damage-causing tree limb fell from a dead or diseased tree adjacent to the roadway entrance ramp

{¶ 10} 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.

{¶ 11} Evidence in the instant action is inconclusive to show plaintiff's damage was caused by an act of an unidentified third party. Defendant has denied liability based on the particular premise 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 conduct 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 if 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.

{¶ 12} Plaintiff has failed to establish her damage was proximately caused by any negligent act or omission on the part of 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 incident was connected to any conduct under the control of defendant or any negligence 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.

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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:

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RDK/laa
7/21
Filed 8/6/09
Sent to S.C. reporter 12/11/09