[Cite as *Talkington v. Ohio Dept. of Natural Resources*, 2020-Ohio-2934.]

KATHY L. TALKINGTON Plaintiff v. OHIO DEPARTMENT OF NATURAL RESOURCES Defendant	Case No. 2019-00910AD Deputy Clerk Daniel R. Borchert MEMORANDUM DECISION

{¶1} Kathy L. Talkington ("plaintiff") has filed a complaint against defendant, Ohio Department of Natural Resources ("ODNR"). Plaintiff asserts that, on July 30, 2019, during the early afternoon at West Branch State Park Campground, Site 62, while "we were away from our campsite a storm occurred which caused a dead branch to fall on our 2016 Mazda Miata." Plaintiff asserts that the branch damaged the vehicle's windshield, windshield pillar, passenger-side mirror, right-side door/fender, and trunk. Plaintiff maintains that the damaged windshield caused the vehicle to be unsafe for driving and, as a consequence, she had the vehicle towed on July 31, 2019. Plaintiff represents that towing and rental of a replacement vehicle were covered by road service and insurance.

{¶2} Plaintiff maintains that she reported the incident to the park office, which arranged to have a camp host come to the scene to take pictures. According to plaintiff, a park officer, Officer Andrew Gatto, also was dispatched to the scene; Officer Gatto took pictures and filed an incident report; and Officer Gatto purportedly stated that a work order would be submitted to remove remaining dead branches to prevent another incident.

{¶3} Plaintiff represents that she has insurance for the damage or loss, and that the insurance policy has a $1,000 deductible provision. Plaintiff further represents that the cost to repair the vehicle was $1,789.24, and that her insurer paid $789.24 and

plaintiff paid a deductible of $1,000. Plaintiff seeks damages in the amount of $1,000. Plaintiff filed supporting documentation. Plaintiff paid the filing fee of $25.00.

{¶4} ODNR has filed an Investigation Report (with exhibits) wherein it states that its position is that "Plaintiff does not state a claim against the State under Chapter 2743. of the Ohio Revised Code." ODNR maintains that plaintiff's complaint is founded upon a theory of negligence, and that, for plaintiff to recover damages arising from a fallen tree limb, plaintiff "must submit evidence establishing defendant had actual or constructive notice of a patent danger that the limb would fall." ODNR reasons: "Plaintiff's complaint includes no evidence that either party was aware of the limb's condition before it fell. And there were no reports or complaints about the condition of the limb prior to the incident. Consequently, there is no evidence of knowledge that the limb was dead and presented a falling hazard for an adequate span of time for the Court to find constructive notice." ODNR contends that plaintiff "has submitted no evidence from which an inference of negligence on the part of defendant can be drawn. Plaintiff failed to prove the damages alleged were the proximate result of any negligence of defendant."

{¶5} Plaintiff filed a response to ODNR's Investigation Report urging that, among other things, it "is expected that the park be diligent in removing dead limbs from areas where people and vehicles will be residing * * *" and that "a failure to perform maintenance on sites, preventing damage to guests and their property is a negligent act."

{¶6} Plaintiff's claim sounds in negligence. Because this action is civil in nature, plaintiff is required to establish her claim by a preponderance of the evidence. *See Weishaar v. Strimbu*, 76 Ohio App.3d 276, 282, 601 N.E.2d 587 (8th Dist.1991). To establish actionable negligence, one "must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Notably, in *Whiting v. State*

Dept. of Mental Health, 141 Ohio App.3d 198, 202, 750 N.E.2d 644 (10th Dist.2001), the Tenth District Court of Appeals explained that all of the elements of negligence "must be demonstrated for a plaintiff to recover under a theory of negligence. Therefore, negligence is without legal consequence unless it is a proximate cause of an injury. *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 347, 504 N.E.2d 19."

{¶7} The court finds that the plaintiff has proven by a preponderance of the evidence that her vehicle received damages and that those damages occurred as a result of plaintiff's vehicle coming into contact with a limb that fell from a tree at West Branch State Park. Whether plaintiff's damages proximately resulted from ODNR's breach of a duty so that liability may be imposed on ODNR, however, requires further examination. *See Black's Law Dictionary* 265 (10th Ed.2014) (defining proximate cause as a "cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor").

{¶8} In *Campbell v. Ohio Dept. of Natural Resources*, Ct. of Cl. No. 2017-00172-AD, 2017-Ohio-8076, the court dealt with a circumstance that is analogous to this case. In *Campbell* the plaintiff (Michael Campbell) filed a claim against ODNR for the cost of repair "and/or" replacement of a shed damaged by tree that fell during a storm. In *Campbell* this court noted: "Negligence claims related to hazards or defects normally require notice on the part of the defendant before a duty of care is imposed. As far as claims related to fallen trees, the 10th District has emphasized the requirement of notice. See, *Osborne v. Miami Univ.*, 10th Dist. No. 77AP-249 (Aug. 4, 1977) (Absent actual or constructive knowledge of a defective condition of a tree, an owner cannot be liable)." *Id.* at ¶ 2.

{¶9} Applying *Campbell*'s reasoning, in this instance the issue therefore is whether ODNR had actual or constructive notice that the tree limb at issue would fall on plaintiff's vehicle. An Ohio court has stated: "'Actual notice' is defined as notice 'given

directly to, or received personally by, a party.' *Black's Law Dictionary*, 1090 (8th Ed.2004). 'Constructive notice' is notice 'arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of.' *Id.* 'Constructive notice,' refers to 'that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.' *Cox v. Estate of Wallace*, 12th Dist. No. CA87-06-078, 1987 WL 32746 (Dec. 31, 1987)." *Swader v. Paramount Property Mgt.*, 12th Dist. No. CA2011-05-084, 2012-Ohio-1477, ¶ 24.

{¶10} Based on the court's review of the claims file, the court is unable to find that plaintiff has proven by a preponderance of the evidence that ODNR had actual or constructive notice that a limb would fall on plaintiff's vehicle on July 30, 2019. Judgment is therefore rendered in favor of defendant.

KATHY L. TALKINGTON Plaintiff v. OHIO DEPARTMENT OF NATURAL RESOURCES Defendant	Case No. 2019-00910AD Deputy Clerk Daniel R. Borchert ENTRY OF ADMINISTRATIVE DETERMINATION

{¶11} 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

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