

[Cite as *Williams v. Ohio Dept. of Transp.*, 2003-Ohio-1315.]

IN THE COURT OF CLAIMS OF OHIO

DERRICK M. WILLIAMS :
 1075 Fountain Lane #A :
 Whitehall, Ohio 43213 : Case No. 2002-07011-AD

Plaintiff : MEMORANDUM DECISION

v. :

OHIO DEPT. OF TRANSPORTATION :

Defendant :

: : : : : : : : : : : : : : :

For Defendant: Gordon Proctor, Director
 Department of Transportation
 1980 West Broad Street
 Columbus, Ohio 43223

: : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶1} On June 19, 2002, plaintiff, Derrick M. Williams, was traveling west on Interstate 70, near the Interstate 71 north exit in Franklin County, when his automobile struck uneven roadway pavement causing tire and rim damage to the vehicle. The roadway area where plaintiff's property damage occurred was located within a construction zone. At the time of plaintiff's incident, the particular area of Interstate 70 was being resurfaced with new asphalt pavement. The highway construction resurfacing project was under the direction of defendant, Department of Transportation, with defendant's contractor, Kokosing Construction Company, in charge of the operation. Plaintiff has suggested defendant's contractor was negligent in maintaining the roadway in a dangerous condition which proximately caused his property damage. Plaintiff filed this complaint seeking to recover \$343.38, the replacement

cost of a tire and rim. Plaintiff indicated defendant should bear responsibility for the automotive damage he incurred. Plaintiff submitted the filing fee with the complaint.

{¶2} Defendant denied any liability in this matter. Defendant acknowledged the area where plaintiff's property damage occurred was being resurfaced at the time of plaintiff's incident. Defendant implied its contractor exercised ordinary care in performing the roadway pavement resurfacing project. Defendant explained the existing asphalt on Interstate 70 was removed to a depth of one and a half inches and a temporary asphalt wedge was positioned between the milled roadway and the existing roadway surface. This asphalt wedge was put in place to permit motorists a smooth transition between driving from a milled roadway surface to a paved roadway surface. Defendant denied any negligent acts or omissions resulted in plaintiff's property damage.

{¶3} Plaintiff did not respond. Plaintiff did not present any evidence other than his own assertion to establish the acts of defendant's contractor caused his loss.

CONCLUSIONS OF LAW

{¶4} 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.

{¶5} Further, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside construction activities to protect personal property from the

{¶6} hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶7} Plaintiff, in the instant action, has presented a claim grounded in nuisance. To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause

physical discomfort to such person. *Dorow v. Kendrick* (1987), 30 Ohio Misc. 2d 40.

{¶8} "[A] civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition, which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176, 180.

{¶9} Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855.

{¶10} 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. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed. Plaintiff has failed to present sufficient evidence to establish his property damage was caused by any negligent act or omission on the part of defendant's contractor. Consequently, his claim is denied.

{¶11} Having considered all the evidence in the claim file and

adopting the memorandum decision concurrently herewith;

{¶12} IT IS ORDERED THAT:

{¶13} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶14} 2) The court shall absorb the court costs of this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

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