

[Cite as *Zhao v. Dept. of Transp.*, 2004-Ohio-5147.]

IN THE COURT OF CLAIMS OF OHIO

HOWARD ZHAO

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Plaintiff

•

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V.

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CASE NO. 2004-06925-AD

DEPARTMENT OF TRANSPORTATION :

$$\vdots$$

MEMORANDUM DECISION

Defendant

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FINDINGS OF FACT

¶ 1) On June 3, 2004, at approximately 2:00 p.m., plaintiff, Howard Zhao, was traveling west on Interstate 480 near the Interstate 71 interchange in Cuyahoga County, when his automobile struck metal debris laying on the roadway. Plaintiff described the debris as “a piece of metal construction tool(s).” The debris caused substantial property damage to plaintiff’s vehicle.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$866.13, his complete cost of automotive repair resulting from the June 3, 2004, incident. Plaintiff asserted defendant, Department of Transportation(DOT), should bear liability for his property damage. The requisite filing fee was paid.

{¶ 3} 3) Defendant denied having any knowledge of debris on the roadway prior to plaintiff's June 3, 2004, incident. Defendant acknowledged a phone call was received on June 1, 2004, regarding an obstacle on the roadway. However, the roadway location of this obstacle was unspecified. Defendant suggested the debris plaintiff's vehicle struck had probably been on Interstate 480 for a short period of time before plaintiff encountered the condition. Furthermore, defendant explained DOT litter patrol crews conducted operations in the area of plaintiff's damage occurrence on May 26, 2004. No construction tool or other debris was discovered. Defendant stated DOT construction employees were doing repair work in the area of Interstate 480 on June 3, 2004.

However, this repair work was confined to roadway ramps and not on the main traveled portion of Interstate 480 where plaintiff's damage event occurred.

{¶ 4} 4) Plaintiff argued defendant should bear liability for his damage because DOT workers were working in the area on June 3, 2004, and a complaint was received about a roadway obstacle on June 1, 2004, on some unspecified road in Cuyahoga County. Plaintiff also argued defendant was negligent and, consequently, liable for his property damage by not conducting more frequent litter removal operations on the roadways.¹

CONCLUSIONS OF LAW

{¶ 5} 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. However, defendant is not an insurer of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 6} 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 maintenance or construction activities to protect personal property

{¶ 7} from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Plaintiff, in the instant claim, has failed to prove defendant negligently maintained the roadway.

{¶ 8} In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (debris) and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. For constructive notice to be proven, plaintiff must show sufficient time has elapsed after the dangerous condition (debris) appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD. 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 defective

¹ Plaintiff filed a response August 17, 2004.

condition (debris) appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. Evidence has shown defendant did not have any notice, either actual or constructive, of the damage-causing debris.

{¶ 9} 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

{¶ 10} 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 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.

{¶ 11} 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 the damage-causing object 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. Consequently, plaintiff's claim is denied.

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DEPARTMENT OF TRANSPORTATION :

ENTRY OF ADMINISTRATIVE

Defendant :

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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

Entry cc:

Plaintiff, Pro se

For Defendant

RDK/laa
8/20
Filed 9/2/04
Sent to S.C. reporter 9/27/04