[Cite as *Benson v. Ohio Dept. of Transp., Dist. One*, 2007-Ohio-1621.]

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

ERIC G. BENSON

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT ONE

Defendant

Case No. 2005-10926-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Eric G. Benson, stated a part of his 2005 soybean crop planted in fields abutting US Route 30 in Wyandot County, Antrim Township failed to mature due to excessive light exposure from high mast lighting installed along the roadway abutting the bean fields. Defendant, Department of Transportation ("DOT"), had installed the high mast lighting along US Route 30 in December, 2004. Plaintiff pointed out the lights were installed at the north and south sides of US Route 30 at the east end of a rest area. The lighting bled out into plaintiff's abutting fields making it impossible to harvest the affected planted soybeans which according to plaintiff, "stayed green and never reached a harvestable [sic] state." Plaintiff estimated he lost approximately 5 ½ acres of planted beans in 60'-120' wide sections covering quarter mile areas along both sides of the lighted roadway. Also, plaintiff observed the lighting appeared to be causing problems with his wheat crop in the fall of 2005. Plaintiff noted remedial measures were attempted with the affected portion of his soybean crop, but the measures did not work.

{¶2} Plaintiff related his crop loss amount to 5.5 acres of soybeans at an average of 52 bushels of beans per acre at a price of $5.50 per bushel. Additionally, plaintiff related he suffered a financial loss in regard to his wheat sowing problems on the same sections of land. Plaintiff has contended defendant should bear the responsibility for his loss regarding his crop production. Consequently, plaintiff filed this complaint seeking to recover $1,733.00. the estimated total 2005 crop loss from the roadway lighting along US Route 30. The filing fee was paid.

{¶3} Defendant acknowledged DOT in December, 2004 completed work on the installation of high mast lighting on US Route 30 in Wyandot County appurtenant to a rest area. Defendant also acknowledged the described high mast lighting was installed along the roadway area adjacent to plaintiff's fields. Defendant stated DOT installed this lighting to "safely illuminate the expressway." Defendant further stated, the installed lights "are the safest and most efficient lighting source given traffic flow and lighting required along the highway and Rest Area." While defendant did explain that this lighting installation was beneficial to the motoring public using the roadway, it was recorded light did, "occasionally bleed onto adjacent property [and] there is little doubt that defendant's light encroaches upon plaintiff's property." Defendant, however argued DOT cannot be held liable for any damage to plaintiff's bean crop caused by any light encroachment.

{¶4} Conversely, in his response to defendant's investigation report, plaintiff

insisted DOT should be responsible for his crop damage losses. Plaintiff recalled he planted soybeans in his fields along the roadway without any damage incident before the lights were installed in 2004. Plaintiff explained he farms his fields using a three year crop rotation of corn, soybeans, and wheat. Plaintiff stated he considers himself a good and experienced farmer, but does not have a workable farming solution to the problem faced from light damage to his crops planted adjacent to the lighted roadway area. Plaintiff implied defendant could have made better choices to benefit all when deciding to illuminate the roadway. Plaintiff reasserted defendant should be liable for his losses.

{¶5} Initially, defendant alleged plaintiff's damage to a particular part of his bean crop is not compensable due to the fact the injury claimed, "falls under the doctrine of damnum absque injuria." Defendant, citing *Smith v. Erie RD. Co.* (1938), 134 Ohio St. 135, 16 N.E. 2d 310, contended when a party "is uniquely affected in degree but not in kind by a highway improvement," any damage claim recovery is barred by the damnum absque injuria doctrine. The issue in *Smith*, id. is the same issue in the instant claim, whether or not defendant's act constituted a taking of plaintiff's property. "Under Section 19, Article I, of the Constitution which requires compensation to be made for private property taken for public use, any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises entitles the owner to compensation." *Smith*, supra at paragraph 1 of the syllabus. However, "[w]hen there is no taking altogether or pro tanto, damages consequential to the taking of other property in the neighborhood, or to the construction of the improvement, are not recoverable; under such circumstances, loss suffered by the owner is damnum absque injuria." *Smith*, supra, at paragraph 2 of the syllabus. Defendant has contended the acts of DOT, in the instant claim, of installing a roadway lighting system did not constitute a pro tanto taking of plaintiff's property and consequently, any damage suffered is noncompensable. Defendant insisted plaintiff's injury ("impacted plant development") from the roadway lights was a harm suffered in degree by other landowners adjacent to a lighted highway. Therefore, defendant asserted

the suffered harm did not differ "in kind" from that sustained by the general public and renders the harm damnum absque injuria.

{¶6} Defendant offered *New York, Chicago & St. Louis Rd. Co. v. Busci* (1934), 128 Ohio St. 134, 190 N.E. 562, for the proposition that a land owner cannot be compensated for a harm which differs in degree, but not in kind from the general public because the landowner's legal status is categorized as damnum absque injuria. In *Busci*, id. a public improvement rendered the street where plaintiffs lived a cul de sac, thus hindering ingress and egress to the property. The court determined hindered access to a non-abutting property owner is an injury of degree and not of kind. In the instant claim, plaintiff owns abutting land affected by defendant's improvement and the action pursued does not involve hindered access to the property.

{¶7} Additionally, defendant argued the act of installing the lights on U.S. Route 30 was done in compliance with DOT's obligation to make improvements upon highways for serving the public and promoting the public good and consequently, none of plaintiff's property was taken by this public improvement. Defendant produced the following quote by the Ohio Supreme Court in the case of *State ex rel. Schiederer v. Preston* (1960), 170 Ohio St. 542 at 544, 166 N.E. 2d 748 at 750 (quoting 1 Lewis on Eminent Domain (3d Ed.), 179 et seq. Section 120), to support this argument:

{¶8} "[A]s all streets are established primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And * * * it follows that, when such uses or improvements are made, no private right is interfered with and consequently no private property is taken."

{¶9} The facts of *State ex rel. Schiederer*, id., involved a situation where a public roadway improvement raised the grade of part of a street in front of the land abutting that street, thereby interfering with the abutting land owner's view over the particular street and

affecting the harmony of the street with the abutting land. The Supreme Court in *State ex rel. Schiederer*, at 548, concluded no actionable taking of property occurred when a public highway improvement raised the grade of part of a street and, "substantially interferes with the view that the owner of that land had over that street and with the relative harmony of the street with his land." The holding in the previous mentioned case has no bearing to the action before this court. "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.*, 92 Ohio St. 3d 529, 533, 2001-Ohio-1276, 751 N.E. 2d 1032, 1037. "In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right . . . (cites omitted). Such an interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises." *State ex rel. OTR v. City of Columbus* (1996), 76 Ohio St. 3d 203, 206, 667 N.E. 2d 8, 12.

{¶10} Alternatively, defendant stated DOT, "enjoys immunity for its decision to install roadway lighting." Presumedly, defendant also appears to be asserting DOT should be immune from any harm caused by the lighting installation and use. Defendant explained DOT was acting under statutory authority (See R.C. 5501.31[1]) when installing the lighting along U.S. Route 30. Defendant explained engineering judgment was utilized in making a decision to install the lighting along the roadway. Therefore, defendant expressed the position DOT should be excused from liability for any damage caused from the exercise of this judgment. Defendant cited *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App. 3d 143, 572 N.E. 2d 208, for the proposition that deference is generally paid to the decisions of DOT engineers in respect to authorizing roadway improvement. The facts of *Lunar*, id. involved an automobile collision and the issue of whether an engineering

[1] R.C. 5501.31 in pertinent part states:

"The director may alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system . . ."

decision to not install a guardrail along the roadway concrete median exacerbated the effects of a crossover-type collision, thereby constituting negligent design. Conflicting engineering expert testimony was presented by both parties and the trial court concluded DOT engineers acted reasonably in deciding not to install guardrails along a roadway concrete median. The holding in *Lunar*, id. regarding DOT engineering decisions has no bearing on the question presented in the instant action. Despite defendant's assertion, this court concludes DOT's reliance upon engineering judgment regarding roadway light installation does not protect DOT from liability.

{¶11} Defendant also presented an immunity argument based on the contention that the decision to install roadway lighting on U.S. Route 30 was a policy decision involving a high degree of independent judgment and therefore DOT has immunity from the consequences of this decision. Defendant specifically relied on *Garland v. Ohio Dept. of Transp.* (1990), 48 Ohio St. 3d 10, 548 N.E. 2d 233, in promoting the immunity defense. In *Garland*, the Ohio Supreme Court held DOT's decision to install a traffic light was discretionary and once the decision was made, DOT had a reasonable amount of time to implement the installation of the device without incurring liability in tort. Additionally, the court in *Garland* wrote: "* * * the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. * * *" quoting *Reynolds v. State* (1984), 14 Ohio St. 3d 68, 471 N.E. 2d 776 at paragraph one of the syllabus at page 11. However, once a decision has been implemented the state may be held liable for negligent conduct in the performance of carrying out the actual implementation of that decision. *Reynolds*, id. Defendant is not immune from liability for the negligent acts or omissions of DOT employees in engaging in the performance of their planned duties.

{¶12} Furthermore, defendant contended if plaintiff's claim is actionable he should nevertheless be barred from recovery based on his own voluntary act of planting crops in

an area consistently illuminated by artificial light. Defendant suggested plaintiff should have known his 2005 bean crop planted near the roadway would not thrive due to the roadway lights installed by DOT in December 2004. Also, defendant asserted even if the high mast highway lighting was deemed a nuisance, plaintiff could not recover since he planted his crop in the vicinity of this potential nuisance which would invoke the defense of "coming to the nuisance." Defendant related plaintiff cannot prove the high mast lighting constituted a nuisance condition due to the premise a qualified nuisance condition requires proof of negligence. *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 55 N.E. 2d 724; *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855. Defendant maintained plaintiff offered no proof of negligence in this matter. Defendant argued for the court to consider the benefit the high mast lighting gave to thousands of motorists weighed against the harm the lights caused plaintiff in destroying five and one half acres of his bean crop. Defendant essentially proposed plaintiff should have to bear a financial burden for his crop loss in a situation where he was legally using his land for a specific valuable purpose and the harm caused was attributable to the acts of DOT.

{¶13} In *Taylor*, particular types of nuisance, both absolute and qualified were defined. The court stated, "[s]ummarized, then, absolute nuisance may be defined as a distinct civil wrong, arising or resulting from the invasion of a legally protected interest, and consisting of an unreasonable interference with the use and enjoyment of the property of another; the doing of anything, or the permitting of anything under one's control or direction to be done without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights; the unlawfully doing of anything, or the permitting of anything under one's control or direction to be done, which results in injury to another; or the collecting and keeping on one's premises of anything inherently dangerous or likely to do mischief, if it escapes, which, escaping, injures another in the enjoyment of his legal rights." *Taylor*, supra, at 440.

{¶14} Conversely, a qualified nuisance was distinguished from absolute nuisance

as follows: "nuisance dependent upon negligence consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another." *Taylor*, supra, at 445. This court, in the instant action, agrees with defendant's position that plaintiff has not shown the DOT installed lighting fit the applicable description of a nuisance, either absolute or qualified.

{¶15} After review of the plaintiff's complaint, defendant's investigation report, the response and all materials in the claim, the court makes the following determination. Evidence in the claim file suggests the essence of plaintiff's claim is consistent with a taking action.

{¶16} Section 19, Article I, Ohio Constitution, states:

{¶17} "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deductions for benefits to any property of the owner."

{¶18} Generally claims arising out of the United States or Ohio Constitutions, are not cognizable in this court. However, a specific exception exists where the issue involves an uncompensated taking of property in alleged violation of Section 19, Article I of the Ohio Constitution. *Kermetz v. Cook-Johnson Realty Corp.* (1977), 54 Ohio App. 2d 220, 376 N.E. 2d 1357; *Nacelle Land Mgt. Corp. v. Ohio Dept. of Natural Resources* (1989), 65 Ohio App. 3d 481, 584 N.E. 2d 790. Plaintiff may file an uncompensated taking action in this court if the taking is instituted by DOT.

{¶19} The Fifth Amendment to the United States Constitution provides, " *** nor

shall private property be taken for public use, without just compensation." In order for compensation to be required in a particular case, there must be a taking. The Ohio Supreme Court has defined "taking" in accordance with the United States Supreme Court's interpretation of that word. In *Smith v. Erie Rd. Co.*, supra, at 142, the court held. "*** there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." Later, in *McKee v. Akron* (1964), 176 Ohio St. 282, 199 N.E. 2d 592, the court gave more of a negative definition of the term; something more than loss of market value or loss of comfortable enjoyment of the property is needed to constitute a taking. Specifically, the court stated, " *** governmental activity must physically displace a person from space in which he was entitled to exercise dominion consistent with the rights of ownership ***." Id. at 285. Thus, in order for a governmental activity to constitute a "taking" there must be a substantial interference with the owner's property rights. Furthermore, according to *Smith*, supra, the actual harm suffered by the plaintiff must differ "in kind" rather than "in degree" from the general public. Contrary to defendant's contention, the court, in the instant claim, determines the harm suffered by plaintiff, the loss of a portion of his bean and wheat crops, was indeed a harm suffered in kind. Therefore, the court, in the instant claim, concludes the lights installed by DOT on US Route 30 resulted in an uncompensated taking of plaintiff's property which is actionable and compensable. Defendant is liable to plaintiff for the damages claimed, plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $1,758.00, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
1/30
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