

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

MARCHON L. SIMS-BARBER

Case No. 2005-07631

Plaintiff

Judge Clark B. Weaver Sr.

v.

DECISION

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

{¶1} Plaintiff brought this action against defendant alleging negligence. The issues of liability and damages were bifurcated and the case was tried to the court on the issue of liability.

{¶2} On March 29, 2005, at approximately 3:30 p.m., plaintiff was driving westbound on Interstate 90 (I-90) near Euclid, Ohio when her vehicle struck a ladder that was lying on the road. At the time, plaintiff was driving in the center lane behind a van and did not see the ladder until the van swerved suddenly to avoid hitting it. Because there were vehicles in both the right and left lanes beside plaintiff, she was unable to change lanes to avoid striking the ladder. The accident caused extensive damage to plaintiff's vehicle.

{¶3} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed her a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶4} As a general rule, defendant has a duty to maintain state highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335. To prove that defendant breached that duty, plaintiff must establish that defendant had actual or constructive notice of the precise condition alleged to have

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caused the damage in question. *Manning v. Ohio Dept. of Transp.* (Apr. 24, 1997), Franklin App. Nos. 96API07-931, 96API07-932, 96API07-937 citing *McClellan v. Ohio Dept. of Transp.* (1986), 34 Ohio App.3d 247. Defendant can be held liable for hazardous road conditions only when it has notice but fails to take reasonable measures to correct such conditions. *Bussard v. Ohio Dept. of Transp.* (1986), 31 Ohio Misc.2d 1.

{¶15} Plaintiff contends that defendant had actual notice of the ladder in the roadway because there is evidence that Edwin P. Bais, a transportation technician for defendant, received a voice mail about the ladder at 2:36 p.m., almost an hour before plaintiff's accident. Additionally, plaintiff suggests that defendant had constructive notice because the ladder had been on the roadway for a sufficient length of time prior to the accident that defendant's employees should have known about it and removed it.

{¶16} Defendant asserts that its routine practice is to respond to hazards on the roadway as soon as practical after receiving notice of a problem. In this case, defendant claims that the 2:36 p.m. voice mail was incorrectly recorded by Bais and, in fact, was not received until after plaintiff's accident. Further, defendant argues that even if the court were to find that defendant had actual notice of the ladder in the road, it did not receive such notice in time to correct the problem and prevent plaintiff's accident.

{¶17} Geraldine Billingsley, a passenger in plaintiff's car when the accident occurred, testified that plaintiff was driving cautiously, about one car length behind the van, when the van swerved and plaintiff suddenly hit the ladder. Billingsley further testified that she used plaintiff's cell phone to immediately call 911 because plaintiff was driving and was unable to do so herself. The record of plaintiff's cell phone calls establishes that an "emergency" call was made from her phone at 3:30 p.m. on the date of the accident. (Defendant's Exhibit E.)

{¶18} Sergeant Kmiecik, of the Cleveland Police Department, was working in the 911 control center at the time that plaintiff's accident occurred. Kmiecik testified that the computerized radio-room log for the hours from 1:28 p.m. to 4 p.m. on the date of the

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accident reflect that the first complaint of a ladder on I-90 westbound came in at 3:30 p.m., and that subsequent calls came in at 3:31, 3:35, and 4:02 p.m. (Defendant's Exhibit A.) According to Kmiecik, defendant was notified of the problem at 3:32 p.m., and a dispatcher "checked with" defendant again after the second call was received. (Defendant's Exhibit G.) Kmiecik stated that it was routine procedure to notify defendant of any hazardous conditions that were called in concerning state roadways. However, because several calls were received in a short period of time, department policy required that a police officer also be dispatched to the area. Kmiecik noted that from the time he first became aware of complaints until the time that an officer arrived at the scene, approximately 45 minutes had passed. He also noted that the records reflected that the ladder was gone when the officer arrived on the scene. (Defendant's Exhibit G.) Kmiecik concluded that, in Cleveland, "at that time of the afternoon" 45 minutes was "a pretty good response."

{¶9} With regard to defendant's record of the occurrence, Bais testified that on March 29, 2005, he received three voice mails about the ladder on I-90. Bais stated that he had been working away from his office for a few hours that day and returned at approximately 3:30 p.m., near the end of his shift. Bais stated that he listened to the voice mails, made handwritten notes of the pertinent information, concentrated on dispatching a crew to inspect the roadway, then entered the information into the computer complaint database. The complaint log shows the following entries: 1) 2:36 pm. — phone call — C.P.D.; 2) 3:40 p.m — voice mail — C.P.D.; and 3) 3:51 a.m. — voice mail — Euclid P.D. (Defendant's Exhibit D.) As noted by plaintiff, the first entry was logged as a 2:36 p.m. phone call. Additionally, defendant pointed out that the third entry was logged as a 3:51 a.m. voice mail.

{¶10} In response to questioning about his computer entries, Bais testified candidly that the computer system was relatively new, that he was not fully acclimated to the system, that he was not a proficient typist, that it was unusual for calls from police departments to be forwarded to him rather than to a district manager, and that he would

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have been rushed because it was the end of his shift. The court finds that Bias' testimony was credible and consistent with the information logged by the Cleveland Police Department. Specifically, the court is persuaded that there was no phone call made at 2:36 p.m. nor was there a voice mail made at 3:51 a.m. Bais was not in his office during either of those times and both entries were, more likely than not, simple errors. Rather, the calls were received most likely at 3:36 p.m., 3:40 p.m., and 3:51 p.m. Thus, the court concludes from the evidence that defendant did not have actual notice of the problem ladder until after plaintiff's 3:30 p.m. phone call to 911 was received by the police department and forwarded to defendant.

{¶11} To the extent that constructive notice is an issue, the court is precluded from making an inference of such notice unless evidence is presented with respect to the time the debris appeared on the roadway. *Spires v. Highway Dept.* (1988), 61 Ohio Misc.2d 262. In this case, there is no evidence when the ladder appeared on the roadway; however, it is reasonable to infer that it was only minutes before plaintiff's accident because the calls concerning the ladder began after 3:30 p.m.

{¶12} Accordingly, plaintiff has failed to show by a preponderance of the evidence that defendant had actual or constructive notice of the ladder in the roadway in sufficient time to correct the problem before plaintiff's accident. Therefore, her claim of negligence must fail.

{¶13} For the foregoing reasons, judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the 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.

CLARK B. WEAVER SR.
Judge

cc:

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