

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

THOMAS MISENCIK

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-04427-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Thomas Misencik, stated that he was traveling east on Interstate 90 in Lake County, through a construction zone, past the Rt. 306 exit, when a chunk of asphalt the size of a softball was propelled into the front end of his 2004 Ford Expedition. Plaintiff related that the asphalt debris struck the front of his vehicle, went through the grille, through the header panel, and lodged in the vehicle's air condition condenser. Plaintiff recalled the described property damage event occurred on December 24, 2006, after construction had been completed on the particular portion of Interstate 90.

{¶2} 2) Plaintiff implied that the damage to his vehicle was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover \$1,216.51, the cost of automotive repair he incurred. The filing fee was paid.

{¶3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of asphalt debris on the roadway prior to plaintiff's property damage incident. Defendant denied receiving any calls or complaints regarding asphalt debris which defendant located at milepost 193.8 on Interstate 90 in

Lake County. Defendant suggested that, “the debris existed in that location for only a relatively short amount of time before plaintiff’s incident.” Defendant explained that DOT Lake County Manager conducts routine roadway inspections, “at least one to two times a month,” and had any debris been found it would have been picked up. Defendant related that DOT crews conducted a roadway litter pick-up on December 22, 2006, two days before plaintiff’s damage occurrence.

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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶5} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247, 517 N.E. 2d 1388. Defendant is only liable for roadway condition of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179.

{¶6} 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 that 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. Dept. of Transportation* (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 that the defective condition (debris) appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. Evidence has shown defendant did not have any notice, either actual or constructive, of the damage-causing debris.

{¶7} 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. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 79, 472 N.E. 2d 707. 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 fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶8} 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 that 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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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 defendant. Court costs are assessed against plaintiff.

MILES C. DURFEY
Clerk

Entry cc:

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Mentor, Ohio 44060

James G. Beasley, Director
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RDK/laa

8/17

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