[Cite as *Mann v. Dept. of Transp.*, 2008-Ohio-1607.]

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

DAVID R. MANN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-07531-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On March 29, 2007, at approximately 8:20 a.m., plaintiff, David R. Mann, was traveling south on Interstate 71 near milemarker 186.0 in Ashland County, when his automobile was struck by a large sign that had been moved into the path of his car by a preceding motorist. Plaintiff stated, "a car in front of my vehicle had driven over a large orange (approximately 4' by 4') sign that was face down in the third lane of the highway." Plaintiff further stated, "[a]s the car in front of me passed over the orange sign, the back corner of the sign elevated and struck my front bumper." Plaintiff recalled he had noticed "an orange construction vehicle" stopped on the left side of Interstate 71, "seconds before the sign hit my car." Plaintiff noted the orange painted vehicle was equipped with small flashing lights that were in operation. According to plaintiff, he also noticed a man exiting the stopped vehicle in the seconds before his automobile struck the downed sign.

{¶2} 2) Plaintiff implied the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to keep the roadway free of debris. Plaintiff filed this complaint seeking to recover $613.14, the cost of replacement parts and repair expenses incurred resulting from the described incident. The filing fee was paid.

{¶3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of any debris on the roadway at milepost 186.0 on Interstate 71 prior to plaintiff's property damage event. Defendant explained no construction activity was being conducted on Interstate 71 in Ashland County on May 29, 2007. Defendant further explained DOT work crews use white trucks and not orange trucks as plaintiff specified in his complaint. Therefore, defendant is unaware of the identity of the individuals who seemingly dropped a sign from an orange truck on Interstate 71. Regardless of the source of the damage-causing debris, defendant suggested the sign likely, "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶4} 4) Defendant argued plaintiff failed to produce sufficient evidence to show any negligence on the part of DOT caused his property damage. Defendant related DOT's Ashland County Manager routinely conducts roadway inspections on Interstate 71 within the county and DOT crews routinely conduct "litter pickups" on that particular roadway. Defendant asserted that if any debris had been discovered at milepost 186 on Interstate 71, "it would have been picked up."

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, 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.

{¶6} 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. 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 condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶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, 81, 2003-Ohio-2573, 788 N.E. 2d 1088, 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} Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT. However, defendant may still bear liability if it can be established if some act or omission on the part of DOT was the proximate cause of plaintiff's injury. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

{¶9} "If any injury is the natural and probable consequence of a negligent act

and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, at 160, 6 OBR 209, 451 N.E. 2 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶10} Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing object at the time of the damage incident 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.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

David R. Mann
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Independence, Ohio 44131

James G. Bailey, Director
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RDK/laa

1/8
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