[Cite as *Andrews v. Ohio Dept. of Transp.*, 2008-Ohio-4626.]

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

DANIEL J. ANDREWS

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-02142-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On January 22, 2008, plaintiff, Daniel J. Andrews, was traveling east on State Route 82, "in front of the C & C Grocery located at 26669 Royalton Road, Columbia Station, Ohio," when his truck tires were punctured by a dislodged road reflector laying on the roadway. Plaintiff asserted that at sometime prior to January 22, 2008, a snow plow/salt truck owned by defendant, Department of Transportation (DOT) and operated by a DOT employee, had uprooted the road reflector, thereby creating a hazard for motorists traveling on the roadway. Plaintiff submitted photographs depicting the damage-causing reflector piece as well as the particular roadway pavement area of State Route 82 where the reflector had been anchored. The photographic evidence submitted does not constitute proof, in and of itself, that the road reflector was dislodged from the roadway by a vehicle owned by DOT.

{¶ 2} However, plaintiff contended that his property damage was proximately caused by negligence on the part of defendant in conducting snow removal activities. Plaintiff filed this complaint seeking to recover damages in the amount of $384.78, the cost of two new replacement tires. The filing fee was paid.

{¶ 3} Defendant denied liability based on the contention that no DOT personnel had any knowledge of a dislodged road reflector prior to plaintiff's damage occurrence. Defendant observed that DOT records indicate that no previous calls or complaints were received regarding the particular road reflector which defendant located at

approximately milepost 6.43 on State Route 82 in Lorain County. Defendant asserted that plaintiff did not present any evidence to establish the length of time the road reflector was dislodged prior to his property damage event. Defendant suggested that the damage-causing condition "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} Defendant acknowledged that DOT crews were engaged in snow removal operations on State Route 82 "throughout the months of December, 2007 and January, 2008." Defendant's records show that DOT crews conducted snow plowing operations on State Route 82 in Lorain County on sixteen days during January, 2008, including January 22, 2008, the day of plaintiff's damage occurrence. Defendant did not specifically deny the allegation of plaintiff that a DOT snow plow dislodged the road reflector on State Route 82 that eventually punctured his truck tires. Defendant contended that plaintiff failed to offer sufficient proof to establish the road reflector at milepost 6.43 on State Route 82 was dislodged by a DOT snow plow. Furthermore, defendant related that DOT has a statutory duty to do whatever is necessary to remove snow from roadways and suggested this duty grants DOT immunity from liability for any damages which may be proximately caused from these snow removal operations.

{¶ 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 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} The duty to remove snow and ice does not supersede the duty to repair pavement defects. The duty to repair defects and the duty to remove roadway snow are concurrently equivalent duties. *Farmer v. Department of Transportation* (1999), 99-02931-AD, jud; *Kirschner v. Department of Transportation* (1999), 99-04542-AD, jud. The fact that defendant chooses to engage its work force in snow and ice removal is not

a defense to failure to timely repair roadway defects.

{¶ 7} 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 conditions 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. There is no evidence that DOT had any notice of the dislodged reflector on the roadway. 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.

{¶ 8} 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 179, 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.

{¶ 9} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him, or that his damage was proximately caused by defendant's negligence. Plaintiff has failed to show that the damage-causing reflector was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant or its agents. *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.

{¶ 10} Finally, plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Therefore, defendant is not liable for any damage plaintiff may have suffered from the dislodged reflector.

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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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RDK/laa

5/14
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