[Cite as *Beckner v. Ohio Dept. of Transp.*, 2008-Ohio-5186.]

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

GREGORY A. BECKNER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-04382-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Gregory A. Beckner, observed that he sustained property damage to his automobile on March 11, 2008, while traveling on State Route 327, when his vehicle struck a piece of a dislodged centerline road reflector. Plaintiff stated, "I ran over a piece of steel from a highway reflector and ruined my tire." Plaintiff submitted a photograph of the reflector piece that damaged his tire.

{¶ 2} 2) Plaintiff asserted that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway free of hazards. Plaintiff filed this complaint seeking to recover damages in the amount of $161.70, for automotive repair. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of a loose reflector on the roadway prior to plaintiff's March 11, 2008 property damage occurrence. Defendant related that DOT records indicate that no previous calls or complaints were received from any entity regarding the particular dislodged reflector which DOT located at milepost 7.90 on State Route 327 in Jackson County. Defendant contended plaintiff failed to produce any evidence to show how long the dislodged reflector existed on the roadway prior to March 11, 2008. Defendant suggested that the loose reflector condition likely, "existed in that location for

only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant asserted that plaintiff did not provide evidence to establish that his property damage was caused by negligent maintenance on the part of DOT. Defendant explained that DOT regularly maintains the roadway in the vicinity of plaintiff's damage event. Defendant stated, "Harry Wolfe, Jackson County Transportation Manager travels each state highway twice a month in Jackson County and looks for potholes, low berms, and other safety hazards and records any deficiencies he finds on the Road Inspection Reports." The Road Inspection Reports for January 7, 2008 and January 24, 2008 were submitted by defendant. Defendant related, "these were the only Road Inspection Reports available for Jackson County." Defendant's Road Inspection Reports for January 7, 2008 and January 24, 2008 record that State Route 327 was inspected and no problems regarding dislodged road reflectors were noted. No evidence has been submitted to establish State Route 327 in Jackson County was inspected between January 25, 2008 and March 10, 2008.

{¶ 5} 5) Despite filing a response, plaintiff did not provide any evidence to show how long the dislodged reflector was on the roadway prior to his March 11, 2008 property damage incident. Plaintiff did note he is "questioning why there is no inspection reports between January 27 and March 11." Also, plaintiff expressed the opinion "that the State of Ohio has wasted more time and money than the total amount of this claim."

CONCLUSIONS OF LAW

{¶ 6} 1) 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.

{¶ 7} 2) 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.

{¶ 8} 3) "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-ste-time standard for the discovery of certain road hazards." *Bussard*, at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. 92AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 9} 4) Plaintiff has not produced any evidence to indicate the length of time the loosened road reflector was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the uprooted reflector. Additionally, 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 loosened road reflector appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication that defendant had constructive notice of the dislodged reflector. Plaintiff has not produced any evidence to infer that 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.

{¶ 10} 5) 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. 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. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice but fails to correct. *Bussard,* 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. However, proof 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. Plaintiff has failed to produce sufficient evidence to prove that his property damage was caused by a defective condition created by DOT. The evidence tends to show plaintiff's damage was caused by an unidentified third party not connected with defendant.

{¶ 11} 6) 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 condition was created by conduct under the control of defendant, or negligent maintenance 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. Plaintiff has failed to provide sufficient evidence to prove that defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his vehicle. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD.

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GREGORY A. BECKNER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-043820-AD

Deputy Clerk Daniel R. Borchert

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:

Gregory A. Beckner
2498 S. Pennsylvania Avenue
Wellston, Ohio 45692

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
7/8
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