[Cite as *Goodman v. Ohio Dept. of Transp.*, 2008-Ohio-5612.]

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

SUSAN JO GOODMAN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03092-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 22, 2008, at approximately 6:00 p.m., plaintiff, Susan Jo Goodman, was traveling on State Route 327 in Ross County, when her 2007 Honda Pilot struck a dislodged centerline road reflector causing tire damage to the vehicle. Plaintiff described the damage incident stating she was "[t]raveling toward Adelphi from home on St Rt 327 at the sharp s curve. I ran over a piece of the reflector which had erupted from the road."

{¶ 2} 2) Plaintiff implied the damage to her vehicle tire was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition on the roadway. Consequently, plaintiff filed this complaint seeking to recover damages in the amount of $127.47, the total cost of a replacement tire. Plaintiff paid the $25.00 filing fee and requested reimbursement of that cost along with her property damage claim.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of a loosened reflector on the roadway prior to plaintiff's February 22, 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 between mileposts 7.50 and 7.99 on State Route 327 in Ross County. Defendant contended plaintiff failed to produce any evidence to show how long the dislodged reflector existed on the roadway prior to 6:00 p.m. on February 22, 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 her property damage was caused by negligent maintenance on the part of DOT. Defendant explained that DOT Ross County Transportation Manager, Bill Pickerell, travels all state roads within the county twice a month "and looks for potholes, low berms, and other safety hazards" while driving a DOT vehicle. Defendant further explained DOT employee Pickerell "records any deficiencies he finds on the Road Inspection Reports." Defendant related Pickerell inspected the particular section of State Route 327 on January 7, 2008, January 29, 2008, and again on February 7, 2008

and did not discover any dislodged road reflectors. Defendant submitted a copy of the Road Inspection Reports reflecting State Route 327 was inspected on the referenced dates. Defendant contended plaintiff failed to produce evidence to establish her property damage was attributable to any negligence on the part of DOT.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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-set-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.

{¶ 8} 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.

{¶ 9} 5) For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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 she 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 any evidence to prove that her property damage was caused by a defective condition created by DOT.

{¶ 10} 6) Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her 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 any 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 her property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that any DOT roadway maintenance activity created a nuisance. Plaintiff has not submitted evidence to prove a negligent act or omission on the part of defendant caused the damage to her vehicle. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD.

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

SUSAN JO GOODMAN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03092-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE DETERMINATION

[Cite as *Goodman v. Ohio Dept. of Transp.*, 2008-Ohio-5612.]

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:

Susan Jo Goodman
18404 St. Rt. 327
Laurelville, Ohio 43135

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

RDK/laa
7/7
Filed 7/31/08
Sent to S.C. reporter 10/28/08