[Cite as *Campbell v. Ohio Dept. of Transp.*, 2008-Ohio-5777.]

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

STACY CAMPBELL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-01120-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Stacy Campbell, filed this action against defendant, Department of Transportation ("DOT"), to recover the cost of repair to his commercial truck that was damaged on November 6, 2007, while traveling on State Route 582 in Wood County. Plaintiff stated, "[m]y driver, Mary Eschedor . . . was westbound on St. Rt. 582, approaching the intersection of SR 199 when she hit a tree limb over the road." According to plaintiff, the right front corner of the refrigeration box of his truck was "caved in" as a result of the vehicle striking the tree limb overhanging the roadway. Plaintiff contended the described damage to his truck was proximately caused by negligence on the part of DOT in maintaining a hazardous condition over the traveled portion of the roadway. Plaintiff seeks damages in the amount of $1,080.72 for vehicle repair costs. The filing fee was paid.

{¶ 2} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the hazardous condition created by the tree limb overhanging the roadway prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints regarding a tree limb hazard which DOT located at milepost 10.05 on State Route 582 in Wood County. Defendant explained plaintiff's driver, Mary Eschedor reported the overhanging tree limb condition to DOT on

November 7, 2007, and consequently DOT personnel were dispatched to the area of State Route 582 in question. Defendant related, "no low-hanging tree limbs were visible nor were there any tree limb debris noticed in the area" when DOT responded to the report. Defendant asserted plaintiff failed to produce any evidence to establish the length of time the purported damage causing condition existed prior to November 6, 2007. Defendant suggested, "it is likely the tree limb existed for only a short time before the incident." Defendant noted the DOT "Wood County Manager inspects all state roadways within the county at least two times a month." Apparently no problems relating to overhanging tree branches were discovered the last time State Route 582 at milepost 10.05 was inspected prior to November 6, 2007. Neither plaintiff nor defendant submitted any photographs depicting the particular roadway area of State Route 582 with adjacent vegetation.

{¶ 3} 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.

{¶ 4} In order to prove a breach of 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. Plaintiff,

in the instant claim, has not offered any evidence to establish defendant had either actual or constructive notice of the overhanging tree limb. Plaintiff, as a matter of law, in order to prevail, must present evidence with regard to the condition of the tree limb and the trier of fact is precluded from making any inference of prior notice unless such evidence is submitted. See *Shupe v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2003-04457-AD, 2004-Ohio-644; *Blausey v. Ohio Dept. of Transp.*, Ct. of Cl. No. 91-13003, 2005-Ohio-1807; *Varns v. Dept. of Transp., Dist. 5* (2006), 2006-05233-AD.

{¶ 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 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.

{¶ 6} 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 tree limb was connected to any 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. 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Stacy Campbell
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Hudson, Michigan 49247

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RDK/laa
6/11
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