[Cite as *Miller v. Ohio Dept. of Transp.*, 2008-Ohio-5912.]

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

DONALD A. MILLER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03971-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Donald A. Miller, filed this complaint against defendant, Department of Transportation ("DOT"), seeking to recover costs of automotive repair for damage to his vehicle resulting from a one-car traffic accident that occurred at approximately 5:15 a.m. on March 5, 2008. In his complaint, plaintiff provided his recollection of the incident forming the basis of his claim. Plaintiff related he was traveling south of State Route 176 (Broadview Road) north of Alger Road in Summit County, when his automobile struck a tree that had fallen across the roadway. Plaintiff recalled State Route 176 was ice and snow covered and the roadway area where the tree had fallen was unlighted. Plaintiff stated, "attributed to road conditions I was unable to stop prior to impact" with the fallen tree. Plaintiff did not offer any statement in regard to the speed of his vehicle as the vehicle approached the fallen tree. Plaintiff contended the damage to his car was proximately caused by negligence on the part of DOT in failing to maintain the roadway free of hazardous conditions. Plaintiff seeks damages in the amount of $377.19, the total cost of automotive replacement parts. The filing fee was paid.

{¶ 2} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of a fallen tree on the roadway prior to plaintiff's

property damage event. Defendant denied receiving any calls or complaints about this particular fallen tree which DOT located at milepost 3.64 on State Route 176 in Summit County. DOT records for March 5, 2008 show snow removal activities were conducted on various roadways in Summit County including State Route 176. The plowing occurred between 1:45 a.m. and 5:55 a.m. on March 5, 2008. Defendant related the DOT crews engaged in snow removal on State Route 176 on March 5, 2008 did not discover a fallen tree laying across the roadway. Defendant asserted plaintiff did not produce any evidence to establish the length of time the fallen tree was on the roadway prior to 5:15 a.m. on March 5, 2008. Defendant explained the DOT "Summit County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least twice a month." Apparently no fallen tree was discovered near milepost 3.64 on State Route 176 the last time that specific section of roadway was inspected before March 5, 2008.

{¶ 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.

{¶ 5} No evidence has been presented to show defendant had actual notice of the tree laying across the traveled portion of the roadway. Therefore, in order for plaintiff to prevail, constructive notice of the debris must be established. This legal concept of notice is of two distinguishable types, actual and constructive. "The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards a sufficient to give notice and is regarded as a substitute for actual notice." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 47 O.O. 231, 105 N.E. 2d 429, paragraph two of the syllabus.

{¶ 6} To establish that defendant had constructive notice of a nuisance or defect in the highways, the hazard "must have existed for such length of time as to impute knowledge or notice." *McClellan*, 34 Ohio App. 3d at 250, 517 N.E. 2d 1388. "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*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "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. No. 92AP-1183.

{¶ 7} Plaintiff, as a matter of law, in order to prevail, must present evidence which regard to the condition of the tree 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. Ohio Dept. of Transp.,*

Dist. 5 (2006), 2006-05233-AD. Plaintiff, in the instant claim, has failed to prove defendant had requisite notice of the fallen tree.

{¶ 8} Assuming notice was established in this matter plaintiff could still not prevail. The court concludes, based on the evidence presented, that the sole cause of the March 5, 2008 motor vehicle accident was plaintiff's own negligence driving; specifically, his failure to maintain an assured clear distance ahead, or violation of R.C. 4511.21(A).[1] "The assured-clear-distance statute is a specific requirement of law, the violation of which constitutes negligence per se." *Estate of Eyler v. Dedomenic* (1995), 107 Ohio App. 3d 860, 864, 669 N.E. 2d 569, citing *Tomlinson v. Cincinnati* (1983), 4 Ohio St. 3d 66, 69, 446 N.E. 2d 454. A finding of negligence per se for violating 4511.21(A) depends on whether evidence has been produced to establish a driver collided with an object that was ahead of him in the path of travel, was stationary or moving in the same direction as the driver, was readily discernible, and did not suddenly appear in the driver's path. *Estate of Eyler.* Evidence presented has indicated the fallen tree which plaintiff struck with his automobile was clearly visible to plaintiff, despite the assertion the area was not lighted. When plaintiff saw the tree on the roadway and failed to stop, he violated R.C. 4511.21(A), the assured-clear-distance-ahead statute. A violation of this statute occurs where evidence exists to indicate a driver collided with an object which: 1) was ahead of him in his path of travel, 2) was stationary or moving in the same direction as the driver, 3) did not suddenly appear in the driver's path, and 4) was reasonably discernable. *McFadden v. Elmer C. Breuer Transp. Co.* (1952), 156 Ohio St. 430, 46 O.O. 354, 103 N.E. 2d 385. A violation of the assured-clear-distance-ahead statute is negligence per se. *Transportation Corp. of*

[1] R.C. 4511.21(A) states:

"(A) No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no persons shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead."

Indiana v. Lennox Trucking, Inc. (1968), 15 Ohio St. 2d 1, 44 O.O. 2d 1, 238 N.E. 2d 539. Therefore, even assuming defendant's conduct or omission was negligent, plaintiff still would not prevail.

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

DONALD A. MILLER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03971-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:

Donald A. Miller
238 Prestwick Drive
Broadview Hts., Ohio 44147-3075

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

RDK/laa
7/14
Filed 8/22/08
Sent to S.C. reporter 11/13/08