[Cite as *Bickerstaff v. Ohio Dept. of Transp.*, 2008-Ohio-6458.]

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

THOMAS BICKERSTAFF

Plaintiff

v.

THE OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05451-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Thomas Bickerstaff, filed this action against defendant, Department of Transportation ("DOT"), alleging his motorcycle was damaged while traveling on Intestate 80 as a proximate cause of negligence on the part of DOT in maintaining the roadway. Plaintiff recalled the damage to his motorcycle occurred on April 14, 2008 at approximately 5:20 p.m. In his complaint plaintiff provided a written narrative of the damage incident noting: "While riding home from my work on my 2006 Yamaha FJR 1300 motorcycle; I was traveling west on Interstate 80 just west of the Belmont Ave/Rt. 11 North exit ramp. I was moving from the right lane to the left lane I hit a large hump (ramp) that had developed in a repair at the bridge crossing Rt 11 North." Plaintiff related the impact of striking the "hump" in the roadway caused the motorcycle to become momentarily airborne and he was nearly thrown from his motorcycle, but he did manage to remain on the vehicle. However, as a direct result of striking this roadway hazard plaintiff's motorcycle received substantial damage. Plaintiff reported the damage included "loss of accessories, bending both wheels, (breaking)

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windshield, lost GPS, suspension damage, (and) denting the gas tank." Plaintiff filed this complaint seeking to recover damages in the amount of $1,000.00, his insurance coverage deductible he incurred for vehicle repair. The $25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Plaintiff submitted photographs taken on April 14, 2008 depicting the roadway bridge deck area where his property damage event occurred. The photographs show a bridge deck where multiple roadway surface repairs have been made. One photograph depicts an area where the surface repair has heaved or elevated several inches above the roadway surface creating a wave effect. Apparently, the photograph showing the wave-like condition of the pavement is the "hump" area described by plaintiff.

{¶ 3} Plaintiff submitted a copy of an e-mail dated April 16, 2008 from DOT maintenance Area Engineer, Ted J. Baker, regarding his impressions of the roadway area where the April 14, 2008 incident occurred. Baker wrote: "[t]his is the same bridge that TRU M & R worked on yesterday (April 15, 2008). He's (plaintiff) right about the hump. According to Gregg, it was practically a launching pad. Temporary repairs have been made and Gregg assured me that they will be checking this area every day until a

more permanent repair is made."

{¶ 4} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of a "hump" on the surface of the roadway prior to plaintiff's April 14, 2008 damage occurrence. Defendant denied receiving any previous calls or complaints regarding a "hump" on a roadway bridge deck which DOT located at approximately state milepost 228 on Interstate 80 in Trumbull County. Defendant asserted plaintiff did not offer any evidence to establish the length of time the shoved pavement condition as described by DOT existed prior to 5:20 p.m. on April 14, 2008. Defendant suggested "it is likely the hump in the road existed for only a short time before the incident." Defendant denied any knowledge of the damage-causing pavement condition until April 15, 2008 when plaintiff reported the condition to DOT personnel.

{¶ 5} Defendant explained the DOT "Trumbull County Manager inspects all state roadways within the county at least two times a month." Apparently no pavement problems were noted the last time an inspection was made at milepost 228 on Interstate 80 before April 14, 2008. According to DOT records pothole patching operations were conducted in the vicinity of plaintiff's incident twenty-six times from November 1, 2007 to April 8, 2008. Litter patrol operations were conducted by DOT in the vicinity of plaintiff's incident twenty-six times between November 1, 2007 and April 4, 2008. DOT records show snow removal treatments were applied to the roadway area at issue ten times from November 15, 2007 to March 21, 2008. Other additional maintenance activity was conducted on at least two occasions in the vicinity of plaintiff's incident according to

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DOT records. Defendant contended plaintiff failed to produce evidence to prove his property damage was proximately caused by DOT negligently maintaining the roadway bridge deck on Interstate 80.

{¶ 6} Defendant submitted photographs depicting the bridge deck surface on Interstate 80 West. The photographs were taken on November 8, 2005 and May 19, 2008. The November 8, 2005 photographs show a roadway surface in generally good condition with minor defects noted on the right lane surface. The May 19, 2008 photographs depict the bridge deck showing substantial roadway surface repairs. The roadway condition that existed on April 14, 2008 had been significantly improved by May 19, 2008. Defendant did not produce any photographs depicting the bridge deck surface as it appeared on or immediately prior to April 14, 2008. Defendant did not submit any photographs showing the bridge deck surface after initial repairs were made prior to April 14, 2008.

{¶ 7} Plaintiff filed a response pointing out that the "hump" in the roadway surface his motorcycle struck was "a previous repair that had obviously deteriorated." Plaintiff reported DOT was required to make multiple repairs on the bridge deck surface to achieve the results shown in the submitted May 19, 2008 photographs. Plaintiff

insisted his property damage was the result of negligence on the part of DOT in performing roadway maintenance.

{¶ 8} 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.

{¶ 9} 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. 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. Insufficient evidence has been presented to establish defendant had notice of the "hump" on the

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roadway surface, but evidence produced does point to the fact defendant created the condition.

{¶ 10} 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.

{¶ 11} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition and failed to

respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. The photographic evidence plaintiff submitted depicting the deteriorated surface patch that caused a significant roadway hazard constitutes sufficient evidence to the trier of fact of negligent maintenance on the part of DOT. The court finds defendant's negligent repair of a defect proximately caused plaintiff's property damage and therefore liability has been established.

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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 plaintiff in the amount of $1,025.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
8/25
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