[Cite as *Allen v. Dept. of Transp.*, 2008-Ohio-6864.]

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

RICHARD F. ALLEN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05826-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On March 2, 2008, at approximately 9:15 a.m., plaintiff, Richard F. Allen, was traveling on State Route 14 in Columbiana County, when his automobile tire was punctured by an uprooted centerline road reflector laying on the traveled portion of the roadway.

{¶ 2} 2) Plaintiff implied the damage to his automobile tire was proximately cause by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazards. Plaintiff filed this complaint seeking to recover $114.96, the cost of a replacement tire. The filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular loose reflector prior to plaintiff's property damage occurrence. Defendant noted no calls or complaints were received from any entity regarding the loose road reflector which DOT located between mileposts 17.25 and 17.50 on State Route 14 in Columbiana County. Defendant asserted plaintiff did

not produce any evidence to establish the length of time the uprooted reflector was on the roadway prior to 9:15 a.m. on March 2, 2008. Defendant suggested that the uprooted reflector "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant argued plaintiff did not offer evidence to show his property damage was proximately caused by conduct attributable to DOT personnel. Defendant explained DOT crews performed various maintenance operations between mileposts 17.25 and 17.50 on State Route 14 in October 2007, December 2007, January 2008 and February 2008. DOT records show the last time prior to March 2, 2008 that DOT personnel were working in the vicinity of plaintiff's damage event was on February 25, 2008 when pothole patching operations were conducted from milepost 0.00 to 19.20. Defendant stated that if any DOT "work crews were doing activities such that if there was a noticeable defect with any raised or loosened pavement markers it would have immediately been repaired." Defendant denied breaching any duty of care owed to plaintiff that resulted in any property damage.

CONCLUSIONS OF LAW

{¶ 5} 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} 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. 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. There is no evidence that DOT had any notice of the

dislodged reflector on the roadway. 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. No evidence has been submitted to establish the damage-causing reflector was dislodged from the roadway by defendant's personnel.

{¶ 7} 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.

{¶ 8} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his property damage was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing reflector was connected to any conduct under the control of defendant, or that there was any negligence 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.

{¶ 9} Finally, plaintiff has not produced any evidence to infer 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the dislodged reflector.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Richard F. Allen
4227 Woodmere Drive
Youngstown, Ohio 44515

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RDK/laa
9/11
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