[Cite as *Kneipp v. Dept. of Transp.*, 2008-Ohio-7090.]

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

JASON KNEIPP

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-06741-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 15, 2008, at approximately 11:56 p.m., plaintiff, Jason Kneipp, was traveling west on State Route 28 at Deerfield Road in Clermont County when his 2005 Dodge Neon struck a displaced sewer lid in the roadway. Plaintiff stated the sewer lid "was up rooted and sitting in the middle of the road." The impact of striking the displaced sewer lid caused tire and rim damage to plaintiff's vehicle. Plaintiff submitted photographs depicting the displaced sewer lid and the damage to his car.

{¶ 2} 2) Plaintiff implied the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous conditions such as the displaced sewer lid. Plaintiff filed this complaint seeking to recover $421.21, the cost of car rental expense he incurred while waiting for his automobile to be repaired. The filing fee was paid. Plaintiff pointed out his insurer paid for the car rental expenses. Plaintiff has not suffered any monetary damage that has not been reimbursed by a collateral source.

{¶ 3} 3) Defendant asserted plaintiff's claim should be dismissed pursuant to R.C. 2743.02(D)[1] since he has not suffered any damages not reimbursed by a collateral source. Additionally, defendant denied liability based on the contention that no DOT personnel had any knowledge of the displaced sewer lid prior to plaintiff's property damage occurrence. Defendant's records show no calls or complaints were received from any entity regarding a displaced sewer lid which DOT located "at approximately milepost 5.60 on SR 28 in Clermont County." Defendant suggested "it is likely the defect (sewer lid) existed for only a short time before the incident." Defendant explained the DOT "Clermont County Manager inspects all state roadways within the county at least two times a month." Apparently no displaced sewer lid was discovered the last time State Route 28 at milepost 5.60 was inspected prior to May 15, 2008. Defendant contended plaintiff did not produce any evidence to establish the length of time the damage-causing sewer lid was displaced prior to 11:56 p.m. on May 15, 2008.

CONCLUSIONS OF LAW

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 3) Plaintiff has not produced sufficient evidence to indicate the length of

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[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section

time that the displaced sewer lid 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 displaced sewer lid. 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 displaced sewer lid appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the displaced sewer lid. 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.

{¶ 7} 4) 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. 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 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 notice of a dangerous condition is not necessary when defendant's own agents actively caused 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*

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apply under those circumstances."

Department of Transportation (1996), 94-13861. Plaintiff has failed to produce sufficient evidence to prove his property damage was caused by a defective condition created by DOT.

{¶ 8} 5) Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing condition was connected to any conduct under the control of defendant, or 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. Plaintiff has failed to provide sufficient evidence to prove defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his vehicle. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD.

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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:

Jason Kneipp
1365 State Route 28
Loveland, Ohio 45140

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
9/25
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