[Cite as *Ault v. Dept. of Transp.*, 2009-Ohio-5114.]

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

ORVILLE A. AULT

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-02588-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Orville A. Ault, related he was traveling south on State Route 60 "about ½ mile before Duncan Falls, when a light reflector came sliding across the road from the north bound lane and punctured about a 3" hole in the sidewall" of the right rear tire of his truck. Plaintiff further related "[w]hen the tire blew out it also punctur(ed) the rear air suspension bag." Plaintiff recalled the described damage incident occurred at approximately 4:15 p.m. on January 29, 2009.

{¶ 2} Plaintiff implied the damage to his truck 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 loose uprooted road reflectors. Consequently, plaintiff filed this complaint seeking to recover $799.95, the total replacement cost of a new tire and air bag helper spring. The filing fee was paid.

{¶ 3} Defendant denied any liability in this matter based on the contention that no DOT personnel had any knowledge of a loose reflector on the roadway prior to plaintiff's January 29, 2009 property damage occurrence. Defendant denied receiving any calls or complaints from any entity regarding a loose road reflector on the roadway

which DOT located "at approximately milepost 8.25 on SR 60 in Muskingum County." Defendant asserted plaintiff did not produce any evidence to establish the length of time the uprooted road reflector was on the roadway prior to 4:15 p.m. on January 29, 2009. Defendant suggested that the uprooted road reflector "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} Defendant argued plaintiff did not offer evidence to prove his property damage was proximately caused by conduct attributable to DOT personnel. Defendant explained DOT crews conducted various maintenance operations on the particular section of State Route 60 during the six-month period preceding January 29, 2009. Defendant noted DOT workers patched potholes on January 21, 2009 and did not discover any loose reflector on the roadway on that date. Defendant stated that if any DOT "work crews were doing activities such that if there was a noticeable defect with any raised or loosened reflector it would have been immediately repaired."

{¶ 5} Defendant acknowledged DOT "maintenance crews were performing snow plowing activities on the day of plaintiff's incident in Muskingum County." Presumedly State Route 60 was plowed on the date of plaintiff's incident. Defendant seemingly argued that if this court finds DOT snow plowing uprooted the road reflector and proximately caused plaintiff's property damage, DOT should be immune from liability. Defendant further argued that snow plowing that results in hazardous conditions such as loose road reflectors being deposited on the roadway "was necessary and reasonable for the safety of the traveling public and done in a manner consistent with normal standards." Defendant stated R.C. 5501.41[1] grants DOT "the right to remove ice and snow from state highways and the authority to do whatever is necessary to conduct such removal activities." Defendant related, "assuming that a snowplow of Defendant did cause a raised pavement marker to become dislodged, Defendant contends that it is given statutory authority to do whatever is reasonable and necessary to remove snow." Contrary to defendant's argument concerning "whatever is

[1] R.C. 5501.41 covering DOT's discretionary authority to remove snow and ice states:

"The director of transportation may remove snow and ice from state highways, purchase the necessary equipment including snow fences, employ the necessary labor, and make all contracts necessary to enable such removal. The director may remove snow and ice from the state highways within municipal corporations, but before doing so he must obtain the consent of the legislative authority of such municipal corporation. The board of county commissioners of county highways, and the board of township trustees on township roads, shall have the same authority to purchase equipment for the

reasonable and necessary," the court finds it neither reasonable nor necessary to create a dangerous roadway hazard while in the course of performing snow removal activities. Defendant contended plaintiff failed to offer sufficient proof to show his property damage was caused by any negligent conduct on the part of DOT in performing snow removal operations on State Route 60 on January 29, 2009.

{¶ 6} Plaintiff filed a response pointing out he believed the damage-causing road reflector was uprooted at approximately 4:15 p.m. on January 29, 2009. Plaintiff stated "I do not know how long it (reflector) had been floating around on the road, but at 4:15 p.m. a vehicle heading North on St. Rt. 60 hit it and it came across the road and blew out my tire and also my suspension air bag." Plaintiff related the reflector could have been dislodged by "a snow plow or a semi truck or even a car (since) St. Rt. 60 is crumbling to pieces and there isn't anything to hold a reflector in place." Plaintiff submitted a photograph of the particular damage-causing road reflector. The road reflector appears broken, rusted, and in a deteriorated state. Plaintiff located his damage occurrence at approximately milepost 8.86 on State Route 60 between "Millers Lane and the ODOT Garage." Plaintiff asserted defendant failed to provide any DOT reports regarding "road reflector inspection." Plaintiff did not produce evidence to establish the length of time the loose reflector condition was present on the roadway prior to 4:15 p.m. on January 29, 2009. Furthermore, plaintiff did not provide evidence to show the road reflector was uprooted as a result of DOT snow removal activities.

{¶ 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 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

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removal of and to remove snow and ice as the director has on the state highway system.

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.

{¶ 8} Defendant has the duty to maintain its highway 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. Additionally, defendant has a duty to exercise reasonable care for the motoring public when conducting snow removal operations. *Andrews v. Ohio Department of Transportation* (1998), 97-07277-AD.

{¶ 9} 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.

{¶ 10} 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. *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. Evidence is inconclusive whether or not the damage-causing reflector was originally dislodged from the roadway by defendant's personnel.

{¶ 11} "If any injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 12} 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.

{¶ 13} 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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