[Cite as *Heckel v. Ohio Dept. of Transp.*, 2009-Ohio-7119.]

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

MATTHEW HECKEL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05251-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} "1) On April 18, 2009, at approximately 10:30 a.m., plaintiff, Matthew Heckel, was traveling north on Interstate 75 "approaching the Buck Rd. exit" when his 2002 Mazda Protégé ES struck "an object" on the roadway causing steering and body damage to the vehicle.

{¶ 2} "2) Plaintiff asserted that the damage to his Mazda Protege was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of debris. Plaintiff filed this complaint seeking to recover damages in the amount of $1,099.04, the total cost of automotive repair incurred as a result of the April 18, 2009 incident. The filing fee was paid.

{¶ 3} "3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular debris condition on the roadway prior to 10:30 a.m. on April 18, 2009. Defendant's records show that no calls or complaints were received regarding debris on the specific roadway area which DOT located at

"county milepost 30.38 on I-75 in Wood County." Defendant suggested that "the debris existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant contended that plaintiff did not produce any evidence to establish the length of time that the damage-causing debris existed on the roadway prior to 10:30 a.m. on April 18, 2009.

{¶ 4} "4) Defendant expressed the opinion that the damage-causing object was deposited on the roadway by an unidentified third party. Therefore, defendant argued that DOT generally can not be held liable for the acts of an unknown third party motorist. Furthermore defendant asserted that plaintiff failed to offer any evidence his damage was caused by any conduct attributable to DOT personnel. Defendant explained that the DOT "Wood County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no debris was discovered at milepost 30.38 on Interstate 75 the last time that section of roadway was inspected prior to April 18, 2009. Defendant related that DOT conducts frequent litter patrols on Interstate 75 noting "litter pick-ups were performed on I-75 and (DOT crews) were in the area of plaintiff's incident on April 17 & 18, 2009." Defendant stated that "if debris had been detected prior to plaintiff's incident, it would have been promptly removed from the roadway." Defendant argued that plaintiff failed to prove that his damage was proximately caused by negligent maintenance on the part of DOT personnel.

{¶ 5} "5) Despite filing a response, plaintiff did not provide any evidence to establish the length of time that the damage-causing object was on the roadway prior to his property damage event. In his response, plaintiff seemingly pointed out that his damage incident occurred on April 16, 2009. In his complaint, plaintiff asserted that the damage incident occurred on April 18, 2009.

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} To prove a breach of the duty by defendant to maintain the highways, plaintiff must establish, by a preponderance of the evidence, that DOT 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.

{¶ 9} Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. There is no evidence to prove that defendant had actual notice of the debris. Additionally, there is no evidence to establish that defendant had constructive notice of the debris. Plaintiff has not produced evidence to indicate the length of time that the damage-causing object was on the roadway prior to the incident forming the basis of this claim. The trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 10} "[C]onstructive notice is that which the law regards as sufficient to give

notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 48 O.O. 231, 105 N.E. 2d 429. "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*, at 4. "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. 92AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047. Plaintiff, in the instant claim, has failed to prove that defendant had any notice of the damage-causing object prior to his incident.

{¶ 11} Evidence in the instant action tends to show that plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise that it had no duty to control the conduct of a third person except in cases where a special relationship exists between defendant and either plaintiff or the person whose conducts needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171, 543 N.E. 2d 769. However, defendant may still bear liability if it can be established if some act or omission on the part of DOT was the proximate cause of plaintiff's injury. Plaintiff has failed to prove, 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 that the damage-causing object 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 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.

_____
MILES C. DURFEY
Clerk

Entry cc:

Matthew Heckel
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RDK/laa
8/11
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