[Cite as *Sweney v. Ohio Dept. of Transp., Dist. 8*, 2009-Ohio-6294.]

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

ROBSON B. SWENEY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2009-03649-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On December 13, 2008 at approximately 10:15 p.m., plaintiff, Robson B. Sweney, sustained property damage to his 2006 Kia Optima owned by his wife while traveling on US Route 27 (Colerain Road) in Hamilton County. Plaintiff described the specific damage incident stating "[w]hile driving south on Colerain Blvd. I moved into what I thought was a left turn lane from Banning Road and struck a large (concrete) divider, badly damaging the left front tire and front suspension of my wife's car." Plaintiff asserted he had "insufficient warning of the divider" located at the approach of a turning lane on US Route 27 to Banning Road. Plaintiff submitted a photograph depicting the roadway markings and concrete divider approaching the intersection of Colerain Road and Banning Road. The photograph shows a single yellow line demarcating the left lane edge of south Colerain Road leading up to and several feet past the edge of the concrete divider. The divider itself, which is several feet in width, starts in a straight line fashion, angles sharply at the actual turning lane entrance to Banning Road, and then continues on a straight line demarcating the left side of the turning lane. Diagonal

yellow lines are painted on the roadway at the outer left side of the divider to apparently serve as a warning to motorists of the existence of the divider. Plaintiff related the "diagonal yellow lines don't start soon enough to warn of the divider's presence and there is no markings, such as reflective paint, on the divider itself." Additionally, plaintiff related "[h]eadlights from north-bound traffic tends to obscure the divider at night." Plaintiff noted the photograph of the divider on Colerain Road was taken on January 1, 2009 during daylight hours.

{¶ 2} Plaintiff contended the damage to the 2006 Kia Optima was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to provide sufficient warning to approaching motorists of the presence of the concrete divider on Colerain Road. Plaintiff maintained the concrete divider was especially hard to see at night due to the headlight glare from northbound traffic on Colerain Road. Plaintiff submitted a second photograph of the divider taken on March 15, 2009, apparently after DOT personnel had installed a small reflector in the middle of the angled section of the divider. The reflector, which stands about two feet in height, was installed in response to plaintiff's complaint concerning visibility problems. Plaintiff filed this complaint seeking to recover $1,014.80, the cost of replacement parts and related repair expenses he incurred as a result of the December 13, 2008 incident. The filing fee was paid.

{¶ 3} Defendant argued plaintiff failed to offer sufficient evidence to establish his property damage was proximately caused by any negligent act or omission attributable to DOT. Defendant explained "[p]laintiff hit a concrete divider that separated a two-way left turn lane that serves both northbound and southbound US 27" and in order to strike

Case No. 2006-03532-AD - 3 - MEMORANDUM DECISION

this roadway divider plaintiff had to drive "over a solid yellow line (that was located) out of the normal traffic lanes." Defendant submitted an aerial photographs of US Route 27 depicting both north and south lanes, the concrete divider, the center line turning lane, and the turning lane to Banning Road demarcated by the concrete divider. Defendant asserted the photograph provides evidence that plaintiff, in order to strike the divider, needed to cross over a painted yellow edge line thereby driving off the roadway area intended for travel. Defendant implied plaintiff's own negligent driving was the proximate cause of the property damage claimed.

{¶ 4} 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} 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.

{¶ 6} Defendant may bear liability if it can be established if some act or omission on the part of DOT or its agents was the proximate cause of plaintiff's injury. 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} "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 the 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. Evidence available tends to point out the roadway was maintained properly under DOT specifications. Plaintiff failed to prove his damage was proximately caused

Case No. 2006-03532-AD - 5 - MEMORANDUM DECISION

by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Vanderson v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-09961-AD, 2006-Ohio-7163; *Shiffler v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-07183-AD, 2008-Ohio-1600. In fact, the sole cause of plaintiff's damage was his own negligent driving. See *Wieleba-Lehotzky v. Ohio Dept. of Transp., Dist. 7*, Ct. of Cl. No. 2004-03918-AD, 2004-Ohio-4129. Plaintiff has not proven defendant maintained a hidden roadway defect. *Clevenger v. Ohio Dept. of Transportation* (1999), 99-12049-AD.

614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ROBSON B. SWENEY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2009-03649-AD

Deputy Clerk Daniel R. Borchert

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

Case No. 2006-03532-AD - 7 - MEMORANDUM DECISION

Entry cc:

Robson B. Sweney
9421 Deer Walk Court
West Chester, Ohio 45069

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
6/30
Filed 7/20/09
Sent to S.C. reporter 11/25/09