[Cite as *Hutchinson v. Ohio Dept. of Transp.*, 2014-Ohio-5884.]

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

JOSEPH R. HUTCHINSON

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2013-00659-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Joseph Hutchinson, filed this action against defendant, Ohio Department of Transportation ("ODOT"), contending that his vehicle was damaged when "a black construction cone base was blowing across the southbound lanes of I-675 at mile marker 15. By the time I saw it there was no way to avoid it." Plaintiff noted the damage-causing incident occurred on September 9, 2013 at approximately 5:45 p.m. Plaintiff asserted that the damage to his vehicle was a proximate result of negligence on the part of ODOT in maintaining a hazardous condition on I-675.

{¶2} Plaintiff seeks damages in the amount of $1,735.79, the total amount to repair the front bumper and right front fender, as well as rental car fees. Plaintiff submitted the $25.00 filing fee with the complaint. Defendant refutes this prayer amount, as plaintiff admitted to receiving an insurance payment of $555.73 after paying a $1,000 deductible. In his response, plaintiff concedes that, pursuant to O.R.C. 2743.02, the appropriate amount of damages is $1,180.06 (including the rental fees). Plaintiff submitted the filing fee with the complaint.

{¶3} Defendant denied liability based on the contention that no ODOT personnel had any knowledge of the particular damage-causing debris prior to plaintiff's incident. Defendant's investigation revealed that plaintiff's incident occurred at "interstate milepost 15.0 (aka, state milepost 7.56) on IR 675 in Greene County." This section of roadway has an average daily traffic count of between 55,860 and 67,890 vehicles. Defendant asserted that plaintiff did not offer any evidence to establish the length of time that the debris existed at this location prior to plaintiff's incident. Defendant suggested that since it is not aware of any incidents at or near the location, or time of plaintiff's incident, "ODOT believes that the debris existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶4} Additionally, defendant contended that the plaintiff did not offer any evidence to prove that the roadway was negligently maintained. Defendant advised that the ODOT "Greene County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times per month." Defendant's investigation revealed that there were over 59 cleaning/sweeping operations and litter pick-up operations performed on IR 675 in the six months prior to this incident. Defendant maintains "that if ODOT personnel had found any debris it would have been picked up."

{¶5} Plaintiff filed a response to defendant's investigation report agreeing to the revised damages amount of $1,180.06. Further he stated: "The very fact that the object was a construction cone base and not a random piece of road debris leads me to conclude that it is more likely than not ODOT was the cause of the cone base's presence on the highway. ODOT manages construction and traffic flow on the highways and is therefore responsible for their property's safe removal when work is complete so they do not become road hazards." Plaintiff then cited to defendant's Exhibit D, stating: "ODOT completed a litter sweep of this stretch of highway 26 times in 26 weeks previous to this incident – an average of once per week – yet in this case I was able to retrieve the cone

base off the left shoulder of the highway on 9/23, a full two weeks after the 9/9 collision. This leads to me to believe the sweeps do not always remove all litter on the road."

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 Company, Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). 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 produced furnishes a reasonable 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.*, 145 Ohio St. 198, 61 N.E. 2d 198 (1945), approved and followed.

{¶7} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App. 2d 273, 361 N.E. 2d 486 (10th Dist. 1976). However, defendant is not an insurer of the safety of its highways. *Kniskern v. Township of Somerford*, 112 Ohio App. 3d 189, 678 N.E. 2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Trans.*, 67 Ohio App. 3d 723, 588 N.E. 2d 864 (10th Dist. 1990).

{¶8} In order to prove a breach of the duty to maintain highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E. 2d 179 (Ct. of Cl. 1986). Plaintiff has produced no evidence that the defendant had actual notice of this construction cone base on IR 675 prior to September 9, 2013.

{¶9} Alternatively, in order to find liability, plaintiff must prove that ODOT had constructive notice of the defect. The trier is precluded from making an inference of

defendant's constructive notice, unless evidence is presented in respect to the time that the defective condition developed. *Spires v. Ohio Highway Department*, 61 Ohio Misc. 2d 262, 577 N.E. 2d 458 (Ct. of Cl. 1988). Plaintiff has produced no such evidence. However, ODOT has not denied ownership of this construction cone base or asserted that the base was moved by a third party or uncontrollably high winds. Therefore, the trier of fact agrees with plaintiff that "it is more likely than not ODOT was the cause of the cone base's presence on the highway."

{¶10} In order for there to be constructive notice, plaintiff must show that sufficient time has elapsed after the dangerous condition appears, so that under circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation*, 78-0126-AD (1978). "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.*, 10th Dist. No. 92AP-1183 (Feb. 4, 1993). While the plaintiff has not produced any evidence regarding the length of time that this object was present on the highway, the trier of fact finds it hard to believe that ODOT was not aware of its presence, considering it is likely responsible for its initial placement on the highway.

{¶11} Generally, in order to recover in a suit involving damage proximately caused by roadway conditions including debris, plaintiff must prove either: 1) defendant had actual or constructive notice of the debris 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*, 75-0287-AD (1976). Plaintiff has produced evidence to infer that defendant, in a general sense, maintains its highways negligently by stating that he was able to recover this construction cone base from the highway two weeks after his incident, even though the plaintiff placed ODOT on

notice regarding the hazardous debris on September 10, 2013. Plaintiff did not receive a response from defendant regarding his complaint until September 20, 2013 (See Attached Emails). *Herlihy v. Ohio Department of Transportation*, 99-07011-AD (1999). The trier of fact finds that the presence of this object on the highway for a full two weeks after the defendant received notice implicates, in a general sense, that defendant negligently maintains its highways.

{¶12} In the instant claim, plaintiff has produced sufficient evidence to prove that defendant was negligent in maintaining the roadway area, and that there was any actionable negligence on the part of the defendant, as the defendant had constructive notice of a hazardous condition, but failed to correct it. *Taylor v. Transportation Dept.*, 97-10898-AD (1998); *Weininger v. Department of Transportation*, 99-10909-AD (1999); *Witherell v. Ohio Dept. of Transportation*, 2000-04758-AD (2000).

{¶13} Therefore, plaintiff is granted judgment in the amount of $1,180.06, of which $1,000.00 represents reimbursement of automotive repair costs and $180.06 represents car rental expenses, plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. No. 1990).

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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 plaintiff in the amount of $1,205.06, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Interim Clerk

Entry cc:

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DM/laa
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