[Cite as *Legarth v. Ohio Dept. of Transp.*, 2014-Ohio-5899.]

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

MARTIN D. LEGARTH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00236-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Martin Legarth, filed a complaint against defendant, Ohio Department of Transportation ("ODOT"), in which he contended the vehicle his wife was driving was damaged when she struck a loose road reflector "while driving North on State Route 60 approximately 750 ft North of the crossroad at welcome to Holmes County Ohio." Plaintiff noted the damage-causing incident occurred on February 18, 2014 at approximately 6:00 pm. Plaintiff implied, the damage to his vehicle was a proximate result of negligence on the part of ODOT in maintaining a hazardous condition on this particular roadway.

{¶2} Plaintiff seeks damages in the amount of $179.23, the total amount to replace one tire. Plaintiff submitted the $25.00 filing fee.

{¶3} Defendant denied liability based on the contention that no ODOT personnel had any knowledge of loose reflectors on SR 60 prior to plaintiff's incident. Defendant's investigation revealed plaintiff's incident "would be located at approximately mile marker 8.1 on SR 60 in Holmes County." This section of roadway has an average daily traffic count between 1,170 and 1,250 vehicles. Defendant contended it received no phone

calls or complaints regarding loose reflectors in this section of roadway. Since it is not aware of any other incidents at or near this location, "ODOT believes that the loose reflector 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, "SR 60 is regularly maintained in the vicinity of the plaintiff's incident." Also, defendant conducted seventeen (17) operations on SR 60 in the six months prior to plaintiff's incident. "Therefore, ODOT work crews were doing activities such that if there was a noticeable defect with any raised or loosened pavement marker it would have immediately been repaired."

{¶5} Plaintiff filed a response to defendant's investigation report in which he disputed defendant's contention that it had no notice of loose reflectors on SR 60. Plaintiff contended, based on evidence provided by defendant, there was a complaint filed on December 20, 2013, involving a loose reflector near mile marker 10.38. However, based on the work log provided by defendant, the next activity was not until December 31, 2013 for "sign maintenance." Plaintiff implied defendant was negligent in failing to regularly inspect or repair this section of roadway in that "three more weeks elapsed [after the December 31, 2013 maintenance] and the next activity, on 1/22/14 was 'litter' . . . no further activity was logged for the entire interval prior to this event on 2/18/14." Plaintiff then refuted defendant's contention that any defects would have been repaired if noticed by ODOT personnel. He contended, the fact that there was no apparent repair conducted after the complaint filed on December 20, 2013 is evidence of negligence in failing to repair and/or inspect. He added: "[t]he last operation encompassing such a task may have been the 'asphalt pavement repair' on 9/24-25/13, which would have been well before freezing weather and snow removal, both conditions known to compromise the stability of the reflectors." Plaintiff included a copy of an email from one

of defendant's employees who admitted that upon inspection following plaintiff's complaint, one additional reflector was found missing, and another required removal. Finally, plaintiff cited a 2004 Cincinnati Enquirer article in which ODOT spokesman, Joel Hunt, commented on the possibility of pavement markers becoming loose during the freeze-thaw process. He also cited a 2006 online article from TheIndyChannel.com which described the potential hazards associated with loose road reflectors.

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 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.*, 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 335, 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). There is no

evidence that the defendant had actual notice of this loose road reflector on SR 60 prior to plaintiff's incident. Plaintiff referenced a complaint from December 20, 2013, however, this complaint involved a reflector loose at a different location on SR 60.

{¶9} In the absence of actual notice, plaintiff may 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).

{¶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 the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation*, 78-026-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). No evidence has shown that ODOT had constructive notice of this particular loose reflector.

{¶11} Generally, in order to recover in a suit involving damage proximately caused by roadway conditions including debris, such as a loose road reflector, plaintiff must prove either: 1) defendant had actual or constructive notice of the road 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*, 75-0287-AD (1976). Plaintiff argued the lack of repair following a complaint on December 20, 2013 is evidence by which the court can infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective conditions. *Herlihy v. Ohio Department of Transportation*, 99-07011-AD

(1999). The court finds this argument persuasive, as there is no evidence defendant repaired the other loose reflector. This coupled with the fact that defendant located two additional defective reflectors immediately following plaintiff's incident, is sufficient evidence that, with more frequent inspections, these defective reflectors would have been identified and removed.

{¶12} The lack of regular inspection and repair, especially in light of another complaint, was the proximate cause of plaintiff's damages. Therefore, plaintiff's claim is granted and he is awarded $179.23 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. 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 $204.23, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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DJM/laa
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