

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

DOUGLAS F. RETHERFORD

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-04862-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} On February 29, 2008, at approximately 4:00 p.m., plaintiff, Douglas F. Retherford, was traveling west on Interstate 670 “within about one mile of the Neil Avenue/315 exit,” when a preceding motorist struck a loose road reflector causing the reflector to be propelled into the path of plaintiff’s vehicle. Plaintiff stated the “reflector embedded itself in the front clip of my car,” a 2006 Audi A3 2.0T. Plaintiff related the road reflector damaged the radiator, condenser, intercooler, front bumper, grill, and grill cover of his automobile. Plaintiff submitted photographs depicting the reflector embedded into the front end of his car.

{¶ 2} Plaintiff implied his property damage 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 the loosened road reflector. Originally, plaintiff claimed damages in the amount of \$2,502.46 for car repair expenses plus \$154.68 for car rental costs. Total damages claimed amounted to \$2,657.14. In

his complaint, plaintiff submitted a copy of an invoice for automotive repair which indicated his insurer paid \$2,338.09¹ and he was responsible for \$333.29 in out-of-pocket expense for car repair, plus \$154.68 in rental costs. On March 11, 2009, a judge of the Court of Claims granted a motion from defendant transferring this claim to the Administrative Determination docket. The entry transferring plaintiff's claim provided "plaintiff's complaint is amended to reduce his prayer amount to \$2,500." Defendant subsequently filed an investigation report stating, "On March 11, 2009, Plaintiff amended the dollar amount to \$319.05" for damages claimed. This court, at the Administrative Determination level calculates plaintiff's damage claim at \$487.97 which includes his out-of-pocket expense for automotive repair, plus car rental costs. The filing fee was paid.

{¶ 3} Defendant denied liability based on the contention that no DOT personnel had any knowledge of a loose reflector on the roadway prior to plaintiff's February 29, 2008 property damage occurrence. Defendant related that DOT records indicate that no previous calls or complaints were received from any entity regarding the particular dislodged reflector which DOT located near milepost 4.14 on Interstate 670 in Franklin County. Defendant contended plaintiff failed to produce any evidence to show how long the dislodged reflector existed on the roadway prior to 4:00 p.m. on February 29, 2008. Defendant suggested that the loose reflector condition likely, "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} Defendant asserted that plaintiff did not provide evidence to establish that his property damage was caused by negligent maintenance on the part of DOT. Defendant explained that DOT regularly maintains the roadway in the vicinity of plaintiff's damage event. Defendant contends that the evidence tends to show plaintiff's damage was caused by an unidentified third party motorist not affiliated with DOT.

CONCLUSIONS OF LAW

{¶ 5} 1) Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976),

¹ R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section

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.

{¶ 6} 2) 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.

{¶ 7} 3) Plaintiff has not produced any evidence to indicate the length of time the loosened road reflector was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the uprooted reflector. Additionally, 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 loosened road reflector appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 8} 4) “[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, 47 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 discovery of certain road hazards.” *Bussard*, 31 Ohio Misc. 2d 1 at 4, 31 OBR 64, 507 N.E. 2d 1179. “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; *Gelarden v. Ohio Dept. of Transp., Dist. 4, Ct. of Cl. No. 2007-02521-AD*, 2007-Ohio-

apply under those circumstances.”

3047. There is no indication that defendant had constructive notice of the dislodged reflector. Plaintiff has not produced any evidence to infer that 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.

{¶ 9} 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.

{¶ 10} 6) Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise 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. 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.

{¶ 11} 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.

{¶ 12} 8) Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show 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.

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Douglas F. Retherford
4341 Stoner Drive
Grove City, Ohio 43123

Jolene M. Molitoris, Director
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RDK/laa
6/25
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