[Cite as *Rohrbacher v. Ohio Dept. of Transp.*, 2009-Ohio-6367.]

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

LINDA E. ROHRBACHER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03681-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Linda E. Rohrbacher, related that she was traveling on State Route 4 "south of Sandusky" on March 11, 2009, at approximately 6:30 p.m., "when suddenly an object flew from the road (and) busted my windshield" on her 2000 Chevrolet Silverado truck. Plaintiff pointed out that both she and the passenger in her truck were covered with glass after the object flew into the windshield of her vehicle. Plaintiff explained that she subsequently discovered the damage-causing object was a center line road reflector that had become loosened from the roadway surface. Apparently, the road reflector had been propelled into the path of plaintiff's vehicle by a preceding motorist. Plaintiff noted that her truck was towed from the scene and that she sought medical treatment immediately after the incident.

{¶ 2} 2) Plaintiff implied that the damage to her vehicle and her personal injury were proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover $240.00 for loss of use of her vehicle,

$50.00 for glass damaged discarded clothing, $20.00 for a damaged car seat, $237.78 for unreimbursed medical expenses and $1,500.00 for pain and suffering associated with the traumatic experience. Plaintiff's total stated damage claim amounts to $2,047.78. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with her damage claim. Plaintiff acknowledged that she carries insurance coverage for property damage with a $250.00 deductible provision and has noted that she received $678.79 from her insurer to pay for the cost of a replacement windshield. Plaintiff submitted evidence showing that she received total reimbursement from her insurer for the cost of a replacement windshield.

{¶ 3} 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 March 11, 2009 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 at milepost 11.77 on State Route 4 in Erie County. Defendant contended that plaintiff failed to produce any evidence to show how long the dislodged reflector existed on the roadway prior to 6:30 p.m. on March 11, 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} 4) Defendant asserted that plaintiff did not provide evidence to establish that her property damage was caused by negligent maintenance on the part of DOT. Defendant explained that DOT regularly maintains the roadways in the vicinity of plaintiff's damage event. Defendant noted that if any DOT employees had discovered a dislodged road reflector, "it would have immediately been repaired." Defendant related that DOT personnel were working in the area of plaintiff's incident on March 9, 2008 and did not notice any loose road reflectors. Defendant explained that the road reflector was uprooted by an unidentified third party motorist not connected to DOT. Defendant contended that DOT cannot be held liable for the negligent acts of an unknown third party motorist.

{¶ 5} 5) Plaintiff filed a response expressing the opinion that the roadway reflectors "were not maintained as they should have been." Plaintiff did not submit any evidence to indicate the length of time that the road reflector was dislodged prior to her damage occurrence. Plaintiff did not produce any evidence to establish that the

reflector was dislodged as a result of any conduct attributable to DOT.

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 7} 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. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no evidence that DOT had any notice of the dislodged reflector on the roadway. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. No evidence has been submitted to establish that the damage-causing reflector was dislodged from the roadway by defendant's personnel.

{¶ 8} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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 she 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.

{¶ 9} Evidence in the instant action is conclusive to show that plaintiff's damage was caused by an act of an unidentified third party. 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. See *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.

{¶ 10} "If an 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.

{¶ 11} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her property damage was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing reflector was connected to any conduct under the control of defendant, or that there was 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.

{¶ 12} Finally, 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. Therefore, defendant is not liable for any damage that plaintiff may have suffered from the dislodged reflector.

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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.

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MILES C. DURFEY
Clerk

Entry cc:

Linda E. Rohrbacher

Jolene M. Molitoris, Director

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RDK/laa
6/11
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