[Cite as *Jarrell v. Ohio Dept. of Transp.*, 2008-Ohio-7099.]

Court of Claims of Ohio

The Ohio Judicial Center
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BRENDA JARRELL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-06261-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Brenda Jarrell, related she sustained property damage to her vehicle while traveling on Interstate 480 in Summit County on May 2, 2008 at approximately 6:45 a.m. Plaintiff particularly described the damage incident, recording "rocks flying all over from new road construction hit the windshield of my 06' Jeep Liberty causing chip and caused crack." Plaintiff located the damage occurrence at Interstate 480 and Chamberlain. Plaintiff implied the damage to her windshield was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in properly maintaining the roadway construction area on Interstate 480. Consequently, plaintiff filed this complaint seeking to recover $183.96, the cost of a replacement windshield. The filing fee was paid.

{¶ 2} Defendant acknowledged the described incident occurred within a construction area where DOT contractor, The Shelly Company ("Shelly"), performed "grading, pavement repair, planning, resurfacing with asphalt concrete and structure repairs on I-480 between county mileposts 0.00 to 3.72 in Summit County." Defendant located plaintiff's incident from her description at county milepost 2.08 on Interstate 480, an area within the limits of the construction project. Defendant explained the

construction area of Interstate 480 was under the control of Shelly and consequently DOT had no responsibility for any damage or mishaps on the roadway within the construction project limits. Defendant asserted Shelly by contractual agreement was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT requirements and specifications. Defendant implied all duties such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. Alternatively, defendant denied neither DOT nor Shelly had any notice of "debris flying around from the traffic on I-480 prior to plaintiff's incident." Defendant reported no prior calls or complaints were received regarding flying debris. Defendant contended plaintiff failed to produce sufficient evidence to establish her property damage was caused by negligent roadway maintenance.

{¶ 3} Defendant acknowledged Shelly work crews milled the specific portion of Interstate 480 the previous night in preparation for repaving. Defendant submitted a statement from Shelly Safety Director, Norm Baur, referencing the roadway milling operation. Baur recorded the following notations: "We had milled the job the night before the claim, and per Spec (Item 254.03), we maintained and cleaned the highway. The ODOT inspector was onsite, and there was nothing out of the ordinary that morning. We had all construction signs posted and we ride the job before we open the lane to the public." It was suggested the debris that damaged plaintiff's windshield emanated from a passing motorist. Defendant essentially denied plaintiff's property damage was caused by debris left on the roadway from the milling operation.

{¶ 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. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with

duties to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119. No evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained by Shelly or DOT.

{¶ 5} 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. 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. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. However, proof 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. Plaintiff has failed to produce sufficient evidence to prove her property damage was caused by a defective condition created by DOT's agents. Evidence at best is inconclusive regarding the origin of the debris which damaged plaintiff's vehicle. Defendant insisted the debris condition was not caused by maintenance or construction activity.

{¶ 6} Generally, in order to recover in any suit involving injury 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* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the debris condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the debris. 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 debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer 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.

{¶ 7} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346, 683 N.E. 2d 112. In fact, the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public both under normal traffic conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462. Plaintiff, in the instant claim has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Evidence available seems to point out the roadway area was relatively clean of debris and was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents.

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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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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
10/21
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