[Cite as *Hatch v. Ohio Dept. of Transp.*, 2009-Ohio-7120.]

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

WILLIAM HATCH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05412-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, William Hatch, asserted he sustained windshield damage to his 2005 Buick Rendezvous while traveling on Interstate 271 in Cuyahoga County. Plaintiff noted this particular section of roadway on Interstate 271 near Brainard Road had been recently milled in preparation for repaving and the milling process had “left excessive amounts of grinding” on the roadway surface. Plaintiff stated “[w]hile driving rock’s (were) being shot into the air like hail.” Apparently plaintiff’s vehicle was pelted with loose aggregate left on the roadway surface which resulted in windshield and paint chip damage. Plaintiff recalled the damage incident occurred on April 23, 2009 at approximately 10:54 a.m. Plaintiff implied the damage to his vehicle was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in maintaining a hazardous roadway condition on Interstate 271 in Cuyahoga County. Plaintiff filed this complaint seeking to recover damages in the amount of $1,380.00, the stated cost of a replacement windshield. The $25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant acknowledged that the area where the described incident

occurred was located within the limits of a construction project under the control of DOT contractor, Karvo Paving Company. Defendant explained the “project dealt with grading, draining, planning, pavement repair and resurfacing with asphalt concrete” on Interstate 271 in Cuyahoga County, between mileposts 31.50 to 35.80. Defendant asserted Karvo, by contractual agreement, was responsible for any roadway damage occurrences or mishaps within the construction zone. Therefore, DOT argued that Karvo is the proper party defendant in this action. 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 section of roadway. All work by the contractor was to be performed in accordance with DOT mandated specifications and requirements and subject to DOT approval. Furthermore, DOT personnel maintained an onsite presence performing work inspections.

{¶ 3} 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.

{¶ 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 contention 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.

{¶ 5} Alternatively, defendant argued that neither DOT nor Karvo had any knowledge of any stone debris on the roadway prior to plaintiff's described damage occurrence. Defendant pointed out DOT records show no calls or complaints were received at the DOT Cuyahoga County Garage concerning a debris condition on Interstate 271 prior to plaintiff's April 23, 2009 incident. Defendant contended plaintiff failed to produce evidence establishing that his property damage was attributable to any conduct on the part of either DOT or Karvo. Defendant asserted the evidence available points to the fact the debris that damaged plaintiff's windshield was displaced by an unidentified third party motorist and not by either DOT or Karvo. Defendant maintained no liability can attach to damage caused by an unidentified third party not affiliated with DOT or Karvo.

{¶ 6} Defendant submitted a copy of a complaint plaintiff sent to DOT by e-mail regarding his April 23, 2009 damage incident. Plaintiff maintained the damage-causing stone debris had been left on the roadway after the pavement had been milled. Essentially, plaintiff asserted Karvo personnel had improperly swept the roadway of stone debris after milling the surface. A Karvo work record (copy submitted) shows Karvo personnel conducted milling operations on Interstate 271 in the area of plaintiff's described damage occurrence from 5:30 p.m. on April 22, 2009 to 7:00 am. on April 23, 2009.

{¶ 7} Also, defendant submitted a letter from Karvo representative, Michael A. Totaro, regarding work performed and safety measures taken during construction operations. Totaro provided the following narrative:

{¶ 8} "Karvo performed all its operations per plan. Karvo used the proper Traffic Control Procedures and complied with all proper Traffic Control Guidelines set forth by OMUTCD (Ohio Manual of Uniform Traffic Control Devices) and in accordance with the

Sections 614.03, 614.04 and 614.07 in the Ohio Dept of Transportation Material & Specifications Manual. In addition, Karvo Traffic Control Supervisor maintains the zone while on the project. All zones and roadway are driven and inspected by Karvo and ODOT concurrently with operations prior to dismantling.

{¶ 9} "The Traffic Control Supervisor, in addition to ODOT personnel, travels the length of the project searching for any potential traffic hazards. If the Traffic Control Supervisor or ODOT observes any issues with-in the zone, the Supervisor will correct the situation immediately and prior to dismantling and opening the roadway to traffic."

{¶ 10} Apparently, neither Karvo nor DOT discovered any problem with debris left on the roadway after milling operations were completed during the morning of April 23, 2009.

{¶ 11} 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 has failed to prove the objects that damaged his windshield emanated from roadway milling operations.

{¶ 12} Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT or its agents. 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 or its agents 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.

{¶ 13} "If any injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in 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 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.

{¶ 14} Generally, 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. 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. Plaintiff, in the instant claim, has alleged that the damage to his vehicle was directly caused by construction activity of DOT's contractor on April 22 and April 23, 2009. Plaintiff has failed to offer sufficient proof to establish that his property damage was caused by defendant or its agents breaching any duty of care in regard to roadway construction. Evidence available seems to point out that the complete milling process was performed properly under DOT specifications. Plaintiff has failed to prove that his damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Vanderson v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-09961-AD, 2006-Ohio-7163; *Shiffler v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-07183-AD, 2008-Ohio-1600.

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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:

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RDK/laa
9/14
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