

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

JESSE T. ETEROVICH

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-06748-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Jesse T. Eterovich, related he was driving his 2007 Honda Accord east on Interstate 76 through a construction area when the car was pelted with debris emanating from roadway construction activity. Plaintiff stated, “[t]he construction site contained a large amount of debris that filled the air and both lanes of the two lane highway making the highway a dangerous hazard. . .” Plaintiff asserted the airborne debris material caused dents and chipped paint to the hood, front bumper and fender of his automobile. Plaintiff recalled the described incident occurred on July 17, 2007 at approximately 6:30 a.m.

{¶2} Plaintiff contended the damage to his vehicle was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”) in maintaining the roadway on Interstate 76 in Summit County. Plaintiff filed this complaint seeking to recover \$552.02, the cost of automotive repair incurred resulting from the July 17, 2007, property damage event. The filing fee was paid.

{¶3} Defendant acknowledged the described incident occurred within a construction area where DOT contractor, The Shelly Company (“Shelly”), performed “minor rehabilitation work to the highway, various bridges and paving with asphalt concrete on I-76 between county mileposts 0.00 to 5.90 in Summit County.” Defendant located plaintiff’s incident from his description at county milepost 2.62 on Interstate 76,

an area within the limits of the construction project. Defendant explained the construction area of Interstate 76 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-76 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 his property damage was caused by negligent roadway maintenance.

{¶4} Defendant acknowledged Shelly work crews milled the right lane of Interstate 76 east from county milepost 0.00 to milepost 2.62 on the night of July 16 through July 17, 2007. This milling was performed as preparation to repave the roadway. Shelly representative, Russell Sherman, Assistant Safety Director, advised approximately one mile of the milled right lane of Interstate 76 was closed to traffic on July 17, 2007. Sherman noted the roadway was milled, swept of debris, and maintained in accordance with DOT specifications. Defendant essentially denied plaintiff’s property damage was caused by debris left on the roadway from the milling operation.

{¶5} Defendant has the duty to maintain its highway 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. No. 00AP-1119. No evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained by Shelly or DOT.

{¶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 Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, 788 N.E. 2d 1088, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 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. 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, as it appears to be the situation in the instant matter. 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 his 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.

{17} 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.

{18} 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 his 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jesse T. Eterovich
430 Bluestone Court
Wadsworth, Ohio 44281

James G. Beasley, Director
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RDK/laa

12/18
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