

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

AUGUSTUS DONALDSON

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-09902-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Augustus Donaldson, asserted the left front tire, rim, rear wheel bearing, and rear strut on his 1999 Chevrolet Monte Carlo were damaged when the vehicle struck “a large boulder” laying on the ramp to Interstate 75 in Montgomery County. Plaintiff recalled the damage incident occurred on May 23, 2008 at approximately 10:30 a.m. Plaintiff described the specific incident noting he was “[d]riving on Main Street (Dayton, OH) to the I-75 North on ramp (and) [t]here was a large boulder in the middle of the on ramp prohibiting merge onto I-75 North.” Plaintiff explained he unsuccessfully attempted to maneuver his vehicle around the boulder and “ended up hitting the boulder causing damage to the car.”

{¶ 2} Plaintiff contended the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway ramp free of hazardous debris conditions. Consequently, plaintiff filed this complaint seeking to recover \$811.40, his cost of automotive repair that he claimed was the direct result of road conditions on Interstate 75 in Montgomery County on May 23, 2008. The filing fee was paid.

{¶ 3} Defendant pointed out the area where plaintiff's stated damage event occurred was located within a construction zone maintained by DOT contractor, Kokosing Construction Company, Inc. ("Kokosing"). Defendant related the construction project involved grading and resurfacing, plus construction of numerous structures in Montgomery County on Interstate 75. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Kokosing is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with DOT requirements, specifications, and approval. 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. 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. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection with the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 4} Alternatively, defendant denied that neither DOT nor Kokosing "had notice of debris on I-75 prior to plaintiff's incident." Defendant contended that plaintiff failed to produce evidence to establish his property damage was caused by negligent roadway maintenance. Defendant contended that plaintiff failed to produce any evidence to establish his damage was proximately caused by any conduct attributable to DOT or Kokosing. Furthermore, defendant suggested the debris in the roadway plaintiff encountered was deposited there by an unidentified third party not affiliated with either DOT or Kokosing. Defendant contended no liability can attach for roadway mishaps proximately caused by the acts of an unknown third party motorist. Defendant submitted a copy of Kokosing records dated May 23, 2008 which document work activity performed and general conditions of the roadway construction site on that date. These records do not mention any boulder debris on the I-75 ramp.

{¶ 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. 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. 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 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. Plaintiff has failed to produce sufficient evidence to prove his property damage was caused by a defective condition created by DOT or Kokosing. Evidence at best is inconclusive regarding the origin of the debris. Defendant insisted the debris condition was not caused by maintenance or construction activity on either the part of DOT or Kokosing.

{¶ 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} Evidence in the instant action seemingly indicates the debris condition was caused by an act of an unidentified third party. 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 conduct 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. However, plaintiff has failed to offer sufficient proof to establish his damage was caused solely by roadway conditions.

{¶ 8} 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 under both normal traffic 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 contractor breached any duty of care which resulted in property damage. Evidence available seems to point out the roadway area was 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 contractor. See *Wachs v. Ohio Dept. of Transp., Dist. 12, Ct. of Cl. No. 2005-09481-AD*, 2006-Ohio-7162.

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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:

Augustus Donaldson
29 Vassar Drive
Dayton, Ohio 45406

RDK/laa
4/15
Filed 5/12/09
Sent to S.C. reporter 8/21/09

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223