[Cite as *Aden v. Ohio Dept. of Transp.*, 2006-Ohio-7306.]

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

REV. BENJAMIN ADEN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2005-11086-AD
Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} During the months of July and August, 2005, Karvo Paving Company ("Karvo"), under a contract with defendant, Department of Transportation("DOT"), performed roadway construction on State Route 8 (Northfield Road) in Cuyahoga County. This particular construction project involved "grading, draining, and resurfacing with asphalt concrete" a section of Northfield Road.

{¶ 2} Plaintiff, Benjamin Aden, owns a residence on a corner lot on Amherst Road in Beachwood, Ohio, which was within the Karvo construction project area. Plaintiff related employees of Karvo, on or about July 12, 2005, "removed sidewalks and the street curbs," adjacent to his residence. Plaintiff explained, "[b]ecause this is a corner house, the sidewalks were replaced on both sides of the yard." According to plaintiff, the sidewalks around his lawn were replaced and sealed with a white spray sealant on July 19, 2005. Plaintiff noted the white spray sealant, "was blown all over the tree lawn and it covered the entire front of the lawn," at his residence. Plaintiff insisted the lawn and tree lawn immediately died from contact with the wind blown spray sealant material.

{¶ 3} Plaintiff further noted Karvo personnel returned to the area around his

residence in early August 2005, and again replaced sidewalk curbing with additional applications of sealant spray. This time, plaintiff asserted his entire lawn died from contact with the sealant material. Later in August 2005, plaintiff recalled he notified a Karvo supervisor, who was working in the area, about the damage to his lawn. Apparently, this Karvo employee observed the damaged lawn, which plaintiff claimed had been killed as a result of applying sealant on several occasions to the adjacent replaced sidewalks. Plaintiff pointed out his lawn was in good condition prior to the Karvo construction activity. Plaintiff maintained the lawn had been watered twice each week and fertilized in June 2005. Plaintiff contended the acts of Karvo in applying sealant spray caused all the damage to his lawn. Plaintiff consequently filed this complaint seeking to recover $900.00, the cost of replacing his lawn. The filing fee was paid.

{¶ 4} Defendant acknowledged the area where plaintiff's residence is located was within a construction zone under the control of DOT contractor, Karvo. However, defendant has contended DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued 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 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* (2004), 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 particular

construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119, 2001 Ohio App. LEXIS 2854.

{¶ 5} Defendant explained Karvo did not receive any complaints other than the one from plaintiff about lawn damage from any overspray of cure seal used on the newly installed sidewalks along State Route 8. Defendant recorded Karvo "passed hundreds of other lawns with the cure seal," and plaintiff made the only complaint about lawn damage from the cure seal.

{¶ 6} Defendant submitted a letter from Karvo representative, George Karvounides which responds to plaintiff's allegations. Karvounides offered several points to support the contention that cure seal overspray was not the cause of the damage to plaintiff's lawn. Karvounides noted:

{¶ 7} "The concrete spray cure sealer (sealer) alleged in plaintiff's complaint to have caused the damage to the lawn, is a water based product.

{¶ 8} "The plaintiff's damaged lawn is approximately a 40 foot by 40 foot area. The application of sealer was limited to the new concrete curb & sidewalk placed along the street edge. The only lawn in immediate contact with the new sidewalk would be that lawn adjacent to one edge of the new sidewalk.

{¶ 9} "The application of the sealer was by a hand-held, portable spray tank with an enclosed hand powered pressure pump. The sealer was hand applied at a low pressure, with the head of the spray wand an approximate distance of one (1) foot from the concrete surface. This low pressure and close application of the sealer would limit overspray to a very limited area. The plaintiff has indicated otherwise, claiming the sealer was blown over his entire front lawn.

{¶ 10} "The grade(s) of property place the new curb and sidewalk at a lower elevation then the plaintiff's lawn. In other words the plaintiff's property drains to the sidewalk/curb, thus eliminating any argument that sealer runoff migrated across the lawn, poisoning it.

{¶ 11} "The plaintiff indicates in its complaint that the damage to his lawn

occurred on July 19, 2005. A review of the NOAA historical weather data for this date indicates that the average temperature for the day was 79 degrees, with a high of 88 degrees. Additionally, no rain occurred and the average wind speed was 8.6 MPH, from almost due west. Thus, the direction of the wind would have caused any sealer over-spray to drift away from the plaintiff's lawn, not on to the lawn.

{¶ 12} "It is Karvo's observation from working in the Cleveland, Ohio area in 2005 that it was a very dry summer, causing lawns distress. A review of the NOAA historical weather data for the month of July, through July 19, indicates that only .48 inches of precipitation fell."

{¶ 13} Climatological data was submitted to support the assertions regarding weather conditions in the area during July, 2005.

{¶ 14} Defendant also submitted a letter from Sean Mawhorr, a representative of Precision Maintenance, Inc. This letter offers Mawhorr's opinion concerning the effects of using cure seal compound near vegetation. Mawhorr recorded the following:

{¶ 15} "[t]he compound used is designed to be applied near vegetation and as a result would have to have been applied directly to the lawn in a very high concentrate to completely kill a whole lawn. A more likely occurrence would be damage to the area within a few inches adjacent to the concrete installed, caused by overspray of the compound, but even this would be unlikely . . ."

{¶ 16} Based on the submitted evidence, defendant contended plaintiff has failed to prove his lawn was damaged by any act or omission on the part of DOT or Karvo. Defendant alleged plaintiff did not offer any evidence other than his own assertions that his lawn was damaged by cure seal overspray.

{¶ 17} In order for plaintiff to prevail upon his 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, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. Plaintiff claimed his lawn was

damaged by the application of cure seal sealant on the newly constructed sidewalks around his yard. As a necessary element of his particular claim, plaintiff was required to prove proximate cause of his damage by a preponderance of the evidence. See, e.g. *Stinson v. England* (1994), 69 Ohio St. 3d 451. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51.

{¶ 18} "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, at 160 quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302-309. In a situation such as the instant claim, plaintiff is required to produce expert testimony regarding the issue of causation and that testimony must be expressed in terms of probability. *Stinson*, supra, at 454. Plaintiff, by not supplying the requisite expert testimony to state a prima facie claim has failed to meet his burden of proof. See *Ryan v. Ohio Department of Transportation*, 2003-09297-AD, 2004-Ohio-900.

{¶ 19} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous condition. Plaintiff failed to prove his property damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction area, or that there was any negligence on the part of defendant or its agents. *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. Consequently, plaintiff's claim is denied.

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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For Defendant

RDK/laa
10/6
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