

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

CHRIS HENDERSON

Plaintiff

v.

OHIO DEPARTMENT OF TRANS.

Defendant

Case No. 2006-05021-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Chris Henderson, stated he was traveling south on Interstate 275 through a construction zone near the Five Mile Road exit in Hamilton County, when his automobile struck a “large 3 X 6 piece” of broken concrete causing substantial damage to the vehicle. Plaintiff recalled this damage incident occurred on July 11, 2006, at approximately 11:00 a.m. Plaintiff asserted the concrete debris his vehicle struck emanated from construction activity. Plaintiff filed this complaint against defendant, Department of Transportation (“DOT”), alleging the property damage to his vehicle was the result of negligent roadway maintenance on the part of DOT. Plaintiff seeks \$2,500.00 in damages for automotive repair. Plaintiff’s total cost of automotive repair amounted to \$2,811.81. The filing fee was paid.

{¶2} Defendant acknowledged the described incident occurred within a construction zone which DOT located at about milepost 37.28 on I-275 in Hamilton County. Defendant explained DOT contractor Kokosing Construction Company, Inc. (“Kokosing”), had control over the roadway construction area on Interstate 275. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kokosing 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

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particular section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by DOT or its contractor.

{¶3} Alternatively, defendant denied that neither DOT nor Kokosing had any notice of any debris material on the traveled portion of the roadway prior to plaintiff's property damage occurrence. Furthermore, defendant denied the damage-causing debris were construction material used by Kokosing or connected to any construction activity of DOT's contractor. Plaintiff did not present any evidence to determine the length of time the debris material was present on the roadway prior to 11:00 a.m. on July 11, 2006. Defendant contended plaintiff failed to produce evidence of negligent roadway maintenance.

{¶4} Defendant submitted a statement from a Kokosing representative acknowledging the contractor was involved in construction activity on Interstate 275 on July 11, 2006. Apparently, Kokosing employees were engaged in removing a concrete sidewalk from Asbury Bridge, an overhead structure spanning Interstate 275 at about milepost 36.7. Kokosing explained, "there is a vandal fence going up over the bridge and a 3" X 6" piece of concrete (as described by Mr. Henderson) won't fit through it and can't go over it." Therefore, Kokosing asserted it was unlikely the debris plaintiff's car struck emanated from the work being performed on Asbury Bridge. Additionally, the bridge is located more than ½ mile distance from the location plaintiff stated he drove over the debris.

{¶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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an

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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 (2004), 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, 2001 Ohio App. LEXIS 2854. No evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained by either Kokosing or DOT.

{¶16} Defendant denied neither DOT nor Kokosing had notice of any concrete debris left on Interstate 275 from bridge work on July 11, 2006. Defendant professed liability cannot be established when requisite notice of damage-causing debris 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. However, proof or notice of a dangerous condition is not necessary when defendant's own agents actively cause such conditions. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Department of Transportation* (1996), 94-13861. In the instant claim, evidence 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*

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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. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the roadway debris.

{¶8} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove his property damage was connected to any conduct under the control of defendant, that defendant or its agents were negligent in maintaining the roadway 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:

Chris Henderson
301 W. 6th Street
Covington, Kentucky 41011

Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
12/12
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