[Cite as *Johnson v. Ohio Dept. of Transp., Dist. 4*, 2008-Ohio-649.]

Court of Claims of Ohio

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FREDERICK C. JOHNSON	Case No. 2007-05997-AD
Plaintiff	Deputy Clerk Daniel R. Borchert
v.	MEMORANDUM DECISION
OHIO DEPARTMENT OF TRANSPORTATION, DIST. 4	
Defendant	

{¶1} Plaintiff, Frederick C. Johnson, asserted he suffered property damage to his automobile on April 22, 2007, while traveling north on State Route 11 at the Canfield entrance in Mahoning County. Plaintiff stated he was driving through a construction area where the roadway had been milled in preparation for repaving when, "a large chunk of pavement/cement debris was thrown/launched by a passing automobile, cracking/digging a hole in my windshield."

{¶2} Plaintiff suggested the damage to his automobile windshield was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway during a construction operation. Consequently, plaintiff filed this complaint seeking to recover $325.30, the complete cost of automotive repair expenses related to the described damage incident of April 22, 2007. Plaintiff submitted the filing fee.

{¶3} Defendant acknowledged plaintiff's property damage event occurred within a construction zone where major roadway resurfacing and bridge repair was being performed. This particular construction project on State Route 11 started at milepost 8.46 and ended at milepost 16.19. Defendant explained DOT contractor The Shelly Company ("Shelly") had control over this construction area on State Route 11 in Mahoning County. All roadway repair and resurfacing work performed by Shelly was

subject to DOT requirements and specifications. Defendant stated, "[p]laintiff's description of the incident area places him at milepost 9.41 which is within the project limits." Defendant asserted Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction project limits. Therefore, defendant argued Shelly is the proper party defendant in this action. Defendant implied all duties, such as the duty to warn, the duty to maintain, the duty to inspect, 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 particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶4} Alternatively, defendant denied neither DOT nor Shelly had notice of any milling debris left on State Route 11 after milling. In fact, DOT maintained any notice regarding debris on the roadway was first obtained when plaintiff filed his complaint. 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, 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.

{¶5} Defendant submitted a statement from DOT Project Engineer, David

Lazar, regarding the April 22, 2007 incident forming the basis of this claim. Lazar wrote, "the area in which the alleged damage occurred was pavement planed, or milled, on April 09, 2007 according to project records." Lazar noted the project diary (dated April 21, 2007), kept in accordance with work performed did not record any information concerning hazardous road conditions left by the milling operation. Lazar did offer the opinion that it was possible for pavement fragments to remain on the road surface and potentially create conditions where the fragments could be "hurled from the roadway by a passing vehicle."

{¶6} 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.

{¶7} 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, 61 N.E. 2d 198, approved and followed.

{¶8} Evidence in the instant action tends to show plaintiff's damage was

caused by an act of an unidentified third party, not DOT. 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. 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.

{¶9} 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 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. See *Wachs v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162. Consequently, plaintiff 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.

____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Frederick C. Johnson
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RDK/laa

12/19
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