**[Cite as *Pinkney v. Dept. of Transp.*, 2008-Ohio-5166.]**

COLON E. PINKNEY

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-01707-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

**{¶ 1}** Plaintiff, Colon E. Pinkney, stated that he was traveling through a construction area on October 18, 2007, "on Glenway Ave at 3920 Glenway close to First St. near the Family Dollar at approximately 11:35 pm at night I hit a man hole cover that was protruding highly in the street." Apparently the underside of plaintiff's 1996 Saturn sedan scraped against the exposed manhole causing a leak in the vehicle's radiator. Plaintiff asserted the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition in a construction area. Plaintiff filed this complaint seeking to recover $451.60, the cost of automotive repair he incurred resulting from the described incident. The filing fee was paid.

**{¶ 2}** Defendant denied any liability in this matter. Defendant explained plaintiff's property damage incident occurred within the limits of a construction project under the control of DOT contractor, Barrett Paving Materials, Inc. ("Barrett"). Defendant pointed out the construction project involved "planning, pavement repair, curb and median reconstruction and resurfacing with asphalt concrete between mileposts 10.62 to 14.50" on State Route 264 (Glenway Avenue) in Hamilton County. The roadway pavement where the incident occurred had been recently milled in preparation for repaving. Defendant asserted Barrett, by contractual agreement, assumed the responsibility for maintaining the roadway within the limits of the

construction project. Therefore, defendant implied all duties, such as the duty to inspect, the duty to warn, and any maintenance duties were delegated when an independent contractor takes control over a particular section of roadway for construction purposes. Barrett was charged with conducting the roadway paving operation in accordance with DOT specifications and requirements.

**{¶ 3}** Defendant submitted a statement from Barrett Human Resource Coordinator, Janice Misch, who recorded the findings of Barrett Construction Supervisor, Earl Payne, regarding the presence of any defects on the roadway. Misch reported "Payne went to investigate the address listed (3920 Glenway) he could find no building with that exact address, also we do not know what direction nor what lane he (plaintiff) was traveling to locate the manhole he (plaintiff) hit." In answering plaintiff's assertion regarding the manhole protruding from the roadway surface, Misch noted, "[c]hecks were made through out the job and all manholes were wedged to within the specifications of 1 ½ inches."

**{¶ 4}** Defendant also submitted a statement from DOT Project Engineer, Darshan R. Singh, who inspected the area where plaintiff stated his damage incident occurred. Singh observed multiple manholes, water valves and catchbasins on Glenway Avenue. However, Singh stated, "I do not recall anything out of the ordinary in this area during the time of construction."

**{¶ 5}** Defendant contended plaintiff failed to offer sufficient evidence to prove that either DOT or Barrett negligently maintained the roadway. Defendant asserted plaintiff failed to prove his property damage was caused by any conduct attributable to DOT or DOT's agents.

**{¶ 6}** Plaintiff filed a response insisting his car was damaged as a result of the acts of DOT's contractor in exposing manhole covers after the roadway surface on Glenway Avenue had been milled. Plaintiff stated "manhole covers were visible and protruding up some inches in the right hand lane in the area that I was driving."

**{¶ 7}** 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. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contention that DOT did not owe any duty in regard to the construction project, defendant was charged with the 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 the height variation between the milled roadway surface and the manhole covers presented particularly hazardous conditions.

**{¶ 8}** For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a 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 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 notice of a dangerous condition is not necessary when defendant's own agents actively caused 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. However, evidence has not shown defendant's agents created a hazardous condition by milling the roadway surface in accordance with DOT specifications. Furthermore, evidence has been presented to establish plaintiff was notified about the pavement conditions and was responsible for taking some driving precautions based on road conditions.

**{¶ 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 so as to render the highway free from an unreasonable risk of harm by 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; *Rhodus*, 67 Ohio App. 3d 723 at 729, 588 N.E. 2d 864. 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 that his property damage was connected to any conduct under the control of defendant, 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.

# 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

COLON E. PINKNEY

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-01707-AD

Deputy Clerk Daniel R. Borchert

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:

Colon E. Pinkney
1211 Wessels Avenue
Cincinnati, Ohio 45205

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
6/24

Filed 7/17/08
Sent to S.C. reporter 10/2/08