[Cite as *Ewry v. Ohio Dept. of Transp.*, 2008-Ohio-7102.]

Court of Claims of Ohio
The Ohio Judicial Center
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LEWIS D. EWRY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-07217-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Lewis D. Ewry, stated he sustained tire damage to his van while traveling on US Route 50 on May 23, 2008 through a roadway construction zone. Plaintiff observed the roadway area where his damage incident occurred had been recently milled in preparation for repaving operations and a sign reading "Uneven Pavement" had been positioned near the beginning of the milled area to notify motorists of the roadway conditions ahead. Plaintiff explained that when he drove onto the milled section of roadway, "(t)here were actually two grooves in each single lane of traffic." Plaintiff asserted the tire of his vehicle was cut on the edge of the milled roadway surface ("grooved pavement"). Additionally, plaintiff claimed his van was thrown out of alignment by traveling on the uneven milled pavement. Plaintiff implied the damage to his van was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in creating a roadway hazard when the pavement on US Route 50 was milled. Consequently, plaintiff filed this complaint seeking to recover $169.03, the cost of replacement parts and associated repair costs for his van. The filing fee was paid.

{¶ 2} Defendant acknowledged a section of US Route 50 in Ross County between mileposts 4.00 to 0.00 (Highland County Line) had been milled by DOT personnel by May 23, 2008 in preparation for pavement repair. However, defendant denied the milling operation created hazardous roadway conditions. Defendant explained the particular pavement repair on US Route 50 designated "Slot Paving" involved milling existing areas of roadway pavement approximately 40" wide and 1" deep. DOT Ross County Administrator Mike Darbyshire, who produced a report regarding the "Slot Paving" procedure recorded the following: "Dual areas of milling occurred in each lane in various areas. As the milling process was being performed the pavement area was continually broomed and loose debris was collected and removed. The milling process does not leave sharp edges or corners. Some of the milled areas did remain open several days prior to placing asphalt." Darbyshire noted signs indicating "Uneven Pavement" were position at each end of the pavement project. Furthermore, Darbyshire related other signs were placed along the project including "Bump," cautionary "35 mph," and "Road Work" notifications. Defendant contended the milling operation was properly performed and plaintiff has failed to offer sufficient evidence to prove DOT's repaving activities caused the damage to his car.

{¶ 3} Defendant submitted a photograph depicting a section of US Route 50 after milling had been completed and before asphalt repaving had been performed. The photographs shows an uneven roadway surface. Defendant seemingly indicated the photograph shows the roadway milling procedure had been performed properly. After examining the photograph, the trier of fact finds the roadway edging delineating the milled and unmilled pavement does not appear to present a particularly sharp or acute hazardous condition for motorists.

{¶ 4} Plaintiff filed a response insisting defendant's roadway milling operation "does in fact leave a sharp edge." Plaintiff referenced the submitted photograph as evidence that a sharp, roadway edge constituting a hazardous condition was left by the milling process. Plaintiff offered a copy of the photograph depicting a milled portion of US Route 50 and marked the area he determined a sharp edge line is present. The area marked on the photograph is near the right edge of the right roadway lane. The marked area does not appear to present a particularly sharp edge or constitute a hazardous condition. Plaintiff acknowledged signs were positioned on US Route 50 at

the beginning of the work zone to advise and notify motorists of the conditions presented. Plaintiff stated signage was not in place throughout the work zone. Plaintiff advised that interruptions between milled and unmilled roadway pavement throughout the specific four mile section of roadway on US Route 50 made it difficult for motorists to determine the location where the road work actually ended. Plaintiff related "(t)his work zone was left in a dangerous condition during a holiday weekend (Memorial Day)."

{¶ 5} 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.

{¶ 6} 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 79, 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 reasonably 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, as it appears to be the situation advanced in the present claim. 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 employees 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. See *Nicasto v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190.

{¶ 7} 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 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.

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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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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