[Cite as *Deucher v. Ohio Dept. of Transp.*, 2008-Ohio-7113.]

Court of Claims of Ohio

The Ohio Judicial Center
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ROSEANNE DEUCHER

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-07799-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On June 19, 2008, at approximately 11:00 a.m., plaintiff, Roseanne Deucher, was traveling south on Interstate 71 “right before milemarker 156" in Morrow County, when her 2007 Honda Odyssey drove over a bucket filled with tools that was laying on the traveled portion of the roadway. The impact of striking the bucket filled with tools caused damage to the right rear tire of plaintiff’s vehicle. Plaintiff pointed out the damage incident occurred in a roadway construction area. Plaintiff recalled she looked in her rearview mirror immediately after the incident and saw “a white pick-up truck at the construction site going back to retrieve the bucket” her vehicle had just ran over.

{¶ 2} 2) Plaintiff asserted her property damage was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover damages in the amount of $174.29, the cost of a replacement tire. The $25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with

her damage claim.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of a bucket with tools laying on the roadway prior to plaintiff's property damage event. From plaintiff's description defendant located the debris condition created by the bucket at "state milepost 156.0 on I-71 in Morrow County." Defendant suggested "that the debris existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant related plaintiff did not present any evidence to determine the length of time the bucket was on the roadway prior to 11:00 a.m. on June 19, 2008 and consequently, plaintiff has failed to prove DOT knew about or should have known about the debris condition. Defendant reported DOT has no record of receiving any calls or complaints regarding a bucket laden with tools on Interstate 71 near milepost 156.0.

{¶ 4} 4) Defendant explained there was construction on Interstate 71 between "state mileposts 144.2 to 146.9." This construction zone worked by DOT contractor, The Ruhlin Company ("Ruhlin"), was about ten miles south of the location where plaintiff stated her damage event happened. Defendant denied the bucket with tools was connected with any Ruhlin personnel. Defendant submitted a statement from DOT Project Engineer, Jackie Corwin, who talked with Ruhlin employees in an attempt to determine the origin of the bucket with tools. Corwin noted, "I talked to all my guys and none of them had picked up a bucket of anything." Corwin reasoned the bucket on the roadway was displaced by some party not affiliated with either DOT or Ruhlin. Defendant contended the bucket with tools was deposited on the roadway by an unidentified third party and therefore DOT argued it is not responsible for damages caused by the acts of unknown motorists.

{¶ 5} 5) Defendant argued plaintiff failed to produce sufficient evidence to show any negligence on the part of DOT caused her property damage. Defendant related DOT's Morrow County Manager routinely conducts roadway inspections on Interstate 71 within the county and DOT crews routinely conduct "litter pickups" on that particular roadway. Defendant asserted that if any debris had been discovered at milepost 156.0 on Interstate 71, "it would have been picked up."

CONCLUSIONS OF LAW

{¶ 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} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247, 517 N.E. 2d 1388. 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. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. 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. Evidence is insufficient to prove the damage-causing debris emanated from DOT or DOT's agents.

{¶ 8} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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 she 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.

{¶ 9} Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT or DOT's contractor. 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.

{¶ 10} "If any injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in 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, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 11} Plaintiff has failed to establish her damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing object at the time of the damage incident was connected to any conduct under the control of defendant or any negligence on the part of defendant. *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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RDK/laa
11/24
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