[Cite as *Zhang v. Ohio Dept. of Transp.*, 2008-Ohio-7077.]

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

SHAOHUA ZHANG

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-07811-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Shaohua Zhang, asserted the windshield on his 2001 Toyota Camry was damaged when it was struck by gravel debris while traveling west on State Route 161 in Union County on June 18, 2008. Plaintiff recalled his damaged incident occurred in an area where the roadway was undergoing repair. Plaintiff described the damage occurrence noting "[t]he gravel used to repair the road between Plain City (and) Irwin hit the windshield." Plaintff stated "[t]he route was under construction and a cleaning vehicle (sweeping the road) and a state owned construction truck were ahead of my car when it happened."

{¶ 2} Plaintiff contended the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in carrying out roadway repair operations on State Route 161. Plaintiff filed this complaint seeking to recover damages in the amount of $348.01, the cost of a replacement windshield. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 3} Defendant acknowledged DOT work crews performed roadway maintenance operations on State Route 161 from mileposts 11.15 to 0.63 in Union County on June 17, 2008 and June 18, 2008. The specific roadway surface maintenance activity generically referred to as a "tar and chip operation" involved the "[a]pplication of a sprayed asphalt binder which is covered immediately by a washed limestone or dolomite aggregate, and rolled with a pneumatic roller."[1]. Defendant asserted signs were posted every two miles along the roadway to notify motorists of the surface treatment activity. Defendant pointed out the signs posted provided such notice as "Fresh Tar," "Loose Stone," "Do Not Pass," "No Edge Lines," and "35 mph." According to defendant "every precaution was taken to make sure drivers were aware of the activity taking place and the condition of the road." Defendant denied any DOT personnel conducted the surface treatment operation in a negligent manner. Defendant contended the signs posted notifying motorists of the surface treatment activity was sufficient to discharge any duty owed to the motoring public in regard to maintenance procedures.

{¶ 4} Defendant related all written procedures were followed on June 18, 2008 when tar and chip operation was performed on State Route 161. Defendant reported these procedures included the outlined" Recommended Process" contained in the Surface Treatment Activity Number-6125 document. The "Recommended Process" included the following steps:

{¶ 5} "1. Traffic control for this activity should be performed in accordance with the Ohio Manual of Uniform Traffic Control Devices, chapter seven, and the ODOT Traffic Engineering Manual, chapter six.

{¶ 6} "2. Clean the pavement surface of all foreign material.

{¶ 7} "3. Apply uniform application of liquid asphalt.

{¶ 8} "4. Place uniform application of cover aggregate.

{¶ 9} "5. Roll sealed area.

{¶ 10} "6. Sweep the pavement clean of any loose aggregate.

{¶ 11} "7. Remove signs and other safety devices."

{¶ 12} Defendant submitted a statement from DOT Union County Manager, Dan

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[1] The quoted passage is contained in DOT's written procedure for roadway Surface Treatment Activity Number-6125 (copy submitted).

Wise, referencing his description of the procedure involved in the tar and chip operation performed on June 18, 2008. Wise wrote the following informed narrative:

{¶ 13} "The 18th was the second day of operation we started work at 8:00am and ended at 3:00pm. Two motorized brooms were used to sweep the pavement out in front of the operation. The operation consists of a distributor that sprays liquid emulsion (tar) on the pavement quickly followed up by a stone spreader box that covers the emulsion with stone and then the stone is rolled into the emulsion. After the emulsion has 'set up' the loose stone can be swept from the roadway, typically this is the following day."

{¶ 14} Plaintiff filed a response recording "[w]hen the stone hit my windshield, two (state) owned vehicles (were) in front of me, one's the motorized broom sweeping the pavement and another pick-up truck." Plaintiff recalled the motorized broom sweeping vehicle generated a lot of dust inhibiting visibility.

{¶ 15} 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. Additionally, defendant has a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. When engaged in such activities, defendant's personnel must operate equipment in a safe manner. *State Farm Mutual Automobile Ins. Company v. Department of Transportation* (1998), 97-11011-AD.

{¶ 16} 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.

{¶ 17} 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, as it appears to be the situation in 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.

{¶ 18} 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 conditions and during highway construction projections. 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; *Feichtner*, at 354. In the instant claim, plaintiff has proven his damage was caused by conduct attributable to DOT personnel.

{¶ 19} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. In the instant action, the trier of fact finds the statements of plaintiff concerning the origin of the damage-causing debris to be persuasive. The trier of fact finds plaintiff's car was damaged by debris that were swept about by a DOT truck. Sufficient evidence has been presented to establish

defendant breached its duty of care to protect motorists from hazards arising out of DOT maintenance activities. Plaintiff has proven his property damage was caused by the acts of DOT personnel. See *Vitek v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-09258-AD, jud, 2005-Ohio-1071. Consequently, defendant is liable to plaintiff for the damages claimed, $348.01, plus the $25.00 filing fee which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $373.01, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
9/26
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