[Cite as *Davis v. Ohio Dept. of Transp., Dist. 7,* 2009-Ohio-3578.]

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

ERIC T. DAVIS

Plaintiff

v.

THE OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 7

Defendant

Case No. 2008-08850-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Eric T. Davis, filed this action against defendant, Department of Transportation ("DOT"), contending his 1996 Nissan Maxima was damaged on August 2, 2008 as a proximate cause of negligence on the part of DOT in allegedly maintaining a hazardous roadway condition on State Route 571 in Miami County. Plaintiff noted he was traveling east on State Route 571 "about 3 miles east of Tipp City, Ohio, just before the intersection with State Route 202" when he "saw a sign that read 'DIP' in the road." Plaintiff recalled he actually traveled over "2 successive 'dips' in the road, the second of which was very deep." According to plaintiff, this second roadway depression "caused my car to bottom out on the road surface, and seriously damaged my muffler." Plaintiff related the muffler on his 1996 Nissan Maxima had to be replaced and he seeks damages in the amount of $154.69, the cost of a new muffler. Plaintiff paid the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant acknowledged the roadway section where plaintiff's stated incident occurred was located within an area (mileposts 16.5 to 17.0 on State Route 571

in Miami County) where DOT had conducted pavement repair operations on July 30, 2008 and July 31, 2008. Defendant asserted the pavement repair was conducted in accordance with DOT accepted standards and inspection procedures. Defendant explained all necessary advisory "bump" signage was in place (installed July 30, 2008) at the pavement repair site to notify motorists of the roadway contour due to construction activity. Defendant denied being aware of or informed about any problem with the roadway presented by the pavement repair. Defendant contended plaintiff failed to produce any evidence to establish the damage to his vehicle was attributable to any conduct on the part of DOT. Defendant denied breaching any duty of care owed to the traveling public while engaging in the pavement replacement project on State Route 571. Defendant maintained the pavement replacement project was performed in accordance with DOT standards and plaintiff has failed to prove DOT crews created a particularly hazardous roadway condition while engaged in the pavement replacement project.

{¶ 3} Defendant submitted a written statement from DOT Miami County Transportation Manager, Brian Evans, regarding his recollections of the work involved on the pavement replacement on State Route 571. Evans recorded the following:

{¶ 4} "On July 30th. Miami County personnel & John Palmer (grinder operator) ground butt joints starting at the edge of the river bridge (joint one) and then grinding another .2 tenths further east (joint two). Later that afternoon, I went out to inspect their work and did not feel they had ground the joints long enough. It was my belief that unless the joints were ground longer it would not be a smooth ride for motorists after hot mixing. On July 31st., the next day, John came back and further ground out the joints another 40 feet making the joints, now with a longer taper, an easier ride. Before we left on the 31st., we put cold patch at the deepest ends of the joints, trying to make the 'bump' as minor as possible for motorists. The deepest end of the joints were about 2" deep, even less with the cold patch there. On the 30th, Wayne Wertz put up 'BUMP' signs to alert motorists of the road condition."

{¶ 5} Plaintiff incident occurred (August 2, 2008), after the roadway pavement had been milled and prepared for repavement, but before the actual repavement with hot mix material was performed (August 4, 2008) DOT employee Evans noted he was unaware of any problems with the roadway before repaving was complete and denied

receiving any calls or complaints about problems with the roadway.

{¶ 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. Additionally, defendant has a duty to exercise reasonable care in conducting 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.

{¶ 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, 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.

{¶ 8} 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 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.

{¶ 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 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. See *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190. Evidence has shown the repavement project complied with DOT specifications. Plaintiff has not provided evidence to prove the roadway area was particularly defective or hazardous to motorists. *Reed v. Ohio Dept. of Transp., Dist. 4*, Ct of Cl. No. 2004-08359-AD, 2005-Ohio-615. Plaintiff has failed to provide sufficient evidence to prove defendant was negligent in failing to redesign or reconstruct the roadway repavement procedure considering plaintiff's incident appears to be the sole incident at this area. See *Koon v. Hoskins* (Nov. 2, 1993), Franklin App. No. 93AP-642; also, *Cherok v. Dept. of Transp., Dist, 4*; Ct. of Cl. No. 2006-01050-AD, 2006-Ohio-7168.

{¶ 10} Plaintiff has failed to prove his property damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162. The evidence available tends to show the sole cause of plaintiff's damage was his own driving maneuver. See *Yokey v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-07425-AD, 2005-Ohio-456; also *Lenaghan v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-06071-AD, 2008-Ohio-1206.

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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:

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RDK/laa
2/11
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