[Cite as *Dowling v. Ohio Dept. of Transp.*, 2009-Ohio-2749.]

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

CATHERINE M. DOWLING, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08892-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On March 30, 2008, at approximately 8:45 a.m., plaintiff, Catherine M. Dowling, was driving her 2003 Ford Taurus on Interstate 75 South, about "4 to 10 miles north of the (Cincinnati)/Dayton exchange," when the vehicle struck concrete debris laying on the roadway. Catherine M. Dowling stated the debris that her car struck consisted of "sections of concrete at the joints had broken out concrete, some gaps 6 to 8 inches." The concrete debris punctured both the fuel tank and the transmission pan of the 2003 Ford Taurus. Seemingly, Catherine M. Dowling implied the damage-causing pieces of concrete were deteriorated roadway pavement.

{¶ 2} 2) Plaintiffs, Catherine M. Dowling and Thomas V. Dowling, asserted the damage to the car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT"), in failing to maintain the roadway free of hazardous conditions. Plaintiffs filed this complaint seeking to recover $640.09, the cost of automotive repair needed that resulted from the March 30, 2008 described incident. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of any concrete debris on the roadway prior to 8:45 a.m. on March 30, 2008. Defendant denied receiving any calls or complaints about concrete debris on the roadway which DOT located between mileposts 25.13 and 31.20 on Interstate 75 in Butler and Warren Counties. Defendant suggested the debris on the roadway "existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant related, "[i]f ODOT personnel had found any debris, it would have been picked up and their last pickup for this area was on March 27, 2008."

{¶ 4} 4) Defendant argued plaintiffs have failed to show the damage-causing debris condition emanated from any conduct attributable to DOT. Defendant explained three overhead bridges spanning Interstate 75 between mileposts 25.13 and 31.20 were in the process of being demolished during the time of the incident forming the basis of this claim (March 30, 2008). No evidence has been presented to show the origin of the damage-causing debris was from bridge demolition operations.

CONCLUSIONS OF LAW

{¶ 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} In order to prove a breach of the duty to maintain the highways, plaintiffs 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.

{¶ 7} For plaintiffs to prevail on a claim of negligence, they must prove, by a preponderance of the evidence, that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their 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. Plaintiffs have the burden of proving, by a preponderance of the evidence, that they 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.

{¶ 8} No evidence in the instant claim was offered to establish the debris came from DOT activity. However, defendant may still bear liability if it can be established that 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.

{¶ 9} "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.

{¶ 10} Plaintiffs have failed to prove their damage was proximately caused by any negligence on the part of DOT. Plaintiffs have failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to them or that their injury was proximately caused by defendant's negligence. Plaintiffs 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 plaintiffs.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
2/12
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