[Cite as *Murray v. Ohio Dept. of Transp.*, 2009-Ohio-7137.]

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

MARY KAY MURRAY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08922-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Mary Kay Murray, asserted her 2004 Dodge Intrepid was damaged on July 16, 2008 when the vehicle struck two traffic control cones in the traveled portion of Interstate 90 in a roadway construction area in Cleveland. Plaintiff located the property damage incident "in the middle of the lane, eastbound on I-90, 2nd lane from the berm, approximately 1000-1500 feet west of the E 22nd street exit." Plaintiff pointed out she was "unable to avoid hitting the cones with my left front bumper (as) [t]he base of one of the cones wedged under my front bumper and then broke into pieces as my bumper detached partially from my car." Plaintiff noted the detached part of her car bumper "rolled up around my left wheel well causing my car to be undriveable." Plaintiff has contended the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation (ODOT), in maintaining a hazardous condition in a construction area on Interstate 90 in Cuyahoga County. Plaintiff filed this complaint seeking to recover damages in the amount of $760.30, representing her insurance coverage deductible for automotive

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repair, car rental expense, and work loss. The filing fee was paid. Plaintiff submitted photographs depicting the orange construction cones her vehicle struck and the damage to her car.

{¶ 2} Defendant acknowledged the area where plaintiff's stated damage event occurred was located within the limits of a construction project maintained by ODOT contractor, Karvo Paving Company (Karvo). Defendant related the construction project "dealt with grading, planing and resurfacing with asphalt concrete of I-90 in Cuyahoga County" between county mileposts 16.20 and 18.42. Defendant located plaintiff's damage incident near county milepost 16.76 which is within the limits of the construction project. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore ODOT argued Karvo is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with ODOT requirements, specifications, and approval. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. The duty of ODOT to maintain the roadway in a safe drivable condition is not delegable to an independent

contractor involved in roadway construction. ODOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that ODOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection with the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 3} 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.

{¶ 4} Alternatively, defendant denied that neither ODOT nor Karvo had any knowledge "of the construction barrel on I-90 prior to plaintiff's incident." Defendant reported ODOT records show no calls or complaints were received regarding orange construction cones on the roadway prior to plaintiff's damage occurrence (6:00 p.m. on July 16, 2008). Furthermore, defendant asserted plaintiff has not offered sufficient evidence to establish her property damage was attributable to conduct on the part of either ODOT or Karvo.

{¶ 5} Defendant submitted a written statement from Karvo Safety Risk Manager, Cathleen Geddes, who explained work on the particular Interstate 90 construction

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project is performed at night and no Karvo personnel are "permitted on this jobsite until 7:00 p.m." According to Geddes, no Karvo employee was working on Interstate 90 at the general time of plaintiff's incident and consequently, no construction cones had been set up by Karvo when plaintiff's damage event occurred, 6:00 p.m. on July 16, 2008. Geddes related "[c]ones are being placed and removed on a daily basis for this jobsite." Geddes implied the cones that damaged plaintiff's car did not emanate from any work performed by Karvo. A "Daily Diary Report" dated July 16, 2008 compiled by ODOT's onsite Project Engineer confirms work did not begin on Interstate 90 until 7:00 p.m. on that date.

{¶ 6} Defendant argued liability cannot be established when requisite notice of damage-causing debris conditions cannot be proven. 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. 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. Plaintiff has not presented sufficient evidence to

establish ODOT or Karvo actively caused the debris condition that damaged her vehicle. Furthermore, plaintiff failed to prove either ODOT or Karvo had notice of the damage-causing debris condition.

{¶ 7} Generally, in order to recover in a suit involving injury proximately caused by roadway conditions including debris, plaintiff must prove either: 1) defendant had actual or constructive notice of the debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the debris condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the debris. Additionally, 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 debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶ 8} 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 ODOT or its agents 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

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unreasonable risk of harm is the precise duty owed by ODOT to the traveling public under both normal traffic 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. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage.

{¶ 9} Plaintiff has not shown, 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 that the damage-causing condition was connected to any conduct under the control of defendant, that 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. Consequently, plaintiff's claim is denied.

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OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth

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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:

Mary Kay Murray
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North Olmsted, Ohio 44070

Jolene M. Molitoris, Director
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RDK/laa
9/30
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