[Cite as *Saini-Rice v. Ohio Dept. of Transp.*, 2009-Ohio-4340.]

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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RASHMI SAINI-RICE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-09121-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On June 28, 2008, at approximately 1:15 p.m., plaintiff, Rashmi Saini-Rice, suffered property damage to her 2008 Mazda sedan while traveling east on Interstate 90 "approaching Dead Man's Curve in Cleveland" on a roadway section where the roadway had been repaved. Plaintiff described the particular damage incident stating she drove onto "the right center lane and when I did this I either crossed a huge hole where the new pavement did not reach the rumble strips or something was sticking up over the new pavement by the rumble strips, under the bridge." Plaintiff noted both right side tires and rims on her vehicle were damaged as a result of the hazardous roadway condition present on Interstate 90. Plaintiff asserted the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to keep the roadway in a construction area free of hazards. Plaintiff filed this complaint seeking to recover $1,760.71 in damages representing the total cost of automotive repair and related expenses resulting from the June 28, 2008 damage event. Plaintiff pointed out she maintains insurance coverage for automotive damage and acknowledged she has received $1,187.59 from her insurer

to cover certain repair expenses. Pursuant to the provisions of R.C. 2743.02(D) [1], plaintiff's damage claim is limited to $573.12. The $25.00 filing fee was paid.

{¶ 2} Defendant acknowledged the area where plaintiff's described damage event occurred was located within a construction project zone on Interstate 90 in Cuyahoga County. From plaintiff's description defendant specifically located the incident between mileposts 17.14 and 17.68 within the construction project limits. Defendant explained the roadway construction zone was under the control of DOT contractor, Karvo Paving Company ("Karvo"). Repaving work, which was included within the construction project plan, was to be performed by Karvo in accordance with DOT mandated requirements and specifications and subject to DOT inspection approval. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction project limits. Therefore, defendant argued Karvo is the proper party defendant in this action. Defendant implied all duties, such as the duty to warn, the duty to maintain, the duty to inspect, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT 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 DOT 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 particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 3} Alternatively, defendant denied neither DOT nor Karvo had any notice of "the pavement" on Interstate 90 prior to plaintiff's incident. Defendant denied receiving any calls or complaints regarding a defective pavement on the roadway prior to June 28, 2008. Defendant argued liability cannot be established when requisite notice of

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[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section

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 DOT or its agents actively caused any defective condition that damaged her vehicle. Defendant asserted no complaints other than plaintiff's complaint were received regarding roadway conditions on Interstate 90 despite the fact that particular roadway has "an average daily traffic volume between 88,910 and 116,560."

{¶ 4} Defendant submitted a statement from Karvo Safety Risk Manager, Cathleen Geddes, regarding her knowledge and assessment concerning work performed on Interstate 90 prior to June 28, 2008. Geddes noted: "Construction including pavement repairs and the area between the rumble strips on the eastbound lanes was completed on June 17th, 2008. The rumble strips area was considered a mill and fill operation, therefore, all asphalt was removed and replaced on the same shift. The damage described to this vehicle could have been caused by anything on the highways along the route described, but as stated above, Karvo was finished with the operations in that section of roadway as of June 17, 2008 . . . This entire project was clearly marked with 'Road Work Ahead' signs which were placed according to the ODOT traffic control standards and they are visible throughout the project."

{¶ 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} 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*

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apply under those circumstances."

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.

{¶ 7} 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 an unreasonable risk of harm is the precise duty owed by DOT to the traveling public both under 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. Evidence available seems to point out the roadway area was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162. Consequently, plaintiff's claim is denied.

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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
4/9
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