[Cite as *McTear v. Dept. of Transp., Dist. 12*, 2008-Ohio-7118.]

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
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KATHY L. MCTEAR

Plaintiff

v.

DEPT. OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-09139-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Kathy L. McTear, stated that she was traveling east on Rockside Road approaching the Interstate 77 North ramp when the windshield of her 2002 Buick Rendevous was struck by "a piece of cement or some other hard object" as her vehicle passed under a bridge spanning the roadway. Plaintiff asserted that the object which struck her car fell from the bridge spanning the roadway. According to plaintiff, the falling "object broke my windshield causing it to crack." Plaintiff recalled that at the time of the described incident (approximately 11:45 a.m. on August 6, 2008) "there were workers on the bridge." The incident was reported to the Independence, Ohio, Police Department at approximately 12:20 p.m. on August 6, 2008.

{¶ 2} Plaintiff contended that the damage to her car windshield was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway in a construction area. Plaintiff filed this complaint seeking to recover $462.79, the cost of a replacement windshield. The filing fee was paid. Evidence has shown that personnel of DOT contractor, Kokosing Construction Company, Inc. (Kokosing), were working on the particular overpass bridge spanning

Interstate 77 preparing the bridge deck to lay new concrete. Defendant acknowledged that the described incident occurred within a construction area where DOT contractor, Kokosing, performed "grading, pavement repair, planning, resurfacing with asphalt concrete and widening of structures on I-77 in Cuyahoga County." Defendant located plaintiff's damage incident from her description "at county milepost 8.37 which is within the project limits" where Kokosing worked. Defendant explained that the construction area of Interstate 77 was under the control of Kokosing and consequently DOT had no responsibility for any damage or mishaps on the roadway within the construction project limits. Defendant asserted that Kokosing by contractual agreement was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT requirements and specifications. Defendant implied that 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. Alternatively, defendant denied that neither DOT nor Kokosing had any notice of "pieces of cement or debris on I-77 prior to plaintiff's incident." Defendant reported that no prior calls or complaints were received "regarding the debris in question." Defendant contended that plaintiff failed to produce sufficient evidence to establish her property damage was caused by negligent roadway maintenance. Defendant contended that plaintiff failed to produce any evidence to establish that her damage was proximately caused by any conduct attributable to DOT or Kokosing.

{¶ 3} Both defendant and plaintiff submitted copies of a written statement from Kokosing Claims Specialist, Pamela LeBlanc, regarding her findings concerning the events of August 6, 2008. LeBlanc noted that Kokosing Project Superintendent, Kerry Hart was informed of plaintiff's complaint by the Independence Police Department on August 6, 2008 and responded by personally inspecting the bridge spanning Interstate 77 where Kokosing crews had prepared the bridge deck in order to pour concrete on August 7, 2008. According to LeBlanc, Kerry Hart did not find any debris on the bridge deck "that may have fallen from our operations onto the roadway." Apparently all Kokosing personnel working on the bridge that day denied dropping anything from the bridge onto the roadway below. Furthermore, no Kokosing workers witnessed "anything fall onto the roadway." LeBlanc recorded that the bridge deck was cleaned of all debris and there was no debris observed on the roadway below by Kerry Hart, although "he

witnessed non-stop trucks hauling concrete going underneath the bridges." LeBlanc reported that she did not discover the origin of the debris that damaged plaintiff's car windshield, and denied any responsibility for the damage. In reference to the trucks observed hauling concrete LeBlanc wrote that: "Some of the trucks didn't have tailgates. Its possible some concrete debris flew onto your (plaintiff's) windshield from one of these trucks, but again, there was nothing on the roadway." Due to the fact that numerous vehicles other than Kokosing trucks travel the roadway. LeBlanc suggested that the debris that struck plaintiff's windshield could have emanated from a unidentified third party motorist not affiliated with either Kokosing or DOT.

{¶ 4} Plaintiff filed a response insisting that the object which damaged her car windshield fell from the bridge spanning Interstate 77. The damage to the windshield was noted in the police report plaintiff filed indicating that the particular damage affected an area "approximately 5 inches in diameter and also caused a (crack) to go the vertical length of the windshield." The damage recorded is consistent with damage caused by a falling object emanating from a bridge.

{¶ 5} Defendant has the duty to maintain its highway 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. 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. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties 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. No. 00AP-1119. The evidence presented establishes that the object that damaged plaintiff's car windshield emanated from a bridge where DOT's agents were working. Apparently the object either spalled from the bridge structure or fell from the bridge deck that was being prepared for repaving.

{¶ 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 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. 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. Defendant professed liability cannot be established when requisite notice of the damage-causing 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 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. Plaintiff has produced sufficient evidence to prove her property damage was either caused by a defective condition created by DOT's agents or the result of defective bridge maintenance.

{¶ 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 under both 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; *Feichtner*, at 354.

{¶ 8} This court has previously held DOT liable for property damage resulting from falling debris. *Elsey v. Dept. of Transportation* (1989), 89-05775-AD. Plaintiff has proven, by a preponderance of the evidence, that she sustained property damage as a result of defendant's negligence regarding bridge maintenance. *Brickner v. ODOT* (1999), 99-10828-AD; *Rini v. ODOT* (1997), 97-05649-AD.

{¶ 9} 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 that the statements of plaintiff concerning the origin of the damage-causing debris are persuasive. Consequently, defendant is liable to plaintiff for the damaged claimed, $462.79, 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 $487.69, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
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