[Cite as *Wellington v. Ohio Dept. of Transp.*, 2009-Ohio-4341.]

Court of Claims of Ohio

The Ohio Judicial Center
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ANITA M. WELLINGTON

Plaintiff

v.

THE OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-09155-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Anita M. Wellington, asserted she sustained suspension damage to her 2002 Chrysler 300 M while traveling through a roadway construction area on Interstate 270 in Franklin County, at approximately 5:30 p.m. on July 5, 2008. Plaintiff specifically described the damage incident stating, "I was traveling northbound on 270 toward exit 29 (Westerville) the highway construction crew dug out a groove across the highway approximately one and half the length of a car, which cause you to drop down into this section and a bump to get out." Plaintiff recalled that when she drove over this particular roadway area "it felt like I was going over a small curb." Plaintiff related the sway bar links on her automobile were damaged by traveling over the roadway area of Interstate 270 where construction work was performed. Plaintiff maintained the damage to her vehicle happened based on the contention that "the construction crew didn't finish their job ensuring a smooth transition for (the) highway travelers."

{¶ 2} Plaintiff implied defendant, Department of Transportation ("DOT"), should bear liability for the damage to her car for failing to maintain a roadway construction area free of hazardous conditions. Plaintiff filed this complaint seeking to recover $173.66, the cost of vehicle repair she incurred resulting from the described July 5,

2008 incident. The $25.00 filing fee was paid.

{¶ 3} Defendant acknowledged the described incident occurred within a construction area where DOT contractor National Engineering and Contracting Company ("National"), performed roadway "grading, draining and paving with asphalt concrete on IR 270 between mileposts 25.90 and 32.20." Defendant located plaintiff's damage incident from her description "at milepost 28.71 which is within the project limits" where National worked. Defendant explained the construction area of Interstate 270 was under the control of National and consequently DOT had no responsibility for any damages or mishaps on the roadway within the construction project limits. All construction work performed by National was to be done in accordance with DOT mandated requirements and specifications and subject to DOT approval. Defendant asserted National, by contractual agreement, was responsible for maintaining the roadway within the construction limits. Therefore, defendant argued National 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.

{¶ 4} Alternatively, defendant denied neither National nor DOT had any notice of any problem with the road surface at milepost 28.71 prior to plaintiff's incident. Defendant related DOT "records indicate that no calls or complaints were received regarding the road surface in question prior to" 5:30 p.m. on July 5, 2008. Defendant argued liability cannot be established when requisite notice of a damage-causing roadway condition cannot be proven. Defendant contended plaintiff failed to provide proof that DOT "in a general sense maintains its highways negligently." Furthermore,

defendant reasoned plaintiff did not offer sufficient evidence to prove any conduct on the part of National or DOT caused the July 5, 2008 property damage occurrence.

{¶ 5} Defendant submitted a copy of a written statement from National Project Environmental Health and Safety Manager, Jesse P.E. Dieter, regarding his findings concerning work performed by National around the time of plaintiff's incident. Dieter pointed out no work was performed on Interstate 270 on July 5,2008 in observance of the national holiday. Concerning actual pavement preparation work performed Dieter noted DOT "does not allow a depth of an inch and a half when milling asphalt (and) [a]ll edges were per the plans and specifications." Defendant pointed out National performed no construction work on Interstate 270 "from July 3-6, 2008."

{¶ 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 so 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.

{¶ 7} 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.

{¶ 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. 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. Although defendant's contractor created the roadway condition that allegedly caused damage to the vehicle plaintiff drove, evidence submitted does not support the fact that the condition created was particularly dangerous based on the circumstances attendant to a roadway construction zone.

{¶ 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 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. 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; *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190.

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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
4/8
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