

# 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

ANTHONY L. BROWN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION - DISTRICT 8

Defendant

Case No. 2008-09350-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

{¶ 1} From July 30 to August 2, 2008, employees of defendant, Department of Transportation (ODOT), repaired a culvert spanning State Route 72 in Greene County. This culvert betterment project was completed on August 2, 2008 with the placement of temporary cold patch material over the culvert repair in order to open the roadway to traffic. Defendant explained cold patch material was used to fill the culvert excavation “due to hot mix asphalt being unavailable over the weekend (August 2, 2008 was a Saturday).” Orange traffic control cones were positioned along each side of the roadway at the culvert repair site. There is no indication of the approximate time ODOT personnel completed repairs on Saturday, August 2, 2008 with the application of cold patch material. There is no evidence ODOT personnel placed signage ahead of the culvert repair site to either warn or advise motorists of roadway conditions created by the repair activity.

{¶ 2} On Sunday, August 3, 2008, at approximately 12:10 p.m., plaintiff, Anthony L. Brown, and two companions were all riding motorcycles north on State Route 72 approaching the culvert repair site. Plaintiff recalled the roadway area was

unmarked and he did not know he was entering a work zone area where a culvert had been replaced. Plaintiff related he did not realize the cold patch material on top of the culvert had settled as he approached the site at approximately 45 mph. Plaintiff estimated the cold patch had settled approximately 6" creating an uneven pavement condition from the existing roadway surface on either side of the culvert repair site. Plaintiff asserted the frame of his motorcycle struck the pavement dip created by the settling cold patch causing substantial damage to the vehicle including wheel, tire, brake rotor, and frame damage.

{¶ 3} The incident was reported to and investigated by the local Ohio State Highway Patrol (OSHP). Part of the OSHP "Traffic Crash Report" was a written statement (copy submitted) by plaintiff. In the witness statement plaintiff offered the following written description of the incident: "Traveling north on SR 72 came around curve running approx 35 mi an hour; ran speed up around 45 mi an hour, hit deep spot in road where a culvert was replaced, threw me up in air (and) into speed wobble pulled bike out, rode into Ceaderville approx 1 mi. pulled over, examined bike, found 2 bent rims, rear tire cut (and) front tire leaking air - nothing was posted along road way indicating hazard spot, bump or dip in road or even to reduce speed."

{¶ 4} Plaintiff submitted a witness statement from Rodney L. Brown, who was riding his own motorcycle along with plaintiff at the time of the August 3, 2008 property damage incident. Rodney Brown related he, plaintiff, and another rider identified as Ronald Johnson, were riding their motorcycles on State Route 72 in Greene County approximately one mile south of Cedarville where they rounded a curve in the road and approached an area "a few hundred feet (ahead where) a culvert had been replaced." Rodney Brown further related "the fill and pavement (where the culvert was replaced) had sank about 6 inches leaving (a) sharp edge in the pavement (and when plaintiff's) motorcycle hit (the) edges in (the) pavement it bent both wheels and damaged (the) tires and brake on his motorcycle."

{¶ 5} Plaintiff asserted the damage to his motorcycle was proximately caused by negligence on the part of ODOT in creating a hazardous condition on the roadway when replacing the culvert on State Route 72. Plaintiff filed this complaint seeking to recover \$2,500.00, the cost of repairing his motorcycle. The filing fee was paid.

{¶ 6} Defendant denied liability in this matter based on the contention that no

ODOT personnel had any knowledge of the deterioration of the culvert repair prior to plaintiff's property damage occurrence. Defendant contended "[b]ecause ODOT did not receive notice of the subject condition, defendant has no way of knowing or determining exactly how long the sinking culvert repair existed prior to Plaintiff Brown's incident." Since cold mix was applied to the top of the culvert repair on August 2, 2008 and plaintiff's incident occurred at approximately 12:10 p.m. on August 3, 2008, it is evident the cold mix patch failed at some point between application on August 2, 2008 and 12:10 p.m. on August 3, 2008. Defendant suggested "it is more likely than not that the sinking culvert repair existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant asserted ODOT employees followed proper procedures in repairing the culvert. Defendant further asserted ODOT adequately warned motorists of the culvert repair by placing traffic control cones adjacent to the repair site. Defendant argued plaintiff has failed to produce evidence to establish his property damage was attributable to conduct on the part of ODOT personnel. Defendant stated OSHP "contacted the Greene County Manager before this incident happened and a crew was enroute when this incident happened." Defendant argued plaintiff has failed to prove his damage was proximately caused by ODOT breaching any duty of care owed to the traveling public.

{¶ 7} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his 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 he 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 the 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.

{¶ 8} 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.

{¶ 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 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.

{¶ 10} Defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD; *Phillips v. Dept. of Transp.* (2009), 2008-10374-AD. Reasonable or ordinary care is that degree of caution and foresight which an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310, 31 O.O. 2d 573, 209 N.E. 2d 142.

{¶ 11} 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*, 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. 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 presented sufficient evidence to prove the defective condition was created by

defendant. *Bickerstaff v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-05451-AD, 2008-Ohio-6458; *McTear v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2008-09139-AD, 2008-Ohio-7118; *Mullins v. Ohio Dept. of Transp., Dist. 8* (2009), 2008-11371-AD.

{¶ 12} Furthermore, defendant has a duty to post warning signs notifying motorists of highway defects or dangerous conditions. *Gael v. State* (1979), 77-0805-AD. There is no indication in the instant action that defendant installed any warning or advisory signs notifying motorists of the culvert replacement area and uneven pavement condition. The only warning in place was the placement of cones positioned adjacent to the site itself. The placement of such cones constitutes insufficient warning of an uneven pavement condition. In the present action, the court concludes sufficient evidence has been offered to establish defendant breached its duty of care owed to the traveling public by creating a hazardous roadway condition and then failing to provide adequate warning of such condition. *Stricker v. Dept. of Transp.* (2001), 2001-04867-AD. Defendant is liable to plaintiff for the damage claimed, \$2,500.00, plus the \$25.00 filing fee which may be awarded 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 \$2,525.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/laa  
9/23  
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