[Cite as *Coleman v. Ohio Dept. of Transp.*, 2009-Ohio-4275.]

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

KATHERINE COLEMAN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-10820-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Katherine Coleman, asserted her car, a 2000 Volkswagen Beetle, was damaged while traveling through a roadway construction area at the intersection of State Route 252 and State Route 82 on September 12, 2008. Plaintiff related that the damage to her car was caused by uneven pavement conditions where the roadway pavement had been graded in preparation for repavement. Plaintiff stated "[t]he significant change in road surface levels caused my Volkswagen Beetle to bottom out and forced the belly pan into the oil pan causing a hole, as well as breaking the rear main seal housing and lower bolts." Plaintiff also pointed out a front tire on her vehicle was also damaged as a result of traveling over the transition from the milled area to the existing paved portion of the roadway. Plaintiff recalled signs were in place to notify her of construction activity and she drove accordingly, but insisted the roadway conditions created by the construction "was not designed to protect motorists." Plaintiff submitted photographs depicting the transition between the milled roadway area and existing paved roadway at the intersection of State Route 252 and State Route 82. In reviewing these photographs, the trier of fact finds the roadway transition depicted does not

appear to be particularly significant. One photograph does show a significantly elevated area in the center of the milled roadway several feet distant from the existing paved roadway area.

{¶ 2} Plaintiff implied the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition on State Route 82 in a construction area. Plaintiff filed this complaint seeking to recover damages in the amount of $1,762.93, the cost of replacement parts and related expenses for automotive repair. The $25.00 filing fee was paid.

{¶ 3} Defendant acknowledged the roadway area where plaintiff's incident occurred was within the limits of a working construction project under the control of DOT contractor, Kokosing Construction Company, Inc. ("Kokosing"). Defendant explained the construction project "dealt with pavement planning, pavement repair, placement of single chip seal, resurfacing with asphalt concrete and structure maintenance work of SR 82 in Lorain County." Defendant asserted this particular construction project on State Route 82 was under the control of Kokosing and consequently DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kokosing is the proper party defendant in this action. 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 section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove her damage was proximately caused by roadway conditions created by DOT or its contractors. All construction work was to be performed in accordance with DOT requirements and specifications and subject to DOT approval.

{¶ 4} Defendant has the duty to maintain its highways in a reasonable 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.

{¶ 5} Defendant noted that from "plaintiff's description of the incident area at SR 82 places her at milepost 8.08 which is within the project limits." Alternatively, defendant denied neither Kokosing nor DOT had any notice with any problem with the road surface at milepost 8.08 prior to plaintiff's incident. Defendant related DOT "records indicate that no calls or complaints were received at the Lorain County Garage regarding the pavement in question prior to" plaintiff's property damage event of September 12, 2008. Defendant pointed out "this portion of SR 82 has an average daily traffic volume between 9,300 and 9,480, however, no other complaints were received prior to plaintiff's incident." 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 Kokosing or DOT caused the September 12, 2008 property damage occurrence.

{¶ 6} Defendant submitted a copy of an e-mail from Kokosing Claims Specialist, Pamela LeBlanc, regarding roadway conditions created by Kokosing construction activity on State Route 82. LeBlanc advised a "Bump" sign was in place on the particular roadway section to notify motorists of pavement transition conditions. LeBlanc contacted a Kokosing on-site foreman who informed her "there is a 1-1/2" lip maximum after the Bump sign" where the roadway transitions from paved surface to milled surface. LeBlanc suggested plaintiff's property damage was caused by traveling at an unsafe speed for the roadway conditions presented. LeBlanc noted the roadway variance of 1-1/2" complied with DOT requirements and specifications.

{¶ 7} 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.

{¶ 8} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 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 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. Defendant contended liability cannot be established when requisite notice of damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to reasonably 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, as it appears to be the situation advanced in the present claim. 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. However, evidence has not shown defendant's contractor created a hazardous condition by milling the roadway surface in accordance with DOT specifications. Furthermore, evidence has been presented to establish plaintiff was notified about the pavement conditions and was responsible for taking some driving precautions based on the road conditions. See *Nicasto v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190. Plaintiff has failed to offer sufficient proof to support a finding that her property damage was caused by defendant or its agents breaching any duty of care in regard to roadway construction. Evidence available seems to point out the roadway 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. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Vanderson v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-09961-AD, 2006-Ohio-7163; *Shiffler v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-07183-AD, 2008-Ohio-1600.

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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
4/29
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