[Cite as *Taylor v. Ohio Dept. of Transp., Dist. 12*, 2009-Ohio-7111.]

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

DAREL TAYLOR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2009-05536-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Darel Taylor, filed this action against defendant, Department of Transportation (DOT), alleging the windshield on his 2006 Chevrolet Cobalt was damaged while traveling through a construction zone on Interstate 90 in Lake County. Plaintiff described the property damage incident noting that: "[w]hile driving on Route 90 West bound a mile past Route 91 entrance ramp several rocks hit my windshield cracking it in three places." Plaintiff asserted rock debris was left on the roadway after defendant's contractor had milled the roadway in preparation for repaving. Plaintiff observed the roadway was not properly swept of debris left by the milling process and consequently the small rocks that remained on the roadway presented a hazard to motorists traveling on Interstate 90. Plaintiff recalled his damage incident occurred at approximately 7:30 a.m. on May 19, 2009. Plaintiff seeks damages in the amount of $300.00, the stated cost of a replacement windshield. The filing fee was paid.

{¶ 2} Defendant acknowledged that the area where plaintiff's described damage event occurred was located within the limits of a construction project under the control of DOT contractor, The Shelly Company (Shelly). Defendant explained the particular project "dealt with grading, planning and resurfacing with asphalt concrete on I-90

between county mileposts 1.88 to 7.80 in Lake County." Defendant asserted that Shelly, by contractual agreement, was responsible for any roadway damage occurrences or mishaps within the construction zone. Therefore, DOT argued that Shelly 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. All work by the contractor was to be performed in accordance with DOT mandated specifications and requirements and subject to DOT approval.

{¶ 3} 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.

{¶ 4} 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. 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 contention 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. 00AP-1119.

{¶ 5} Alternatively, defendant argued that neither DOT nor Shelly had any knowledge "of debris flying around from the traffic on I-90" prior to plaintiff's described damage occurrence. DOT records indicate a motorist complained of debris on May 12, 2009, but at a different location from plaintiff's incident. Records also show plaintiff and another motorist both complained about construction debris on Interstate 90 on May 19, 2009, the day of plaintiff's incident. DOT records do not list the approximate time the complaints regarding construction debris were received on May 19, 2009. Defendant contended plaintiff failed to produce evidence establishing that his property damage was attributable to any conduct on either the part of DOT or Shelly. Shelly work records (copies submitted) show milling operations were conducted on Interstate 90 West during the early morning hours of May 18, 2009. Both DOT and Shelly records (copies submitted) indicate the milled roadway was swept of debris by a Shelly sub-contractor, ending at 4:30 a.m. on May 18, 2009. Shelly Assistant Safety Director, Russell Sherman, submitted a written statement regarding plaintiff's damage claim. Sherman recorded, "[w]e have maintained the above referenced jobsite according to the Ohio Department of Transportation specifications." Sherman suggested the debris that damaged plaintiff's windshield did not emanate from any work performed by Shelly, but from an unidentified third party motorist.

{¶ 6} Plaintiff filed a response insisting his property damage was proximately caused by a failure to properly sweep Interstate 90 after the existing roadway pavement had been milled. Plaintiff contended the fact two other individuals complained about damage from debris constitutes sufficient evidence the roadway was improperly swept after milling operations. Plaintiff argued "the damage caused to the windshield of my car was the cause of negligence on the part of ODOT and the Shelly Company to meet the sweeping guidelines of the contract." Plaintiff submitted a quote for a replacement windshield with a total price of $266.82.

{¶ 7} Generally, in order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247, 517 N.E. 2d 1388. 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. 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, in the instant claim, has alleged that the damage to his vehicle was directly caused by construction activity of DOT's contractor prior to May 19, 2009.

{¶ 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 the 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. 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.

{¶ 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 both under 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. Plaintiff has provided sufficient evidence to prove a known hazardous condition existed on the roadway after milling and sweeping operations were completed and neither DOT nor its agents timely corrected the condition. Plaintiff has proven his damage was proximately caused by negligent acts and omissions on the part of DOT onsite personnel and DOT's agents. Therefore, defendant is liable to plaintiff in the amount of $266.82, the total cost of a replacement windshield, plus the $25.00 filing fee, which may be awarded as 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 $291.82, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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