

[Cite as *Murphy v. Ohio Dept. of Transp.*, 2005-Ohio-454.]

IN THE COURT OF CLAIMS OF OHIO

THOMAS J. MURPHY	:	
Plaintiff	:	
v.	:	CASE NO. 2004-08944-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
.....	:	

{¶ 1} Plaintiff, Thomas J. Murphy, stated he was traveling north on Interstate 271 just beyond the Interstate 480 West exit in Cuyahoga County, when his automobile was struck by a rock propelled from a lawn mower cutting grass in the roadway median area. Plaintiff recalled this incident occurred on August 27, 2004, at approximately 8:00 a.m. Plaintiff sustained body damage to his car as a proximate cause of the mowing operations being conducted in the median area of Interstate 271. Plaintiff has asserted defendant, Department of Transportation (DOT), should bear liability for the property damage resulting from the August 27, 2004, incident. Therefore, plaintiff filed this complaint seeking to recover \$775.00 for automotive body repair, plus \$25.00 for filing fee reimbursement. The requisite material filing fee was paid.

{¶ 2} Defendant denied any liability in this matter. Defendant denied having any DOT personnel conducting mowing operations in the area of Interstate 271 on August 27, 2004. Defendant maintained DOT did not perform any mowing activity on Interstate 271 in the six-month period preceding August 27, 2004.

{¶ 3} Defendant explained it contracted roadway area mowing projects for particular sections of Interstate 271 to an independent contractor, Clear Valley LTD. Pursuant to the terms of its contract with DOT, Clear Valley LTD assumed control of the mowing work zone taking responsibility for any injury resulting from negligent conduct. Due to the agreements manifested in this contract, DOT has argued it is not the proper party defendant under the facts of the present

action. However, Clear Valley LTD denied having any personnel conducting mowing near Interstate 271 on August 27, 2004. According to Clear Valley LTD all mowing done by its crews was completed on Interstate 271 by August 23, 2004, and the mowing crews had been moved to other roadways. Both DOT and Clear Valley LTD have denied their personnel were mowing median areas of Interstate 271 on August 27, 2004.

{¶ 4} Plaintiff insisted his property damage incident occurred on August 27, 2004, and involved a projectile propelled from some type of moving equipment operating in the median of Interstate 271. Plaintiff stated he assumed the moving equipment was mowing equipment. It has not been established that any of defendant's moving equipment was operating in the particular median area of Interstate 271 on August 27, 2004. Evidence has shown DOT crews performed pothole patching, litter patrol, and maintained road cruisers on Interstate 271 in Cuyahoga County on August 27, 2004.

{¶ 5} Defendant has the duty to keep the roads in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 6} Further, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey 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.

{¶ 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. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. 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 failed

to sustain such burden.” Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶ 8} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff’s injury was proximately caused by defendant’s negligence. Plaintiff failed to show the damage-causing object was connected to any conduct under the control of defendant or any negligence on the part of defendant. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD.

{¶ 9} Furthermore, DOT has no liability if it can be shown the damage causing object emanated from mowing under the control of Clear Valley LTD. Defendant submitted a copy of its contract with Clear Valley LTD, which states Clear Valley LTD agrees to indemnify and save harmless DOT for any damages to property sustained by a person due to negligence on the part of Clear Valley LTD. Defendant argued that even if Clear Valley LTD was responsible for creating a hazardous condition inside a work zone, DOT cannot be held liable for any negligent acts or omissions of its independent contractor. Defendant suggested its duty to maintain the roadway in a safe drivable condition was delegated to Clear Valley LTD by contractual agreement.

{¶ 10} Defendant cited the case of *Gore v. Ohio Dept. of Trans.*, Franklin App. NO. 02AP-996, 2003-Ohio-1648, for proposition that DOT as a principle cannot be held liable for any negligence of an independent contractor such as Clear Valley LTD. *Gore*, *id.* involved a situation where a motorist was injured as a result of lawn mowing activities along a state highway conducted by an independent contractor of the Department of Transportation. The court in *Gore* held any duty to exercise reasonable care for the safety of motorists while performing roadside lawn mowing is delegable. Essentially DOT is not the proper party to sue for injuries resulting from lawn mowing operations along state roadways undertaken by independent contractors of DOT. See *Cwalinski v. Transportation Dept. of Ohio* (2003), 2003-06778-AD. Defendant may by contract delegate its duty of care in situations where an independent contractor handles mowing activities. Under the rationale of *Gore*, *supra*, DOT cannot be held liable for any negligence of Clear Valley LTD in connection with mowing on the Interstate 271 median. DOT can not be the proper party defendant in this action if the damage was attributable to acts of Clear Valley LTD.

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OHIO DEPARTMENT OF :
TRANSPORTATION :

ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant :

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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Plaintiff, Pro se

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For Defendant

RDK/laa
12/13
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