[Cite as *Nelson v. Ohio Dept. of Transp.*, 2006-Ohio-7127.]

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

RONALD W. NELSON

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-05942-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} From July 24, to July 26, 2006, employees of defendant, Department of Transportation ("DOT"), conducted roadway maintenance operations from mileposts 20.00 to 29.42 on State Route 81 in Allen County. The particular work DOT conducted was "preventive maintenance" classified as a tar and stone road surface treatment. Under the DOT "Performance Standard" the operational description and purpose for this type of road work involved the application of "a chip, sand, or fog coat to sections of bituminous surfaces to seal cracks or rejuvenate dry weathered surfaces to prevent further surface deterioration." Materials used in the work consisted of gallons of liquid asphalt and tons of aggregate. Eleven maintenance workers were recommended to perform the road work. The standard work method outlined for the job directed workers to:

1) Place signs and other safety devices
2) Clean surface of all foreign material
3) Apply uniform application of liquid asphalt
4) Place uniform application of cover aggregate
5) Roll sealed area
6) Clean up work area
7) Remove signs and other safety devices.

{¶2} Defendant asserted all these steps were followed during the course of the July 24, to July 26, 2006, roadway maintenance project on State Route 81. According to defendant, signs reading "Fresh Tar," "Loose Stone," "No Passing" and "No Edge Lines" were positioned every two miles along the roadway in the maintenance operation area. The work was described as a "full seal job with #9 stone." DOT related loose stone was swept from the roadway on July 25, 2006.

{¶3} Plaintiff, Ronald W. Nelson, stated he drove his 1995 Chrysler Concorde on State Route 81 through the maintenance area on July 26, 2006, and suffered damage to his vehicle from loose stone aggregate left on the roadway. Plaintiff pointed out he observed the posted signs notifying him of the maintenance operation and slowed his vehicle as he traveled through the area. Plaintiff claimed a lot of loose stones were laying on the roadway and these stones were propelled into the body of his car by "on-coming vehicles" driving over the loose aggregate. Plaintiff also noted his own act of driving over the stones caused damages to his automobile to "a small degree," but the bulk of his property damage was caused, "mostly by on-coming traffic spraying loose stone down the

side of my car." Plaintiff contended DOT's July 24, to July 26, 2006, maintenance activities created hazardous roadway conditions for motor vehicle traffic. Plaintiff implied his car was damaged as a proximate cause of negligence on the part of DOT in failing to sweep away all loose stone aggregate from the roadway after completing the road sealing surface treatment on State Route 81. Consequently, plaintiff filed this complaint seeking to recover $250.00, his insurance coverage deductible for automobile repair on his 1995 Chrysler Concorde resulting from the described July 26, 2006, incident. The filing fee was paid.

{¶4} Defendant denied any liability in this action, asserting "every precaution was taken to make sure the drivers were aware of the activity taking place and the condition of the road." Defendant noted signs were posted to inform motorists of the maintenance operation and DOT took "extra measures" to follow procedures for applying surface treatment to the roadway. Defendant denied any DOT personnel acted negligently in applying tar and stone on State Route 81. Defendant did not specifically address the issue regarding loose stone left on the roadway after sweeping was conducted.

{¶5} Defendant has the duty to maintain its highway 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 the safety 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} 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. 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. 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 does not prove plaintiff's damage was proximately caused by any negligent act or omission on the part of DOT. *Vanderson v. Ohio Dept. of Transportation* (2006), 2005-09961-AD.

{¶7} In order to prove a breach of 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. 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. The trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. 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, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. Plaintiff, in the instant claim, has failed to prove the damage-causing debris emanated from DOT's activity on July 24, July 25, and July 26, 2006. Plaintiff has failed to show DOT caused or had notice of the debris on the roadway that damaged his car. See *Toms v. Ohio Dept. of Transportation* (2006), 2005-11710-AD.

{¶8} 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, 81, 2003-Ohio-2573, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. 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, approved and followed.

{¶9} Plaintiff has failed to prove, 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 debris was connected to any conduct under the control of defendant or any negligence on the part of defendant. *Taylor v. Transportation* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

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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. 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:

Ronald W. Nelson
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Plaintiff, Pro se

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For Defendant

RDK/laa
11/28
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