[Cite as *Lawrence v. Ohio Dept. of Transp.*, 2007-Ohio-1989.]

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

TAYLOR LAWRENCE

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-06591-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Taylor Lawrence, stated he was driving his 2002 BMW automobile on Interstate 71 North, "going toward Columbus/Cincinnati (Hyde Park) Exit (Kenwood) Area," when the vehicle struck a pothole causing substantial damage to the vehicle. Plaintiff subsequently determined the pothole was located, "in the Eastbound lane of Rt 562 as it divides to Northbound I71 and Ridge Roads."

{¶ 2} 2) Plaintiff submitted two repair estimates for his automobile dated October 5, and October 9, 2006. Plaintiff has alleged the property damage he sustained to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition on the roadway. Consequently, plaintiff filed this complaint seeking to recover $2,500.00 for automotive repair expenses. Plaintiff was not required to pay the filing fee.

{¶ 3} 3) Defendant denied any liability in this matter asserting plaintiff failed to produce evidence establishing his property damage was related to any negligent act or omission on the part of DOT. Defendant explained plaintiff alleged his automobile struck a pothole on Interstate 71 at the Kenwood Road Exit on July 3, 2006. Defendant noted the indicated pothole location would be at approximately milepost 11.81 on Interstate 71 in Hamilton County. Defendant related the phone logs at DOT's district office, "show that one

anonymous call was received to report a pothole the day of plaintiff's incident but when it was checked out, no pothole was found." Defendant observed DOT employees conduct roadway inspections, "at least two times a month." Apparently no potholes were discovered during previous roadway inspections.

{¶ 4} 4) Despite filing a response, plaintiff has not submitted any evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim.

{¶ 5} 5) On January 18, 2007, defendant filed a reply to plaintiff's response and a supplemental investigation report. Defendant's investigation revealed the incident occurred in a construction zone under the control of Barrett Paving Materials, Inc ("Barrett"). Barrett performed milling operations in accordance with standard practices. The operation left a drop off between lanes of 1.5 inches. Defendant contends this minor difference in pavement height was not a defect. Defendant also contends as a private contractor Barrett was the proper party defendant to sue in this matter.

CONCLUSIONS OF LAW

{¶ 6} 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*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 7} 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, 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.

{¶ 8} 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, 507 N.E. 2d 1179.

{¶ 9} 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, 2001 Ohio App. LEXIS 2854. Insufficient evidence has been produced to show a hazardous condition was created by the roadway resurfacing activity conducted from June 30, to July 3, 2006.

{¶ 10} 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, 465. 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*, 2005-09961-AD, 2006-Ohio-7163.

{¶ 11} Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285, 423 N.E. 2d 467, 469. This court,

as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 471 N.E. 2d 477. Plaintiff has not shown, 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 that the proximate cause of his property damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction area or that there was any negligence on the part of defendant or its agents. *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.

{¶ 12} Plaintiff has also presented a claim in which he appears to allege the repaving project resulted in a nuisance condition on the roadway. To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use of enjoyment of such property, or cause physical discomfort to such person. *Dorrow v. Kendrick* (1987), 30 Ohio Misc. 2d 40, 508 N.E. 2d 684.

{¶ 13} "[A] civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition, which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176, 180, 297 N.E. 2d 105, 109. Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855. Plaintiff has failed to prove, by a preponderance of the evidence, that the roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his car. *Hall v. Ohio Dept. of Transportation* (2000), 99-12863-AD. The evidence presented does not prove any nuisance condition existed.

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

TAYLOR LAWRENCE

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-06591-AD

Deputy Clerk Daniel R. Borchert

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:

Scott Gilbert, Esq.
215 West 9th Street

James Beasley, Director
Department of Transportation

Cincinnati, Ohio 45202

1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
1/11
Filed 4/3/07
Sent to S.C. reporter 4/25/07