[Cite as *Meyer v. Ohio Dept. of Transp.*, 2007-Ohio-2401.]

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

THEODOR MEYER

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-06566-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Theodor Meyer, stated he was driving south on US Route 250 in Sandusky, Ohio on September 29, 2006, at about 5:30 p.m., when his automobile struck an, "iron pipe about 6" in diameter sticking about 4" above the ground down surface," of the roadway. This exposed "iron pipe" caused wheel damage to plaintiff's 2005 Volkswagen Jetta. Apparently, the roadway area where plaintiff's incident occurred was located within a construction zone where the exiting road pavement had been milled in preparation for repaving. Plaintiff filed this complaint against defendant, Department of Transportation ("DOT"), alleging the property damage to his vehicle was the result of maintaining a hazardous roadway condition through the State Route 250 construction zone. Plaintiff seeks damages in the amount of $412.16, for replacement parts and related repair expenses. The filing fee was paid.

{¶2} Defendant denied any liability in this matter. Defendant explained plaintiff's property damage incident occurred on a roadway construction area under the control of DOT"s contractor, Erie Blacktop, Inc. ("Erie"). Defendant asserted Erie, by contractual agreement, assumed the responsibility for maintaining the roadway within the construction zone. Therefore, DOT implied all duties, such as the duty to inspect, the duty to warn, and any maintenance duties were delegated when an independent contractor takes control over a particular section of roadway. Erie was charged with conducting the roadway paving

operation in accordance with DOT specifications. Defendant retained a Project Engineer at the construction site who recorded a Daily Diary Report, which did not note any problems with pipes protruding from the road surface on or about September 29, 2006.

{¶3} Defendant submitted statements from Erie employee, James L. Kromer, regarding the repavement on State Route 250. Kromer recorded, "we are unable to verify whether we were milling in that area or not," since plaintiff did not provide a more precise location of his incident site, although plaintiff did point out the incident occurred on a roadway surface that had been "ground down." Kromer suggested plaintiff was driving his car in an unsafe manner for roadway conditions presented by the milled surface area.

{¶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. 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. 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. 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. No. 00AP-119, 2001 Ohio App. LEXIS 2854. No evidence other than plaintiff's assertion has been produced to show the height variations between the milled roadway surface and the manhole covers presented particularly hazardous conditions.

{¶5} 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. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. Defendant professed 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 correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. 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 in the instant matter. 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. However, evidence has not shown defendant's agents created a hazardous condition by milling the roadway surface in accordance with DOT specification. Furthermore, evidence has been presented to establish plaintiff was notified about the pavement conditions and was responsible for taking some driving precautions based on road conditions.

{¶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 so as to render the highway free from an unreasonable risk of harm by 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; *Rhodus*, supra at 729; *Feichtner*, supra, a 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove that his property damage was connected to any conduct under the control of defendant, 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. 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:

Theodor Meyer
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Huron, Ohio 44839

James Beasley, Director
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RDK/laa
3/29
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