[Cite as *Streng v. Dept. of Transp.*, 2007-Ohio-3099.]

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

MICHAEL H. STRENG

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-01771-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On December 20, 2006, at approximately 7:05 p.m., plaintiff, Michael H. Streng, was traveling north on Interstate 270, "near Morse Rd.," through a construction area, when his automobile struck an object laying on the traveled portion of the roadway. Plaintiff related he was driving in the far left lane of the roadway next to a concrete highway divider at the time his car struck the object, which caused tire and rim damage to the vehicle. Plaintiff stated he traveled the same area of Interstate 270 on December 21, 2006, and, "noticed a large piece of metal very close to where," his car struck the object on December 20, 2006. Plaintiff observed the piece of metal was shaped like a large bracket about 18" to 24" long, 4" to 6" wide and 1/14" thick.

{¶2} 2) Consequently, plaintiff filed this claim seeking to recover $458.58, for replacement parts, automotive repair, and work loss resulting from the December 20, 2006, property damage occurrence. Plaintiff implied he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. The filing fee was paid.

{¶3} 3) Defendant explained plaintiff's damage incident occurred near milepost 31.50 on I-270 in Franklin County in a roadway construction zone under the control of DOT contractor National Engineering and Contracting Company ("National"). Defendant asserted National, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued National is the proper party defendant in this action. Defendant implied all duties such as the duty to inspect, the duty to warn, and all maintenance duties were delegated when an independent contractor takes control over a particular section of roadway.

{¶4} 4) Furthermore, defendant denied that neither DOT nor National had any notice of metal debris on the roadway prior to plaintiff's damage occurrence. Defendant professed DOT first received notice of a debris problem on December 21, 2006, when plaintiff filed a damage incident report. Defendant stated the origin of the debris is unknown, but denied the debris emanated from roadway construction activity. Defendant speculated, the debris could have been dropped from another vehicle not associated with DOT or National. Defendant noted National had no personnel working on Interstate 270 at the time of plaintiff's property damage event.

{¶5} 5) Despite filing a response, plaintiff did not present any evidence to

indicate the length of time the debris condition was present on the roadway prior to his property damage occurrence.

CONCLUSIONS OF LAW

{¶6} 1) 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. See *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶7} 2) 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.

{¶8} 3) In order to recover in any suit involving injury proximately caused by roadway conditions plaintiff must prove either: 1) defendant had actual or constructive notice of the condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. 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.

{¶9} 4) Plaintiff has not produced any evidence to indicate the length of time the metal debris was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the metal debris. Additionally, 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 debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the metal debris. Plaintiff

has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶10} 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.

{¶11} 6) Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise it had no duty to control the conduct of a third person except in cases where a special relationship exists between defendant and either plaintiff or the person whose conduct needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171. However, defendant may still bear liability if it can be established if some act or omission on the part of DOT was the proximate cause of plaintiff's injury. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51.

{¶12} 7) "If any 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, at 160 quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309.

{¶13} 8) Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of an unknown third party which did not involve DOT or its agent. 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 object was connected to any conduct under the control of defendant or 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:

Michael H. Streng
10325 SR 736
Plain City, Ohio 43064

James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
5/10
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