

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

JULIE ANTALOCY

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-05440-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Julie Antalocy, asserted she suffered property damage to her automobile windshield while driving through a construction area on State Route 11 on May 4, 2007. Plaintiff related, when the property damage incident occurred she was traveling north on State Route 11, “just entered from Canfield,” on a roadway area that had been milled in preparation for repaving. Plaintiff stated her automobile damage occurred when, “a string of cars passed me on the ground (and) prepped (roadway) surface and a stone flew up and chipped my windshield.” Presumably, passing traffic propelled pavement debris, left on the roadway by the milling process, into the path of plaintiff’s car, cracking the windshield.

{¶2} Plaintiff implied her property damage claimed was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway within a construction zone, specifically State Route 11 in Mahoning County. Plaintiff filed this complaint seeking to recover \$434.45 in damages for a replacement windshield. Plaintiff also requested reimbursed of the \$25.00 filing fee as compensable costs. The filing fee was paid.

{¶3} Defendant acknowledged the area where plaintiff’s alleged damage event occurred was located within a construction zone between mileposts 8.46 and 16.19 on State Route 11 in Mahoning County. From plaintiff’s description defendant specifically

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located the incident at milepost 9.41, in an area where roadway milling began on April 9, 2007. Defendant explained this roadway construction zone was under the control of DOT contractor, The Shelly Company (“Shelly”). Repaving work, including preparation work such as milling, was to be performed by Shelly in accordance with DOT mandated requirements and specifications.

{¶4} Defendant submitted a statement regarding roadway conditions within the construction project limits from Shelly Safety Director, Norm Baur. Baur reported Shelly began milling State Route 11 on April 9, 2007, and repaving started some time after. Concerning the actual milling operations, Baur noted, “[a]t the end of each milling shift we had the road swept and cleaned,” pursuant to DOT specifications. Furthermore, Baur related all records were checked and nothing “out of the ordinary” was entered for May 4, 2007, the specified date of plaintiff’s incident.

{¶5} Pursuing an argument promoted in numerous claims, defendant has contended DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant asserted Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Shelly is the proper party defendant in this action. Defendant implied all duties such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. 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*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant’s contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection with the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

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{¶6} Alternatively, defendant denied neither DOT nor Shelly had notice of any milling debris left on State Route 11 after milling and clean up attempts had been conducted. In fact, defendant asserted DOT first learned of the incident after plaintiff filed her complaint. Defendant professed liability cannot be established when requisite notice of the damage-causing debris 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, 31 OBR 64, 507 N.E. 2d 1179. 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, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶7} 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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. *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} Plaintiff has the burden of proving, by a preponderance of the evidence, that she 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 sustain 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, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶9} 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

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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, 543 N.E. 2d 769. 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, 14 OBR 446, 471 N.E. 2d 477.

{¶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 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. 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 seems to point out the roadway area was relatively clean of debris and was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162.

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Julie Antalocy
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RDK/laa

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11/28

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