

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

JUDD SHIFFLER

Case No. 2007-07183-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPT. OF TRANSPORTATION

Defendant

FINDINGS OF FACT

{¶1} 1) Plaintiff, Judd Shiffler, related he was traveling east on State Route 2 in Lake County on a bridge spanning Worden Road when his 2006 Mini Cooper hit a “bump” which jolted the car so badly the windshield cracked. Plaintiff explained the roadway pavement approaching the bridge had been recently milled in preparation for repaving making the deviation between the milled surface and the remaining bridge surface “high and sharp.” Plaintiff surmised this extreme height deviation between the roadway surfaces caused the damage to his car. Plaintiff estimated he was traveling between 45 and 50 mph at the time he traveled over the bridge, at approximately 6:00 p.m. on June 29, 2007.

{¶2} 2) Plaintiff contended his property damage was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining a hazardous condition in a roadway construction area. Plaintiff filed this complaint seeking to recover \$218.12, the cost of a replacement windshield. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that amount in addition to his damage claim.

{¶3} 3) Defendant acknowledged plaintiff’s described damage incident occurred within the limits of a construction project under the control of DOT contractor, The Shelly Company (“Shelly”). Defendant explained the construction project involved

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bridge deck repair as well as roadway grading and draining. Defendant asserted Shelly was responsible under contract for maintaining State Route 2 within the construction work zone, although all work was to be performed subject to DOT specifications, inspections, satisfaction, and approval. 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.

{¶4} 4) Alternatively, defendant denied neither DOT nor Shelly had any knowledge of an uneven road surface on State Route 2 prior to plaintiff's property damage event. Defendant's records show no calls or complaints were received regarding the road surface on State Route 2 prior to plaintiff's damage occurrence. Defendant contended plaintiff failed to produce evidence to establish the roadway was negligently maintained.

{¶5} 5) Defendant submitted a written statement from Shelly Assistant Safety Director, Russell Sherman, who reported about the roadway conditions on State Route 2 at the time of plaintiff's incident. Sherman noted, "[t]he base course of asphalt had been laid and the milled surface terminated with a ramp to the level of the bridge deck."

{¶6} 6) Defendant also submitted a document from DOT Project Inspector, Matthew Piascik, regarding his assessment of the particular portion of State Route 2 at the bridge deck where plaintiff's incident occurred. Piascik stated, "[t]he pavement differential (between the milled surface and bridge deck) would have been approximately 1" (and therefore) [t]he transition was not as drastic as the plaintiff claims." Piascik observed the roadway and offered the opinion that the transition area "was in acceptable riding condition." According to Piascik, standard procedure dictated "Bump" signs were to be positioned at each bridge approach until resurfacing was completed.

CONCLUSIONS OF LAW

{¶7} The duty of DOT to maintain the roadway in a safe drivable condition is

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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 particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶8} Alternatively, defendant denied neither DOT nor Shelly had any notice of any hazardous pavement condition caused by construction activity. Defendant professed liability cannot be established when requisite notice of a damage-causing roadway condition cannot be shown. 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 conditions. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Department of Transportation* (1996), 94-13861. In the instant claim, evidence does not prove a hazardous roadway condition was created by any construction work or that the roadway was negligently maintained.

{¶9} 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. 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.

{¶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

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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 present action, 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 or its agents. *Vanderson v. Ohio Dept. of Transportation*, 2005-09961-AD, 2006-Ohio-7163.

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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:

Judd Shiffler
6362 Meadowbrook Drive
Mentor, Ohio 44060

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
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Sent to S.C. reporter 4/2/08