[Cite as *Victor v. Ohio Dept. of Transp.*, 2008-Ohio-2519.]

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

RANDOLPH VICTOR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-07329-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Randolph Victor, stated he was traveling south on Interstate 271 near the Interstate 480 exit at about 6:30 p.m. on July 26, 2007, "when a blue tractor cutting grass on the right side (of the road) lifted the mower and something flew out hitting the right side front door of my 2007 Toyota." After the incident described, plaintiff contacted a representative of defendant, Department of Transportation ("DOT"), and was informed that grass mowing operations along Interstate 271 were performed by a DOT contractor, Brypan.

{¶2} Despite the fact the mowing along Interstate 271 on July 26, 2007, was performed by a DOT contractor, plaintiff implied the damage to his car caused by the mowing activity was attributable to acts of defendant. Consequently, plaintiff filed this complaint seeking to recover $456.85, the estimated cost of repairing the damage to the front door of his vehicle. The filing fee was paid.

{¶3} Defendant asserted no DOT tractors were mowing along the particular area of Interstate 271 on July 26, 2007. Defendant explained DOT contractor, Brypan, was engaged to conduct mowing operations along Interstate 271 in Cuyahoga County from April 16, 2007 to October 31, 2007. Defendant further explained Brypan owns and uses red tractors for mowing while DOT owns and uses blue tractors.

{¶4} Although plaintiff stated the tractor that was mowing on July 26, 2007 was

blue in color which would indicate a DOT owned tractor, defendant denied DOT performed any mowing along Interstate 271 in Cuyahoga County between February 1, 2007 and July 30, 2007. DOT maintenance records support this assertion.

{¶5} 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. Furthermore, the duty to cut grass on highways is delegable to an independent contractor such as Brypan and consequently, no liability shall attach to DOT for damage caused by the negligent acts of the independent contractor engaged in mowing operations. See *Gore v. Ohio Dept. of Transp*., Franklin App. No. 02AP-996, 2003-Ohio-1648; *Cwalinski v. Ohio Dept. of Transp.*, 2003-06778-AD, 2003-Ohio-5561.

{¶6} When maintenance is performed by DOT personnel, defendant must exercise due diligence in conducting such maintenance and repair of highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶7} 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, 788 N.E. 2d 1088, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707. 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, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶8} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his damage was proximately caused by defendant's negligence. Plaintiff failed to show the damage to his car was connected to any conduct under the control of defendant, or any negligence on the part of defendant. *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.

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

RANDOLPH VICTOR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-07329-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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Randolph Victor
28010 Cannon
Solon, Ohio 44139

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
1/11
Filed 3/6/08
Sent to S.C. reporter 5/27/08