

[Cite as *Nicastro v. Ohio Dept. of Transp.*, 2008-Ohio-4190.]

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

DON NICASTRO

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-09232-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On June 14, 2007, at approximately 8:25 a.m., plaintiff, Don Nicastro, was traveling on US Route 27 at Colerain Avenue and Banning Road in Cincinnati through a construction zone when his 1995 Dodge Caravan struck a raised manhole cover puncturing the vehicle's transmission pan. The existing asphalt roadway pavement through the construction zone had been milled in preparation for repaving with new asphalt overlay and numerous existing manhole covers were left higher than the roadway surface due to the milling process. Plaintiff filed this complaint against defendant, Department of Transportation ("DOT"), alleging the property damage to his vehicle was proximately caused by maintaining a hazardous roadway condition through the construction area after the roadway surface on US Route 27 had been milled. Plaintiff seeks damages of \$915.26 for automotive repair expenses, plus reimbursement of the \$25.00 filing fee cost. The filing fee was submitted with the complaint.

{¶ 2} Defendant denied any liability in this matter. Defendant explained plaintiff's property damage incident occurred within the limits of a construction project under the control of DOT's contractor R.B. Jergens Contractors, Inc. ("RBJ"). Defendant asserted RBJ, 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. RBJ was charged with conducting the roadway paving operation in accordance with DOT specifications and requirements.

{¶ 3} Defendant submitted a statement from RBJ Project Manager, Vic Roberts,

regarding particular repaving work performed by RBJ on June 14, 2007 and addressing plaintiff's damage complaint. Roberts explained:

{¶ 4} "RBJ was under contract with ODOT to widen and improve Colerain Avenue in Cincinnati. The project required milling old asphalt pavement in preparation for a new asphalt overlay. Asphalt milling always exposes manholes. So RBJ promptly installed a protective asphalt 'wedge' around all exposed manholes to reasonably accommodate traffic. This is standard practice for all ODOT contractors."

{¶ 5} Roberts acknowledged plaintiff contacted RBJ's office on June 14, 2007 to report vehicle damage he had apparently sustained while driving on the milled roadway surface. Roberts related plaintiff was the only motorist traveling on the recently milled roadway to report any damage on or about June 14, 2007. Roberts noted safety wedges around exposed manholes on milled roadway surfaces were utilized "to safely accommodate traffic." Since Colerain Avenue bore a high traffic volume, Roberts recorded "ODOT determined it was best to mill and repave Colerain Avenue under traffic," and not close the roadway to complete the repaving process. Consequently, Roberts observed asphalt wedges were installed around the exposed manholes in accordance with ODOT requirements and the wedges in Robert's opinion provided "a reasonable level' of impact protection."

{¶ 6} Photographs were submitted depicting a protective asphalt wedge around a manhole cover on a milled roadway surface. The trier of fact notes the conditions depicted in the photograph do not appear to present any special hazard or danger to a reasonably cautious motorist traveling on the roadway through the construction zone.

{¶ 7} Defendant contended plaintiff failed to offer sufficient evidence to prove that either DOT or RBJ negligently maintained the roadway. Defendant asserted plaintiff failed to prove his damage was caused by any conduct attributable to DOT or DOT's agents.

{¶ 8} Despite filing a response, plaintiff did not produced any evidence to establish his vehicle was damaged as a result of striking an exposed manhole cover

that was not properly ramped in accordance with DOT requirements. Plaintiff did not provide evidence, other than his own assertion, to prove his damage was caused by a hazardous roadway condition maintained by DOT's contractor.

{¶ 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. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 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 the 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-1119. No evidence other than plaintiff's assertion has been produced to show the height variation between the milled roadway surface and the manhole covers presented particularly hazardous conditions.

{¶ 10} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a 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, 15 OBR 179, 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. 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. 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, 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 caused such condition, as it appears to be the situation in the instant matter. 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. However, evidence has not shown defendant’s agents created a hazardous condition by milling the roadway surface in accordance with DOT specifications. 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.

{¶ 11} 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, 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 both under 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; *Rhodus*, supra at 729, 588 N.E. 2d 864. 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

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Don Nicastro
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RDK/laa
5/7
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