[Cite as *Bernot v. Ohio Dept. of Transp.*, 2008-Ohio-4623.]

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

JOHN BERNOT

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-09216-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, John Bernot, asserted he suffered property damage to the body of his automobile while driving through a roadway construction area at approximately 7:00 a.m. on June 29, 2007. Plaintiff related the property damage incident occurred when he was traveling on State Route 2 in Wickliffe, Ohio, on a roadway surface that had recently been milled in preparation for repaving. Plaintiff recalled he was traveling in the center roadway lane of State Route 2 and he noticed "several loose pieces of concrete on the road where the exposed concrete pavement appeared to be broken." According to plaintiff, a passing motorist traveling in the roadway lane next to him drove over "the loose pieces of concrete" propelling the pavement debris onto the body of his car causing damage.

{¶ 2} Plaintiff contended the property damage to his automobile was proximately caused by failure to sweep the roadway clear of aggregate after the pavement had been milled. Plaintiff filed this complaint against defendant, Department of Transportation ("DOT"), claiming DOT should bear liability for his automotive repair costs resulting from the June 29, 2007 incident. Plaintiff seeks recovery in the amount of $1,595.38. Plaintiff acknowledged he maintains insurance coverage for the damage claimed with a $250.00 deductible provision. Plaintiff also acknowledged he received $1,320.38 from his insurance carrier. Consequently, plaintiff's damage claim is limited

to his insurance deductible.[1] The filing fee was paid. Plaintiff requested reimbursement of that amount along with his damage claim.

{¶ 3} Defendant explained the area where plaintiff's damage event occurred was located within a construction zone under the control of DOT contractor, The Shelly Company ("Shelly"). The particular construction project involved roadway grading, draining, and repair of bridge decks on State Route 2 in Lake County. All work was to be performed in accordance with DOT specifications and requirements. Shelly admitted the section of State Route 2 where plaintiff's incident occurred had been milled prior to June 29, 2007. However, Shelly related the job site was maintained "according to the Ohio Department of Transportation specifications for milling and cleaning the highway." Shelly essentially contended aggregate debris from the milled roadway was adequately swept from the surface in accordance with DOT requirements.

{¶ 4} Plaintiff filed a response expressing his disagreement with the assertion that the roadway milling operation was performed in accordance with DOT specifications. Plaintiff argued DOT "does not have a specification for milling and cleaning the highway." Plaintiff recalled that when he traveled State Route 2 on June 29, 2007 he noticed the "asphalt surface was gone and (the remaining) surface was now concrete." Plaintiff assumed Shelly had just completed milling operations, "because the air was full of dust and tiny bits of asphalt were everywhere." Plaintiff noted as he continued to travel on the milled roadway surface he could see "broken pieces of pavement on the road." Plaintiff stated the "broken pieces of pavement" constituted "unsound concrete" that was left on the roadway after the top asphalt surface had been milled. Plaintiff pointed out these pieces of concrete were not swept

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[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. The division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of (B)(2) of that section apply under those circumstances."

from the roadway after being dislodged by milling equipment and this remaining debris subsequently damaged his car when the debris was propelled from the roadway surface by a passing motorist.

{¶ 5} Plaintiff submitted a copy of DOT's specification for conducting a roadway planing operation such as was performed by Shelly on State Route 2 on June 29, 2007. Plaintiff specifically referenced specifications 254.03 and 254.04 which mandate:

{¶ 6} "254.03 Planing. Make one or more planing passes, as necessary, over the designated area to remove irregularities such as bumps, corrugations, and wheel ruts, and when required, establish a new pavement surface elevation or cross-slope.

{¶ 7} "*Remove cuttings from the surface following each pass. Before opening the completed area to traffic, thoroughly clean the surface of all loose material that would create a hazard or nuisance or would redeposit into the surface texture. Dispose of cuttings according to 105.16.*

{¶ 8} "*Implement effective measures to control dust, pavement contamination, and the scattering of loose particles during planing and cleaning operations.*

{¶ 9} "*If damage occurs to the adjacent pavement by planing operations, repair the damage area to the Engineer's satisfaction. Ensure that the repaired area matches the adjacent pavement in terms of smoothness and mix type.*

{¶ 10} "254.04 Surface Patching. *Patch areas of the planed surface that the Engineer designates to have spalling or dislodged unsound pavement. Before patching, clean areas of loose material, coat with 407.02 asphalt material, and fill with Item 448, Type 1 material. Level and compact new material flush to the adjacent pavement.*"

{¶ 11} Plaintiff contended Shelly's milling operation damaged the underlying concrete pavement and Shelly failed to conduct repairs to this damage in accordance with DOT specifications 254.03 and 254.04 before opening the roadway to traffic. Plaintiff expressed the belief Shelly did not follow DOT specifications in regard to roadway planing and repairs to damaged pavement caused by this planing. Plaintiff again asserted Shelly left "dislodged pieces of concrete" on the planed roadway and this

created debris condition damaged his car.

{¶ 12} 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 particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1191.

{¶ 13} Alternatively, defendant denied neither DOT nor Shelly had any notice of any debris on State Route 2 on June 29, 2007. 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 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 is inconclusive regarding the origin of the debris which damaged plaintiff's vehicle. Defendant asserted the roadway was swept in accordance with

specifications and no other damage incidents were reported. Conversely, plaintiff maintained the material that damaged his car emanated from construction activity.

{¶ 14} 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.

{¶ 15} 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 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.

{¶ 16} 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, 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. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. The trier of fact finds the roadway area was relatively clean of debris and was maintained properly under DOT specifications. 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

John Bernot
6573 Forbes Court
Mentor, Ohio 44060

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

RDK/laa

5/1
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