[Cite as *Foor v. Ohio Dept. of Transp., Dist. 7*, 2008-Ohio-5171.]

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

SHAUN FOOR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 7

Defendant

Case No. 2008-02169-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} Plaintiff, Shaun Foor, filed this complaint against defendant, Department of Transportation ("DOT"), alleging his automobile was damaged on January 16, 2008 while traveling through a construction zone on Interstate 75 South in Montgomery County. Plaintiff stated he was "following a dumptruck from the state construction when a rock flew off and hit the front bumper of my 2006 Malibu." Plaintiff located the described property damage incident at "right before the I-75, 4 split." Plaintiff asserted the damage to his vehicle was proximately caused by negligence on the part of DOT in maintaining a roadway construction zone. Therefore, plaintiff filed this action seeking to recover $852.47, the cost of automotive repair incurred as a result of his vehicle being struck by debris emanating from a truck involved in roadway construction. The filing fee was paid.

{¶ 2} Defendant acknowledged DOT dump trucks were hauling berm material on Interstate 75 in Montgomery County in the vicinity of plaintiff's described incident on January 16, 2008. Defendant stated "berm material was hauled from an aggregate plant on the north side of Dayton (Hoke Road) to southbound I-75 to a sign installation project at the south edge of Dayton (Stewart Street)." According to defendant's records a total of 2.97 tons of material was transported by DOT on January 16, 2008 on

Interstate 75. Defendant explained a DOT dump truck has a load capacity of 7 tons. Although admitting DOT trucks were hauling aggregate material at the particular location and at the precise time of plaintiff's property damage event, defendant has denied liability in this matter. Defendant denied liability based on the assertion that "ODOT did not have notice that there was a problem with rocks falling from the dump trucks on I-75." Defendant observed no complaints were received about rocks falling from DOT dump trucks. Defendant pointed out plaintiff did not file an accident report regarding the described incident with law enforcement and did not report the incident to DOT. Defendant expressed the opinion that it "does not believe that it breached its duty of care to the traveling public and, therefore, did not act negligently toward plaintiff."

CONCLUSIONS OF LAW

{¶ 3} Defendant has the duty to maintain its highways 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. Additionally, defendant has 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. When engaged in such activities, defendant's personnel must operate equipment in a safe manner. *State Farm Mutual Automobile Ins. Company v. Department of Transportation* (1998), 97-11011-AD.

{¶ 4} 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, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 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 conditions is not necessary when defendant's own agents actively cause 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.

{¶ 5} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. In the instant action, the trier of fact finds the statements of plaintiff concerning the origin of the damage-causing debris to be persuasive. The trier of fact finds plaintiff's car was damaged by debris that fell from a DOT truck. Sufficient evidence has been presented to establish defendant breached its duty of care to protect motorists from hazards arising out of DOT maintenance activities. Plaintiff has proven his property damage was caused by the acts of DOT personnel. See *Vitek v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-09258-AD, jud,

2005-Ohio-1071. Consequently, defendant is liable to plaintiff for the damages claimed, $852.47, plus the $25.00 filing fee which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $877.47, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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