[Cite as *Husak v. Ohio Dept. of Transp.*, 2008-Ohio-5179.]

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

KAREN HUSAK

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03963-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On March 22, 2008, at approximately 1:05 p.m., plaintiff, Karen Husak, was traveling west on Interstate 480, through a construction zone, when her automobile struck an orange traffic control barrel causing substantial damage to the vehicle. Plaintiff recalled that the incident occurred as she was driving west on Interstate 480 at the Interstate 71 split. Plaintiff related that as she was entering Interstate 71 the car in front of her swerved to avoid the orange barrel that was right in the middle of the roadway lane. Plaintiff explained that she could not see the barrel until the car in front of her swerved to avoid it and she could not move to either side of the roadway due to traffic on her left and a median wall on her right. While braking her vehicle in an unsuccessful attempt to avoid striking the barrel, plaintiff's car bumper hit the barrel causing damage to the bumper cover, license plate cover, right fog lamp hole cover, and right fog lamp assembly. Plaintiff pointed out that she was subsequently informed that traffic control barrels had been placed along the roadway shoulder along the median barrier wall and the barrel her vehicle struck had possibly been wind blown into the traveled portion of the roadway.

{¶ 2} Plaintiff implied that her property damage was proximately caused by negligence on the part of defendant, Department of Transportation (DOT) or DOT agents in failing to maintain proper positioning of the traffic control barrel.

Consequently, plaintiff filed this complaint seeking to recover $668.43, her total cost of vehicle repair resulting from the March 22, 2008 incident. The filing fee was paid.

{¶ 3} Defendant acknowledged that the roadway area where plaintiff's damage event occurred was within a construction project zone where DOT contractor, Karvo Paving Company (Karvo) was engaged in roadway construction activity. DOT Project Engineer, Robert J. Wallace, wrote an e-mail (copy submitted) noting that: "[b]arrels were located in the shoulder at the I-480 Westbound to I-71 Southbound ramp in preparation for the future partial closure of the ramp" at the time of plaintiff's damage occurrence, March 22, 2008. Defendant denied liability in this matter based on the contention that neither DOT nor Karvo were aware of a dislodged traffic control barrel prior to plaintiff's damage incident. Defendant asserted that neither DOT nor Karvo received any prior complaints of a displaced barrel which defendant located near milepost 10.92 on Interstate 480 in Cuyahoga County. Defendant contended that plaintiff failed to provide any evidence to establish any conduct on the part of DOT or Karvo caused her property damage. Defendant suggested that the barrel was deposited on the highway by an unidentified third party at some undetermined time prior to plaintiff's property damage event.

{¶ 4} 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.

{¶ 5} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the debris alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247, 517 N.E. 2d 1388. Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v.*

Dept. of Transp. (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. The trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. 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. There is no evidence DOT or DOT's agents displaced the damage-causing traffic control barrel.

{¶ 6} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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. 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.

{¶ 7} Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise it had no duty to control the conduct of a third person except in cases where a special relationship exists between defendant and either plaintiff or the person whose conduct needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171, 543 N.E. 2d 769. However, defendant may still bear liability if it can be established if some act or omission on the part of DOT was the proximate cause of plaintiff's injury. 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.

{¶ 8} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, at 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 9} Plaintiff has failed to establish her damage was proximately caused by any negligent act or omission on the part of DOT. In fact, it appears that the cause of plaintiff's injury was the act of an unknown third party which did not involve DOT or DOT agents. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiffs' injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing object at the time of the damage incident was connected to any conduct under the control of defendant or any negligence on the part of defendant proximately caused the damage. *Herman v. Ohio Dept. of Transp.* (2006), 2006-05730-AD.

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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.

_____
MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa

7/8
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