[Cite as *Eliliott v. Ohio Dept. of Transp.*, 2008-Ohio-5604.]

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

GULIZ A. ELLIOTT

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-02304-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

[Cite as *Eliliott v. Ohio Dept. of Transp.*, 2008-Ohio-5604.]

FINDINGS OF FACT

{¶ 1} 1) On January 23, 2008, at approximately 7:45 p.m., plaintiff, Guliz A. Elliott, was traveling north on Interstate 271, "[a]pproximately 1-2 miles before the Route 8 exit (Exit 18)" in Summit County, when her automobile struck two hay bales laying on the traveled portion of the roadway. Plaintiff pointed out she noticed multiple hay bales strewn about both the north and south lanes of Interstate 271. Plaintiff estimated there were probably six to eight hay bales laying on the roadway. The impact of striking the hay bales caused body damage to the vehicle plaintiff was driving, a 1997 Toyota Avalon XL.

{¶ 2} 2) Plaintiff implied the damage to the Toyota Avalon was proximately caused by negligence on the part of defendant Department of Transportation, in failing to maintain the roadway free of debris. Plaintiff filed this complaint seeking to recover $1,433.73, the total cost of automotive repair. In her complaint plaintiff acknowledged she carries insurance coverage automotive damage with a $500.00 deductible provision. Plaintiff also acknowledged she received $933.73 from her insurer to cover repair costs. Damages in this claim are limited to plaintiff's insurance deductible pursuant to the provisions of R.C. 2743.02(D)[1]. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of hay bales on the roadway prior to 7:45 p.m. on January 23, 2008. Defendant's records show no calls or complaints were received regarding hay bale debris on the particular roadway area which DOT located near county milepost 9.86 on Interstate 271 in Summit County. Defendant suggested, "the debris existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant contended plaintiff failed to produce evidence to prove DOT negligently maintained the roadway. Defendant denied the damage causing hay bales originated from any activity under the control of DOT. Defendant explained DOT personnel conduct frequent litter pickups on Interstate 271 in Summit County and

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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. This 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 division (B)(2) of that section apply under the circumstances."

conduct periodic inspections of that particular roadway. Defendant asserted if any debris had been discovered prior to plaintiff's damage event, DOT employees would have promptly removed the debris from the roadway. Defendant related plaintiff did not offer any evidence to establish the length of time the hay bales were laying on the roadway prior to 7:45 p.m. on January 23, 2008.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} "If any 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, 160, 6 OBR 209, 451 N.E. 2 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 10} Plaintiff has failed to establish her damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing hay bale 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. *Herman v. Ohio Dept. of Transp.* (2006), 2006-05730-AD.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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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:

Guliz A. Elliott
7250 Honeydale Drive
Northfield Center, Ohio 44067

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
7/2
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