[Cite as *Almasi v. Ohio Dept. of Transp., Dist. 4,* 2008-Ohio-5625.]

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

ALOYSIUS G. ALMASI

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 4

Defendant

Case No. 2008-04021-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

[Cite as *Almasi v. Ohio Dept. of Transp., Dist. 4*, 2008-Ohio-5625.]

{¶ 1} Plaintiff Aloysius G. Almasi, related he was traveling south on Interstate 271 "near the Richfield 303 exit," about 11:40 a.m. on March 14, 2008, when "mud and rocks came off the back" of a truck traveling five car lengths in front of his vehicle (a 2002 Chevrolet Venture mini-van) and struck the windshield of the van. Plaintiff further related the airborne mud and rock debris "burst into 4 or 5 pieces, came down and cracked my windshield just below the passenger wiper arm." Plaintiff contended the truck (License Plate #PBT 6872) that carried the damage-causing debris was owned by the Kokosing Construction Company, Inc. ("Kokosing") and operated by Kokosing employee, identified as Jeremy Overholtz. Plaintiff recalled that after his van was struck with the rock and mud debris he followed the Kokosing truck driven by Overholtz to a nearby exit and "showed him the damage." Plaintiff explained mud debris was still present on his van windshield despite the fact it was raining. According to plaintiff the mud debris on his vehicle windshield "matched the stuff that was on (the) back bumper" of the Kokosing truck driven by Overholtz. After presenting his vehicle damage to Overholtz, plaintiff maintained he was directed to a nearby Kokosing "yard" to report the incident. Plaintiff asserted that he was subsequently able to obtain the phone number of Kokosing Claim Director, Pam LeBlanc and he contacted her regarding the damage to his van in an attempt to obtain some sort of monetary settlement to cover the cost of a replacement windshield. Plaintiff observed his attempt to settle his damage claim with Kokosing was unsuccessful. Plaintiff has since filed this complaint against defendant, Department of Transportation ("DOT"), claiming DOT should bear liability for the cost of replacing his vehicle windshield. Plaintiff claimed damages in the amount of $221.36. The $25.00 filing fee was paid and plaintiff seeks recovery of that cost along with his damage claim.

{¶ 2} Defendant acknowledged that on the date of plaintiff's purported incident, March 14, 2008, Interstate 271, in the vicinity of the Richfield 303 exit, was under construction. The particular construction project involved bridge replacements on Interstate 271 in Summit County with construction work performed by DOT contractor, Kokosing. All bridge replacement work was subject to be performed to DOT specifications and requirements. Defendant asserted that under the contract between DOT and Kokosing, Kokosing assumed responsibility "for any occurrences or mishaps

in the area in which they are working." Defendant pointed out the damage incident described by plaintiff constitutes such an occurrence which Kokosing is responsible for according to contract. Defendant contended DOT is not the proper party defendant based on the facts of the property damage occurrence as depicted by plaintiff.

{¶ 3} Defendant submitted a written report from Kokosing representative, Pam J. LeBlanc, regarding the investigation into the incident forming the basis of this claim and her recollections of conversations she had with plaintiff. In her report, LeBlanc confirmed Kokosing employee, Jeremy Overholtz, drove a Kokosing owned pick-up truck on Interstate 271 on March 14, 2008. It was recorded Overholtz drove the truck, which was not classified as a "job truck" for over thirty minutes on Interstate 217 before exiting the roadway. Overholtz's job classification was described as a "carpenter foreman on this job" and consequently, the truck he was driving was not used for hauling construction debris. LeBlanc noted this Kokosing pick-up truck "was not caked with mud." LeBlanc further noted, "[o]ur people are trained to wash and/or sweep off anything they haul, as any flying debris has the potential to cause an accident." According to Overholtz, as recorded by LeBlanc, he was confronted by plaintiff regarding the damage to plaintiff's van windshield. LeBlanc wrote that Overholtz apparently tried to advise plaintiff that the damage to his windshield could have emanated from any vehicle traveling on Interstate 271 and not just from a Kokosing vehicle. LeBlanc wrote plaintiff was directed to contact her and she did talk to plaintiff who stated "someone is going to pay for this, not me." LeBlanc essentially denied plaintiff's property damage was caused by any Kokosing employee driving a Kokosing

truck. No statement from Jeremy Overholtz was included with the LeBlanc report.

{¶ 4} Plaintiff filed a response insisting his property damage was caused by debris emanating from a Kokosing vehicle. Plaintiff wrote, "[w]hen I caught up with Mr. Overholtz at the exit, I showed him the stuff that hit my windshield (some of it was still on the windshield even though it was raining) matched the stuff on the back of his truck." Plaintiff stated the damage-causing debris, "didn't come up off the road or from another vehicle because traffic was very light at the time and there was no other vehicle between him and me." Plaintiff recalled Overholtz arrived at the Kokosing yard while he was there talking to another Kokosing employee. Plaintiff further recalled Overholtz vehemently denied responsibility for the damage to plaintiff's van windshield. Plaintiff expressed his belief that "I strongly feel I did nothing wrong to cause this incident to happen. What did happen was Kokosing's fault and I just want them to own up to it and replace my windshield."

{¶ 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 condition 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 employees 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, 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 79, 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 is inconclusive to show plaintiff's damage

was caused by an act of an unidentified third party or Kokosing. Defendant has denied liability based on the particular premise it had not 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. See *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 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, 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.

{¶ 10} Plaintiff has failed to establish his damage was proximately caused by a negligent act or omission on the part of DOT. In the event plaintiff's injury was the act of an unknown third party which did not involve DOT then DOT has no liability. 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 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. *Herman v. Ohio Dept. of Transp.* (2006), 2006-05730-AD.

{¶ 11} Assuming the damage to plaintiff's van was actually caused by acts attributable to Kokosing, defendant still bears no responsibility. It has been previously held that 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 engaging in roadway construction. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 12} Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with 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. However, no evidence other than plaintiff's own assertion has been produced to show a hazardous condition was maintained on the project that would prove liability on the part of DOT. Plaintiff's description of the damage causing incident essentially reported mud and rock debris fell from a Kokosing truck traveling on Interstate 271 during a time when the truck and driver were not engaged in any type of roadway construction activity. These circumstances presented point out a situation where defendant exercised no control at all over the acts of DOT

contractor Kokosing, the alleged tortfeasor. If the damage-causing debris did emanate from a Kokosing truck, no liability shall attach to defendant since the Kokosing truck and driver were not involved in construction activity at the time of the incident. In regard to defendant's liability, the rules concerning notice and duties to third party motorists apply. Therefore, plaintiff has failed to prove any negligence on the part of defendant caused his property damage.

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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:

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RDK/laa
7/8
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