[Cite as *Miller v. Dept. of Transp.*, 2008-Ohio-7074.]

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

DOREEN S. MILLER

Plaintiff

v.

DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-06946-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Doreen S. Miller, filed this complaint against defendant, Department of Transportation ("DOT"), contending DOT should bear liability for damage to her automobile she sustained while traveling through a construction zone on Interstate 75 South in Montgomery County. Plaintiff related she was driving home from work on May 28, 2008 at about 4:50 p.m. when she "heard something like metal under my car" as she traveled on Interstate 75 under the Interstate 70 overpass. Plaintiff recalled that she responded to the sounds she heard by stopping her car on the shoulder area of the nearest exit ramp (Wyse Road/Miller Lane) and examining the under carriage of the vehicle. Plaintiff maintained that when she did not discover any damage when she visually inspected her vehicle she proceeded on until she noticed "(m)y low-tire pressure light came on and I could hear something knocking so I exited off at the next exit, Needmore Rd." and eventually pulled off the roadway where she found her automobile right rear tire was flat. Subsequently, tire repair shop personnel found a steel rod approximately 6 to 7" long imbedded in plaintiff's tire. Plaintiff stated

the damage-causing steel rod "looks like a bolt that the head had been (torqued) off and has about an inch of thread at the other end." Plaintiff asserted the damage-causing steel rod emanated from the roadway construction site on Interstate 75 South and suggested the object was "(p)erhaps something used to hold cement barriers together."

{¶ 2} Plaintiff filed this complaint seeking to recover $617.15, the cost of multiple tires and repair expenses for her vehicle, a 2007 Toyota Camry. Plaintiff requested additional unspecified damages of $100.00. Plaintiff implied the tire damage to her car was proximately caused by negligence on the part of DOT in keeping the roadway in a construction zone free of hazards. The filing fee was paid.

{¶ 3} Defendant acknowledged the described incident occurred within a construction zone which DOT located at about milepost 16.20 on Interstate 70 in Montgomery County. Defendant explained DOT contractor Kokosing Construction Company, Inc. ("Kokosing"), had control over the roadway construction area on Interstate 70 from mileposts 14.31 to 16.41 (project limits). The particular construction project dealt with reconstruction of the Interstate 70/Interstate 75 interchange including ramps and bridges. All work was to be performed to DOT specifications and requirements. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kokosing 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 section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove her damage was proximately caused by roadway conditions created by DOT or its contractor.

{¶ 4} Alternatively, defendant denied that neither DOT nor Kokosing had any notice of any debris material on the traveled portion of the roadway prior to plaintiff's property damage occurrence. Furthermore, defendant denied the damage-causing debris were construction material used by Kokosing or connected to any construction activity of DOT's contractor. Plaintiff did not present any evidence to determine the length of time the debris material was present on the roadway prior to 4:50 p.m. on May 28, 2008. Defendant contended plaintiff failed to produced evidence of negligent roadway maintenance.

{¶ 5} Defendant submitted a statement from a Kokosing representative denying any Kokosing personnel were working in the area of plaintiff's incident on May 28, 2008. Furthermore, Kokosing could not identify the object that damaged plaintiff's car and denied having any knowledge of the origin of the damage-causing object. Both Kokosing and DOT suggested the damage causing object was deposited on the roadway by an unidentified third party.

{¶ 6} 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. 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. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. 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. No evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained by either Kokosing or DOT.

{¶ 7} Defendant professed liability cannot be established when requisite notice of 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 or 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. Ohio 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 insisted the debris condition was not caused by maintenance or construction activity.

{¶ 8} Generally, in order to recover in a suit involving injury proximately caused by roadway conditions including debris, plaintiff must prove either: 1) defendant had actual or constructive notice of the debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the debris condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the debris. Additionally, 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. There is no indication defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Therefore, defendant is not liable for any damage plaintiff may have suffered from the roadway debris.

{¶ 9} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove her property damage was connected to any conduct under the control of defendant, that defendant or its agents were negligent in maintaining the roadway area, or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1988), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-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 agai\nst plaintiff.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
10/15
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