[Cite as *Healy v. Dept. of Transp., Dist. 12*, 2008-Ohio-7092.]

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

JENNIFER A. HEALY

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-07110-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Jennifer A. Healy, asserted the right rear door window of her 2005 Mitsubishi Lancer was broken by airborne roadway debris while she was traveling through a construction zone on Interstate 271 on May 14, 2008 at approximately 8:00 a.m. Plaintiff stated the damage incident occurred "as I was changing lanes near Rockside Rd. a rock from the unpaved road on the freeway (Interstate 271 South), hit my passenger rear window (and) instantly shattered the window." Plaintiff implied the property damage she sustained on May 14, 2008 was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain Interstate 271 safe for the traveling public during roadway construction. Consequently, plaintiff filed this complaint seeking to recover $155.00, the cost of a replacement car window. The filing fee was paid.

{¶ 2} Defendant acknowledged the area where plaintiff's described damage event occurred was located within a construction zone on Interstate 271 n Cuyahoga County. From plaintiff's description defendant specifically located the incident at county

milepost 4.17 within the construction project limits. Defendant explained the roadway construction zone was under the control of DOT contractor, Karvo Paving Company ("Karvo"). Repaving work, which was included in the construction project plan, was to be performed by Karvo in accordance with DOT mandated requirements and specifications. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction project limits. Therefore, defendant argued Karvo is the proper party defendant in this action. Defendant implied all duties, such as the duty to warn, the duty to maintain, the duty to inspect, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. 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. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty 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. 00AP-1119.

{¶ 3} Alternatively, defendant denied neither DOT nor Karvo had any notice of "rocks or flying debris" on Interstate 271 prior to plaintiff's incident. Defendant denied receiving any calls or complaints regarding debris on the roadway prior to 8:00 a.m. on May 14, 2008. Defendant argued 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 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. Plaintiff has not presented sufficient evidence to establish DOT or its agents actively caused the debris condition that damaged her vehicle.

{¶ 4} Defendant submitted a statement from Karvo Safety Risk Manager,

Cathleen Geddes, noting the activity of Karvo personnel on May 14, 2008 in regard to the construction project on Interstate 271. Geddes related "[a]t the time mentioned in the complaint, our employees were setting cones southbound on I271 getting prepared for concrete and partial repairs." According to Geddes, "[t]here were no milling or grinding operations involved" in the vicinity of plaintiff's incident and the roadway area had been swept of milling debris by 6:30 a.m. on May 14, 2008 by a Karvo subcontractor, Cook Paving. Geddes stated all proper signs in accordance with DOT standards were in place at the site to notify motorists of the construction activity. Furthermore, Geddes explained all project work, including roadway milling and sweeping, was performed at night due to the high volume of traffic using Interstate 271 during daylight hours.

{¶ 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} 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. Plaintiff has the burden of proving, by a preponderance of the evidence, that she 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.

{¶ 7} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT

acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346, 683 N.E. 2d 112. In fact, the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Evidence available seems to point out the roadway area was relatively clean of debris and was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162. Consequently, plaintiff's claim is denied.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jennifer Healy
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RDK/laa
10/21
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