[Cite as *Fields v. Ohio Dept. of Transp.*, 2008-Ohio-7104.]
SHERMA W. FIELDS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08728-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On June 8, 2008, at approximately 1:45 p.m., plaintiff, Sherma W. Fields, was traveling east on Interstate 90 in Cuyahoga County through a construction zone, when her truck ran over a rock laying on the roadway causing substantial damage to the vehicle.

{¶ 2} 2) Plaintiff asserted the damage to her truck was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover $1,238.15, the total cost of vehicle repair, plus $125.00 for towing and storage costs. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with her damage claim. In her complaint, plaintiff reported she maintains insurance coverage for damage to her truck with a $500.00 deductible provision and acknowledged she received payment of $738.15 from her insurer to cover the cost of vehicle repair. Pursuant to R.C. 2743.02(D) plaintiff's damage claim for repair expense is limited to her insurance coverage deductible.[1]

{¶ 3} 3) Defendant explained the described damage incident occurred within a construction area where DOT contractor Karvo Paving Company ("Karvo"), performed "grading, draining, planning and resurfacing with asphalt concrete of I-90 in Cuyahoga County." Defendant located plaintiff's damage occurrence from her description between

[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 345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."

mileposts 16.28 and 16.76 on Interstate 90, an area within the construction project limits. Defendant contended the construction area of Interstate 90 was under the control of Karvo and consequently, DOT had no responsibility for any damage or mishaps on the roadway within the construction project limits. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction area, although all work performed was subject to DOT requirements and specifications. Defendant implied all duties such as the duty to inspect, the duty to warn, the duty to maintain, the duty to remove roadway hazards, and the duty to repair defects were delegated when an independent contractor takes control over a particular section of roadway. Defendant argued Karvo is the proper party defendant in this action.

{¶ 4} 4) Alternatively, defendant denied that neither DOT nor Karvo had any notice of a rock in the roadway prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints about a rock on Interstate 90 prior to June 8, 2008. Defendant asserted plaintiff did not submit any evidence to indicate the length of time the rock was on the roadway prior to 1:45 p.m. on June 8, 2008. Defendant suggested the damage-causing rock was deposited on the roadway by an unidentified third party and not by either DOT or Karvo.

{¶ 5} 5) Defendant submitted a written statement from Karvo Safety Risk Manager, Cathleen Geddes, in which she reported no Karvo personnel were working on Interstate 90 after 7:30 a.m. on June 7, 2008 with work resuming at 6:30 a.m. on June 9, 2008, the day after plaintiff's damage occurrence. Geddes suggested the damage-causing rock was deposited on the roadway by a passing vehicle not associate with Karvo at sometime after road work had stopped on June 7, 2008.

CONCLUSIONS OF LAW

{¶ 6} 1) 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.

{¶ 7} 2) Alternatively, defendant denied neither DOT nor Karvo had notice of any rock debris left on Interstate 90 after work ceased on June 7, 2008. 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 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.

{¶ 8} 3) 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.

{¶ 9} 4) 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.

{¶ 10} 5) 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.

{¶ 11} 6) 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
10/28
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