[Cite as *Nicodemus v. Ohio Dept. of Transp.*, 2008-Ohio-7117.]

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

BARB NICODEMUS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08655-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Barb Nicodemus, filed this action against defendant, Department of Transportation (DOT), alleging that her 2005 Chrysler PT Cruiser received paint damage from a DOT vehicle conducting roadway painting operations on either Interstate 71 or Interstate 270 or Interstate 70 on June 18, 2008. plaintiff stated that, "[s]omewhere between Columbus and Dayton I passed a paint truck painting the lines on the highway." Plaintiff recalled that she did not observe any signs notifying motorists of the painting operation or warning motorists of wet paint. Plaintiff also recalled that there were no traffic control devices such as cones placed along the roadway to keep traffic from contacting with fresh yellow paint. According to plaintiff, she did not discover the paint on her car "until much later when I stopped for gas." Plaintiff estimated that her vehicle received yellow paint damage at sometime between 10:00 a.m. and 2:00 p.m. on June 18, 2008. Plaintiff submitted multiple photographs depicting yellow paint specks along the entire left side of her vehicle with the bulk of the paint damage present in the left front and rear wheel wells. Plaintiff contended that the paint damage to her car was proximately caused by negligence on the part of defendant in failing to

adequate warn motorists about edge line painting operations conducted on Interstate 71 or Interstate 270 or Interstate 70 on June 18, 2008. Plaintiff seeks damages in the amount of $1,677.22, the total cost of paint removal. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with her damage claim.

{¶ 2} Defendant explained that based on plaintiff's description, the purported paint overspray incident could have occurred on either Interstate 71 or Interstate 70 in three separate counties, Franklin, Madison, or Clark. Defendant specifically denied that any DOT road crews conducted any painting operations on either Interstate 71 or Interstate 70 in the three county area on June 18, 2008. Defendant denied that any paint damage to plaintiff's vehicle was attributable to any DOT work activity or conduct under the control of DOT. Defendant submitted copies of DOT records for maintenance activities for June 18, 2008. The records indicate DOT crews performed routine roadway maintenance on June 18, 2008 on Interstate 71 and Interstate 70 in Franklin, Madison, and Clark Counties. However, no painting operations were conducted on June 18, 2008 on Interstate 71 or Interstate 70 in the designated counties. No DOT contractors conducted roadway painting operations on June 18, 2008 on Interstate 71 or Interstate 70.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} Plaintiff has the burden of proof to show that her property damage was the direct result of failure of defendant's agents to exercise ordinary care in conducting roadway painting operations. *Brake v. Department of Transportation* (2000), 99-12545-AD. A failure to exercise ordinary care may be shown in situations where motorists do not receive adequate or effective advisement of a DOT painting activity. See *Hosmer v. Ohio Department of Transportation*, Ct. of Cl. No. 2002-08301-AD, 2003-Ohio-1921. In the instant claim, plaintiff has failed to prove her property damage was caused by any negligent act or omission on the part of defendant or DOT agents. *Marlow v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2006-07864-AD, 2007-Ohio-4877.

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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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MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
11/24
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