[Cite as *Hershey v. Ohio Dept. of Transp.*, 2008-Ohio-5918.]

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

CARISSA HERSHEY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-04277-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

[Cite as *Hershey v. Ohio Dept. of Transp.*, 2008-Ohio-5918.]

FINDINGS OF FACT

{¶ 1} 1) On March 29, 2008, at approximately 6:55 p.m., plaintiff, Carissa Hershey, was traveling north on Interstate 270 "between Morse Rd and 161 exit" in Franklin County, when her automobile struck a rock-like object laying on the traveled portion of the roadway. Plaintiff recalled there were three "large rocks, about the size of a large grapefruit" laying on the roadway and her vehicle struck one of the "large rocks." Plaintiff observed the "rocks seemed to be large chunks of cement." Plaintiff's car, a 2005 Volkswagen Jetta, sustained tire and rim damage from impacting with the rock debris in the roadway.

{¶ 2} 2) Plaintiff asserted her property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover $327.04, the cost of automotive repair she incurred as a result of the March 29, 2008 incident. The filing fee was paid.

{¶ 3} 3) Defendant explained the area where plaintiff's damage event occurred was within the limits of a roadway construction project under the control of DOT contractor, National Engineering & Contracting Company ("National"). Defendant denied liability in this matter based on the contention that neither DOT personnel nor National personnel had any knowledge of debris on the roadway prior to plaintiff's March 29, 2008 property damage event. Defendant denied receiving any calls or complaints regarding the particular rock-like debris which DOT located between mileposts 30.52 and 32.27 on Interstate 270 in Franklin County. Defendant asserted plaintiff did not produce any evidence to establish the length of time the debris was on the roadway prior to 6:55 p.m. on March 29, 2008. Defendant related "ODOT believes that the debris existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant suggested the damage-causing debris was deposited on the roadway by an unidentified third party and not by either DOT or National.

CONCLUSIONS OF LAW

{¶ 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} 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 conditions 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 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.

{¶ 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. 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} 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 conducts 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 the 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.

{¶ 8} Plaintiff has failed to establish her damage was proximately caused by any negligent act or omission on the part of DOT or DOT agents. In fact, it appears the cause of plaintiff's injury was the act of an unknown third party which did not involve DOT. 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 proximately caused the damage. *Herman v. Ohio Dept. of Transp.* (2006), 2006-05730.

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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:

Carissa Hershey
1757 Schrock Road
Apt. F
Columbus, Ohio 43229

James G. Beasley, Director
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RDK/laa
7/16
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