[Cite as *Rensing v. Ohio Dept. of Transp.*, 2009-Ohio-3028.]

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

JACK RENSING

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11478-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Jack Rensing, filed this action against defendant, Department of Transportation("DOT"), alleging a leased 2009 Pontiac G5 was damaged as a result of negligence on the part of DOT employees conducting edge line painting operations on State Route 309 in Marion County. Plaintiff indicated his damage incident occurred between 1:30 p.m. and 2:00 p.m. on October 7, 2008. In his complaint, plaintiff described the damage event recording the following: "ODOT was painting white (edge) line (on) OH 309 W putting orange cones every 1/4 mile (approx.). I was traveling west on 309 between Meeker & St. Rt. 37. I came upon a knoll in the road. When I got on top of (the) knoll I saw a cone in the right hand center of my lane. There was a semi (coming) at me. There was a ditch on my right side and a cross road with a semi sitting at the stop sign. No where to go but hit the cone and that is what caused the damage to my rent a car."

{¶ 2} Plaintiff implied the damage to the leased 2009 Pontiac G5 was proximately caused by negligence on the part of the DOT painting crew in the placement of traffic control cones on the traveled portion of State Route 309. Plaintiff

seeks recovery of damages in the amount of $1,455.78 for the cost of repairing the damaged car, $55.50 for two days loss of use of the vehicle, $245.00 for towing, $145.57 for "diminished value," and $100.00 for "administration fee." Total damages claimed amount to $2,001.85. The filing fee was paid.

{¶ 3} Defendant acknowledged DOT employees conducted edgeline painting operations on State Route 309 on October 6, 2008. A copy of a submitted DOT work order record shows edgeline painting occurred on State Route 309 in Marion County between 7:00 a.m. to 3:00 p.m. on Monday, October 6, 2008. Defendant explained the painting operation involved two vehicles, the paint striper truck and a follow truck carrying traffic control cones that were placed on the roadway to notify motorists of the painting. The striper truck carried two DOT employees, the driver, Amy Berkshire and Perry Wallace. DOT employee Richard Clark drove the follow truck carrying traffic control cones. Defendant asserted "all traffic control requirements were in place during the painting operation." According to defendant, the DOT paint crew was finished with the edgeline painting and stopped at a crossroad near the time plaintiff's damage event occurred.

{¶ 4} Defendant submitted written statements from all three DOT employees involved in the October 6, 2008 painting operation. Amy Berkshire, the driver of the paint truck, recorded the painting job was finishing up on State Route 309 near the Marion/Hardin County line when she "saw a car pulled over on a side road with a man (plaintiff) standing beside the car." Berkshire recalled "[t]he man (plaintiff) then walked to the end of the road and as we passed him I watched in my side mirror (and); as we stopped, he opened the passenger door of our follow cone truck." Berkshire further recalled plaintiff appeared agitated and was "yelling at Dick (Clark) the driver of the follow truck." Berkshire noted she then got out of the paint truck and approached plaintiff. Berkshire related she heard plaintiff stated that "he ran over a cone that was in the road (and) was unable to avoid hitting the cone because there was a vehicle coming at him." Perry Wallace, who was in the DOT paint truck with Berkshire, related he saw the car plaintiff was driving pulled over to the side of the road with fluid running out of the radiator and heard plaintiff remark he had hit a cone in the middle of the road. Wallace denied witnessing the vehicle plaintiff was driving strike a DOT traffic control cone in the middle of State Route 309. Richard Clark, the driver of the follow truck

carrying cones, recalled the painting job had just finished and he had pulled the DOT truck over at a crossroad west of the Hardin County line when he noticed the car plaintiff was driving also pulled over. Clark noted "a guy (plaintiff) got out (of the 2009 Pontiac G5) came over to my pickup open(ed) the passenger door and asked me why I set the cone in the middle of the road." Clark reported he responded to plaintiff's question by stating "I didn't put the cone there (in the middle of the road) it was placed on the white (edge) line."

{¶ 5} Apparently after conversing with the DOT employees plaintiff contacted the local Ohio State Highway Patrol ("OSHP") post who dispatched Trooper Benjamin Addy to the scene. Trooper Addy compiled a Traffic Crash Report (copy submitted) upon investigating the incident forming the basis of this claim. The Traffic Crash Report included a summary of the October 6, 2008 damage event and a witness statement from plaintiff. Plaintiff related he was traveling west on State Route 309 "towards Kenton from Meeker" when he struck the cone in the middle of the roadway. The narrative section in the Traffic Crash Report noted plaintiff was traveling eastbound when the incident occurred. A vehicle traveling toward Kenton in Hardin County from Meeker in Marion County would be traveling west. An edgeline painting operation in Marion County moving toward the Hardin County line would be traveling west. In his written statement, plaintiff maintained the DOT painting crew had placed the traffic control cone in the middle of the westbound roadway lane of State Route 309 although he has not presented any evidence to establish he actually witnessed the DOT employee place the cone in the middle of the roadway. Plaintiff estimated he first noticed the cone in the roadway at a distance of approximately 200 feet. Plaintiff estimated he was traveling about 58 mph when he first saw the cone on the roadway.

{¶ 6} Defendant specifically denied the cone was deliberately positioned in the middle of the roadway by a DOT employee. Defendant suggested the cone was displaced from the roadway edgeline into the middle of the roadway lane by an unidentified third party motorist. Defendant's employee specifically denied placing the damage-causing cone in the middle of the roadway lane. Evidence in the Traffic Crash Report shows the October 6, 2008 property damage event occurred during daylight hours under clear weather conditions.

{¶ 7} Plaintiff filed a response insisting he could not avoid driving over the cone

that was in the middle of the roadway lane due to oncoming traffic, following traffic, and his unfamiliarity with the rental car he was driving. Plaintiff reevaluated the circumstances of the October 6, 2008 incident and estimated he first noticed the cone at a distance of 50 feet. Plaintiff did not provide any evidence to show a DOT employee actually placed the cone in the middle of the roadway lane or had any prior knowledge the cone had been displaced onto the roadway by a third party motorist.

{¶ 8} 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} Plaintiff has the burden of proof to show his 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 acknowledged he discovered defendant was conducting edgeline painting.

{¶ 10} 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 hazardous condition 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 condition 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. Plaintiff has not proven defendant positioned a traffic control cone in the middle of the road.

{¶ 11} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty. that it breached that duty, and that the breach proximately caused his 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.

{¶ 12} 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 that 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.

{¶ 13} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 14} Plaintiff has failed to establish his damage was proximately caused by any

negligent act or omission on the part of DOT. 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-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 against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
3/10
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