[Cite as *Brininger v. Ohio Dept. of Transp., Dist. 12*, 2009-Ohio-3772.]

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

LAWRENCE BRININGER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-08868-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Lawrence Brininger, related he was traveling on Interstate 90 in Cuyahoga County through a construction zone when his "car ran over something" causing substantial damage to the vehicle. Plaintiff recalled the damage to his car occurred on June 10, 2008, at approximately 5:00 a.m. on an area of roadway where only one travel lane was open due to construction operations. Plaintiff implied the damage to his automobile, a 1999 Mazda 626LX, was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain Interstate 90 free of debris during roadway construction. Consequently, plaintiff filed this complaint seeking to recover $946.92, the cost of automotive repair incurred that resulted from the June 10, 2008 incident. The filing fee was paid.

{¶ 2} Defendant acknowledged the area where plaintiff's described damage event occurred was located within the limits of a construction project under the control of DOT contractor, Karvo Paving Company ("Karvo"). Defendant pointed out the particular construction project "dealt with grading, draining, planning, and resurfacing with asphalt concrete of I-90 in Cuyahoga County." From plaintiff's description,

defendant located the property damage incident between mileposts 16.53 and 16.76 within the construction project limits. All construction work performed by Karvo was to be done in accordance with DOT mandated requirements and specifications and subject to DOT approval. 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 debris between mileposts 16.53 and 16.76 on Interstate 90 prior to plaintiff's incident. Defendant suggested the debris or whatever caused plaintiff's property damage was deposited on the roadway by an unidentified third party not affiliated with either DOT or Karvo. Defendant contended it had no duty to control the conduct of a third party.

{¶ 4} Defendant submitted a statement from Karvo Safety Risk Manager, Cathleen Geddes, noting the activity of Karvo personnel on June 9, 2008 and June 10, 2008 in regard to the construction project on Interstate 90. Geddes pointed out the specific work performed on Interstate 90 was done "at night due to the high volume and intensity of traffic during the daylight hours." Geddes related, "Karvo paving crews worked on Monday June 9th, 2008 beginning at 5:30 a.m. crews were milling at West 14th and there was no construction zone set up at the 77/90 merge for our construction project." According to Geddes, construction work was suspended during the evening of June 9, 2008 due to inclement weather and "there were no crews on the jobsite at the

time submitted in the claim," 5:00 a.m. on June 10, 2008. Geddes observed, [a]ll crews were finished by 12:00 a.m." Geddes noted, "[t]his project was clearly marked with 'Road Work Ahead' signs which were placed according to the ODOT traffic control standards and they are visible throughout the project."

{¶ 5} 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 Karvo actively caused the debris condition that damaged his vehicle. Furthermore, plaintiff failed to prove either DOT or Karvo had notice of the damage-causing debris condition.

{¶ 6} 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.

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

{¶ 8} 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.

{¶ 9} 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 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.

{¶ 10} "If any 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.

{¶ 11} Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole 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 was connected to any conduct under the control of defendant or any negligence on the part of defendant. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-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
3/26
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