[Cite as *Lease v. Ohio Dept. of Transp., Dist. 4,* 2009-Ohio-3774.]

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

DALE LEBETH LEASE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DIST. 4

Defendant

Case No. 2008-09601-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Dale Lebeth Lease, asserted she suffered property damage to her 2004 Chrysler Pacifica while driving through a construction area on Interstate 77 on May 15, 2008, May 30, 2008, and June 1, 2008. Plaintiff pointed out her vehicle was damaged from running over uneven pavement conditions or "bumps" in that roadway that had been created from milling the existing roadway surface on Interstate 77 in preparation for repaving and adding a third roadway lane. Plaintiff located the May 15, 2008 incident at "the bridge over Copley Road." Plaintiff noted on that day "[w]e were south bound and the asphalt had been removed (without) any transition strip to lessen the bump from the low level of the road bed to high level of the cement bridge." According to plaintiff, the impact of her vehicle running over the bump on the bridge caused substantial suspension and brake damage. Plaintiff recalled the May 30, 2008 and June 1, 2008 damage events both occurred at the same location; on an Interstate 77 "(north) bound off ramp of White Pond." Plaintiff related a bump on the roadway ramp was created "where (the) road bed was removed in a small strip (and) again no transition strip was laid for weeks." Plaintiff explained no signs were in position on

Interstate 77 to warn motorists of the uneven pavement conditions at either location described. Plaintiff related by June 1, 2008, "[m]y vehicle began making a progressively loud noise in the front end" and she consequently had the automobile inspected. Plaintiff asserted the struts, tie rods, sway bar links, and front brake rotors on her 2004 Chrysler Pacifica were damaged as a result of traveling over uneven pavement conditions on Interstate 77 caused by construction activity.

{¶ 2} Plaintiff implied the property damage claimed was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining hazardous roadway conditions within a construction zone on Interstate 77 in Summit County. Plaintiff filed this complaint seeking to recover $1,187.85 in damages for automotive repair costs. The $25.00 filing fee was paid.

{¶ 3} Defendant acknowledged the described incidents occurred within a construction project area under the control of DOT contractor Great Lakes Construction Company ("Great Lakes"). Defendant explained the particular construction project "dealt with grading, draining, asphalt concrete on asphalt concrete base and by rehabilitating structures on I-77 in Summit County." Defendant asserted Great Lakes, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Great Lakes is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with DOT requirements, specifications and approval. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, 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 the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 4} Defendant stated, "investigation reveals that ODOT and Great Lakes

Construction Co. had notice of the pavement on I-77 prior to plaintiff's incident." Defendant related that both DOT and Great Lakes had notice of a motorist problem with uneven pavement from roadway milling on Interstate 77 South on the bridge over Copley Road. Defendant's records show DOT received a complaint on May 13, 2008 regarding uneven pavement conditions on Interstate 77 South which resulted in vehicle damage. Defendant's records indicate a motorist traveling on "I-77 south bound by Copley rd exit" sustained two flat tires and rim damage on his vehicle at approximately 5:05 p.m. on May 12, 2008. On May 16, 2008, three days after receiving the complaint about damage-causing uneven road conditions, defendant sent Great Lakes written notification of the May 13, 2008 complaint. In a letter dated August 12, 2008, Great Lakes Safety Coordinator Michael Muzychenko denied Great Lakes milled any portion of Interstate 77 within the construction project limits. Additionally, Muszchenko reported "Great Lakes Construction was not responsible for any asphalt placement on this project." Apparently Great Lakes subcontractor Shelly & Sands milled the roadway within the construction project limits. Defendant explained that only two complaints were received regarding damage-causing roadway conditions created by milling, despite the fact that the particular section of Interstate 77 "has an average daily traffic volume between 76,300 and 82,240." Defendant argued plaintiff failed to offer sufficient evidence to prove her property damage was caused by any act or omission on the part of DOT or DOT's contractors.

{¶ 5} On July 3, 2008, plaintiff sent defendant a letter referencing the claimed damage to her vehicle from allegedly traveling over defective pavement conditions on Interstate 77 on May 15, 2008, May 30, 2008, and June 1, 2008. In this letter, plaintiff insisted her car was damaged from traveling over uneven pavement at two construction locations on Interstate 77; "(the) cement bridge going South over Copley Rd. (and) on (the) ramp going North from I-77 to White Pond Drive." Plaintiff attributed the damage to her vehicle from "the severe difference in the road levels."

{¶ 6} Defendant submitted an e-mail from Great Lakes Safety Director, William Hocevar, who verified that Shelly and Sands performed roadway milling on the areas of Interstate 77 where plaintiff claimed her vehicle was damaged. Hocevar wrote "[o]ur work performed was within the specs (specifications) set forth by the state of Ohio." In his analysis of the roadway gradiation caused by the milling, Hocevar recorded "Shelly

and Sands milled per spec, (specification) and left an elevation change of less than 1 ½ inches." According to Hocevar and DOT generated blueprints "an elevation change of 1 ½ inches was allowed." Hocevar stated "[n]o other cars traveling in the referenced areas had issues with their vehicles (and) [t]housands of cars drove over this transition without incident." According to Hocevar, defendant at sometime requested a modification in the milled roadway and "Shelly placed a ramp asphalt transition in the referenced areas." However, Hocevar denied the DOT request was made due to work out of compliance with specifications or any deficiencies found by DOT upon inspection.

{¶ 7} Plaintiff filed a response disputing the assertions made concerning an elevation change of less than 1 ½ inches on the milled roadway surface she drove over in May and June 2008. Plaintiff recalled the ramp asphalt transition strip placed on the uneven roadway surface "was laid 3 days after I hit it." Plaintiff expressed doubt that defendant inspected the elevation change on the milled roadway until after she made a complaint with DOT about damage to her vehicle from a potentially hazardous roadway condition. Plaintiff suggested the ramp asphalt transition was placed on the roadway because she complained to defendant about problems with the roadway elevation change.

{¶ 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. *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. Generally, 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. 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.

{¶ 9} 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 conditions 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.

{¶ 10} 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.

{¶ 11} Plaintiff, in the instant claim, asserted the damage to her automobile was caused by dangerous roadway conditions created when the existing pavement was milled. Defendant disputed plaintiff's contention that her property damage was caused by negligent performance of roadway construction activities or negligent inspection. Defendant may bear liability if it can be established if some act or omission on the part of DOT or its agents 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.

{¶ 12} "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. Plaintiff has failed to offer sufficient proof to establish her property damage

was caused by defendant or its agents breaching any duty of care in regard to roadway construction. Evidence available seems to point out the roadway 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. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Vanderson v. Ohio Dept. of Transp.*, Ct. of Cl. NO. 2005-09961-AD, 2006-Ohio-7163; *Shiffler v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-07183-AD, 2008-Ohio-1600.

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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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