[Cite as *Roberts v. Dept. of Transp.*, 2009-Ohio-4272.]

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

JAMES ROBERTS

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-10625-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, James Roberts, asserted he sustained tire and rim damage to his automobile due to traveling over uneven pavement surface on State Route 444 in a roadway construction area in Montgomery County. Plaintiff recalled he was traveling north on State Route 4 and drove onto the State Route 444 exit ramp at approximately 2:30 p.m. on October 17, 2008. Plaintiff explained the roadway on the exit ramp "was being resurfaced up to 444 highway (and) when merging on to 444 from the exit ramp there was no smooth transition from the surfaced to (the) resurfaced road." Plaintiff related when he reached this roadway transition area the front end tires of his vehicle "hit so hard that the wheel jerked out of my hand for a second." Plaintiff maintained the existing roadway condition at the point where the unsurfaced road met the surfaced road created a "huge ledge/bump" that damaged his vehicle.

{¶ 2} Plaintiff contended his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition in a roadway construction area. Consequently, plaintiff filed this complaint seeking to recover $356.31, the cost of a replacement tire and rim. The filing fee was paid.

{¶ 3} Defendant acknowledged the roadway area where plaintiff's incident occurred was within the limits of a working construction project under the control of DOT contractor, Barrett Paving Materials, Incorporated ("Barrett"). Defendant explained the construction project "dealt with grading, draining, asphalt planing and resurfacing the four lane highway" of State Route 4 in Montgomery County. From plaintiff's description defendant located the damage occurrence on State Route 444 between mileposts 21.76 and 21.99, an area within the construction project limits. Defendant contended Barrett is the proper party defendant in this action since the roadway construction area was under the control of Barrett and consequently DOT had no responsibility for any damage or mishaps on the roadway within the construction project limits. Defendant asserted that Barrett, by contractual agreement, was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT approval, requirements and specifications. Defendant implied that 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.

{¶ 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} 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.

{¶ 6} Expressing an alternative argument defendant denied that neither DOT nor Barrett "had notice of the pavement on SR 4 prior to plaintiff's incident." Defendant

stated DOT "records indicate no calls or complaints were received at the Montgomery County Garage regarding the pavement in question prior to" October 17, 2008. Defendant related the particular section of State Route 4 "has an average daily traffic volume between 25,120 and 27,250, however, no other complaints (about roadway conditions) were received prior to plaintiff's incident." Defendant asserted plaintiff has failed to prove his damage was caused by negligent roadway maintenance. Defendant further asserted plaintiff did not offer sufficient evidence to establish his damage was the result of any conduct attributable to DOT or Barrett.

{¶ 7} 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 precise condition or defect 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. 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.

{¶ 8} Defendant submitted a letter from Barrett Construction Manager, Bill Wohlford, regarding the construction work Barrett personnel performed on the State Route 444 ramp. Wohlford provided the following information:

{¶ 9} "Barrett's crew was working on the night shift. SR 444 was already completed with the first course of asphalt. Traffic was being maintained on the inside lane of SR 444. Ramp 1 was milled on October 13, 2008. The asphalt on ramp 1 was completed on the night of October 17, 2008. All protocols were followed and areas of different depths of the road were wedged. There were no other incidents in this area at this time."

{¶ 10} Wohlford expressed the opinion that plaintiff's automotive damage occurred due to traveling at an unsafe speed for the roadway conditions present.

{¶ 11} Plaintiff filed a response. Plaintiff denied he was traveling too fast for roadway conditions present on October 17, 2008. Plaintiff explained, "I was merging on a highway from the on ramp so you have to accelerate to merge in the flow of traffic" and coupled with the location of the transition area from unpaved to paved surface he

could not decelerate his vehicle to properly negotiate the transition. Plaintiff recalled he reported his property damage to the Ohio State Highway Patrol "around 4:00 p.m." on October 17, 2008 and was told "I was not the only person reporting problems at this construction zone." Plaintiff also recalled he contacted DOT concerning his damage incident on October 20, 2008. Plaintiff submitted a photograph depicting the roadway area where his damage event occurred. The photograph was taken after all repaving operations were completed and traffic control had been removed. Plaintiff related that due to traffic control in place on October 17, 2008 he "had to merge onto the high speed lane (of State Route 444) since it was the only lane open at the time" and he was therefore "forced onto the uneven transition" resulting in the property damage claim. Plaintiff insisted his damage was caused by negligent construction operations.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} Plaintiff, in the instant claim, asserted the damage to his automobile was caused by dangerous roadway conditions when an uneven pavement condition was created by pavement resurfacing. Defendant disputed plaintiff's contention that his

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 contractor 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.

{¶ 15} "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 his property damage was caused by defendant or its contractor 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 his damage was proximately caused by any negligent act or omission on the part of DOT or its contractor. 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.

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-10625-AD

Deputy Clerk Daniel R. Borchert

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:

James Roberts
2341 Charleston Way
Beavercreek, Ohio 45431

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
4/16
Filed 5/13/09
Sent to S.C. reporter 8/21/09