[Cite as *St. Cyr v. Ohio Dept. of Transp., Dist. 12*, 2009-Ohio-4274.]

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

ERIC ST. CYR

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-10803-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Eric St. Cyr, stated he was traveling east on Interstate 90 in Cuyahoga County through a construction zone on October 20, 2008, when his 1999 Buick Park Avenue was damaged when he attempted to avoid "an unfastended construction barrel in the roadway." Plaintiff pointed out the damage incident occurred "between west boulevard and west 44th street exit" on Interstate 90 in an unmarked construction area. Furthermore, plaintiff explained the traffic control barrel he tried to avoid was not properly positioned upright but "was rolling across the (roadway) lane" at the time of impact. Plaintiff expressed the opinion that "the barrel, being unweighted, was likely dragged into the lane by the force of a passing truck as it was not particularly windy that day." Apparently, when he maneuvered his car to avoid the traffic control barrel in the roadway he lost control of the vehicle and it was totally destroyed upon "crashing into a concrete median."

{¶ 2} Plaintiff contended the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition in the roadway construction area, specifically, by not

properly "securing and weighting" a traffic control barrel. Plaintiff filed this complaint seeking to recover damages in the amount of $2,373.00, the total estimated value of his vehicle, plus related expenses incurred resulting from the October 20, 2008 incident. The filing fee was paid.

{¶ 3} Defendant acknowledged the roadway area where plaintiff's incident occurred was within the limits of a construction project under the control of DOT contractor, Burton Scot Contractors ("Burton"). Defendant explained the construction project "dealt with draining and paving with asphalt concrete for Routes 90 and 490 in the City of Cleveland" spanning from county mileposts 13.41 to county milepost 14.84. Defendant located plaintiff's described incident between county mileposts 13.09 and 13.45 on Interstate 90, a location within the limits of the construction project. Defendant asserted this particular construction project area of Interstate 90 was under the control of Burton and consequently DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant further asserted that Burton, by contractual agreement, was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT requirements and specifications and subject to DOT approval. 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. Generally, 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. The duty of defendant 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} Alternatively, defendant denied that neither DOT nor Burton "had notice of the construction barrel on I-90 prior to plaintiff's incident." Defendant reported that no calls or complaints were received regarding a traffic control barrel laying on the roadway. Defendant asserted plaintiff has failed to offer sufficient proof to establish his property damage was proximately caused by any negligent act or omission on the part of DOT or Burton.

{¶ 5} Defendant submitted a letter from Burton Safety Officer, Bea Rauch, concerning her investigation into plaintiff's claim. Rauch noted the area where plaintiff's vehicle was damaged was "in a posted construction zone" where all signage was in place in accordance with DOT regulations and all roadway work was performed in accordance with DOT specifications. Also Rauch pointed out Burton did not start roadway construction work until 6:00 p.m. on October 20, 2008 and plaintiff acknowledged his damage incident occurred at 5:00 p.m. Rauch denied Burton had positioned any traffic control barrels on Interstate 90 on October 20, 2008 and pointed out "all cones and barrels were removed from this project prior to October 20, 2008." According to Rauch, traffic control work for Interstate 90 on October 20, 2008 was done by a Burton Subcontractor, A & A Safety, Inc., who "provided a rolling zone that included two (2) trucks (an impact continuator truck and a zone truck) and a Cleveland Police Officer with a patrol car." Apparently no barrels were utilized by A & A Safety, Inc. on October 20, 2008.

{¶ 6} Additionally, defendant submitted written correspondence from DOT representative Irma Haase who provided information regarding DOT activity in the area during October, 2008. Haase provided the following:

{¶ 7} "On Oct. 2, 2008, District 12 did close two lanes of the Innerbelt Bridge. Message boards and additional signage for this closure were placed within the project limits and beyond. And, I'm sorry but I cannot remember exactly what the signage was and if there were any barrels out for that."

{¶ 8} Plaintiff filed a response pointing out there was a traffic control barrel on Interstate 90 on October 20, 2008 and referenced the traffic incident police report he filed with his complaint which noted the existence of a barrel on the roadway. Plaintiff

insisted “[c]onstruction was in process at the site” of his property damage occurrence. Plaintiff alleged “the barrel was tossed over the cement barrier and not properly weighted down, Most likely from the day before and blown into I-90 by wind or a truck.” Plaintiff did not produce any evidence to support this allegation.

{¶ 9} 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 DOT or DOT’s contractors 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. There is no evidence DOT or DOT’s contractors displaced the damage-causing traffic control barrel.

{¶ 10} 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.

{¶ 11} Evidence in the instant action tends to show plaintiff’s damage was caused by an act of an unidentified third party, not DOT or a DOT contractor. Generally, defendant has 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 conduct 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.

{¶ 12} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in 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.

{¶ 13} Plaintiff has failed to establish damage was proximately caused by any negligent act or omission on the part of DOT. In fact, it appears that the cause of plaintiff's injury was the act of an unknown third party which did not involve DOT or DOT agents. Plaintiff has not offered any evidence to prove DOT or DOT contractors placed a traffic control barrel on the roadway and failed secure the barrel or acted negligently in not adequately weighting the barrel to the roadway. 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 that 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; *Husak v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-03963-AD, 2008-Ohio-5179.

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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
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Filed 5/12/09
Sent to S.C. reporter 8/21/09