[Cite as *Olmeda v. Ohio Dept. of Transp.*, 2009-Ohio-4344.]

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

ALFONSO OLMEDA

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-09660-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Alfonso Olmeda, asserted the tire and rim on his 2008 Acura were damaged when the vehicle struck a roadway defect while traveling through a construction zone on Interstate 480 at approximately 11:30 p.m. on Sunday, August 10, 2008. Plaintiff offered a narrative description of the damage incident noting: "[w]hile traveling northbound on (Interstate) 71 from the airport and merging onto (Interstate) 480 East there was a large slab of cement on the highway, which I failed to see (and) upon impact my car rim was severely bent and the tire ruined." Plaintiff related the particular section of roadway where his property damage occurred "was the start of a construction zone."

{¶ 2} Plaintiff contended the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway through a construction area on Interstate 480 in Cuyahoga County. Plaintiff filed this complaint seeking to recover damages in the amount of $658.23, his total cost of automotive repair resulting from the August 10, 2008 incident. In his complaint, plaintiff acknowledged he carries car insurance coverage with a

$500.00 deductible provision and he further acknowledged he has received payments in the amount of $158.23 from his insurer. Pursuant to R.C. 2743.02(D)[1], plaintiff's damage claim is limited to $500.00. The filing fee was paid.

{¶ 3} 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 pavement repair of I-480 in Cuyahoga County." From plaintiff's description, defendant located the property damage incident between mileposts 8.54 to 8.75 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.

{¶ 4} Alternatively, defendant denied neither DOT nor Karvo had any notice of any debris condition between mileposts 8.54 to 8.75 on Interstate 480 prior to plaintiff's incident. Defendant asserted DOT has no record of any calls or complaints about

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[1] R.C. 2743.40(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provision of division (B)(2) of that section

debris or defective roadway conditions at the particular location on Interstate 480 prior to plaintiff's described property damage event. Defendant observed "that this portion of I-480 has an average daily traffic volume between 108,540 and 120,960, however, no other complaints were received prior to plaintiff's incident."

{¶ 5} Defendant argued plaintiff failed to offer sufficient proof to establish the roadway was negligently maintained or that the damage-causing roadway condition was attributable to conduct on either the part of DOT or Karvo. 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.

{¶ 6} Defendant submitted e-mail correspondence from DOT Project Engineer, Robert J. Wallace, who recorded no work was performed on Interstate 480 on August 10, 2008 due to inclement weather (rain). Additionally, Wallace in referring to the location where plaintiff's incident occurred, stated "[t]he ramp in question did have a permanent zone in the spring, but this zone was removed on May 31, 2008." Defendant provided a copy of the Daily Diary Report for the construction project dated May 31, 2008, which notes on that date Karvo removed the concrete barrier wall and three impact attentuators on ramps on Interstate 480. Also, on May 31, 2008 Karvo cut joints in the pavement on ramp R on Interstate 480.

{¶ 7} Defendant submitted other Daily Diary Reports dated August 7, 2008 and August 8, 2008. These reports indicate a trench was excavated on ramp R and a duct cable was installed, with connector bits.

{¶ 8} 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 or hazardous condition that

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apply under those circumstances."

damaged his vehicle. Furthermore, plaintiff failed to prove either DOT or Karvo had notice of the damage-causing debris condition or created a roadway hazard while conducting construction activities. Plaintiff recalled his vehicle was damaged from traveling over "a large slab of cement on the highway."

{¶ 9} 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.

{¶ 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. 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.

{¶ 11} 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 project. 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.

{¶ 12} Evidence in the instant action is inconclusive to prove 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 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.

{¶ 13} "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.

{¶ 14} Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. It appears plaintiff's injury was caused by 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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