[Cite as *Lamb v. Ohio Dept. of Transp.*, 2009-Ohio-4678.]

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

BEVERLY W. LAMB

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11184-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On October 14, 2008, at approximately 3:00 p.m., plaintiff, Beverly W. Lamb, was traveling south on Montgomery Road (State Route 22/3) in Warren County, when her 2000 Lincoln Town Car struck an uneven pavement condition on the roadway caused by recent construction activity. Plaintiff stated the roadway was "dangerous and unstable (and) [i]t is full of extremely low spots." Plaintiff explained she drove from a paved business parking lot and attempted to turn right onto Montgomery Road when the left front tire on her vehicle, "blew [g]oing from gravel about 5" to the asphalt." Plaintiff attributed her tire damage to the uneven pavement conditions created by construction activity on Montgomery Road. Plaintiff asserted the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining hazardous roadway conditions in a construction area on Montgomery Road or State Route 22/3. Consequently, plaintiff filed this complaint seeking to recover $573.66, the cost of replacement parts and related expenses she incurred as a result of the October 14, 2008 incident. The filing fee was paid.

{¶ 2} Defendant acknowledged the roadway area where plaintiff's described incident occurred was located within a construction zone where DOT contractor, John

R. Jurgensen ("Jurgensen"), was working. Defendant related the construction project "dealt with widening from two lanes to four lanes, including new sewer system and full-depth pavement of SR 22/3 in Hamilton and Warren Counties." Defendant located plaintiff's damage occurrence from her description "at milepost 0.04 which is within the project limits" where Jurgensen worked. Defendant explained the construction area of State Route 22/3 was under the control of Jurgensen and consequently DOT had no responsibility for any damages or mishaps on the roadway within the construction project limits. All construction work performed by Jurgensen was to be done in accordance with DOT mandated requirements and specifications and subject to DOT approval. Defendant asserted Jurgensen, by contractual agreement, was responsible for maintaining the roadway within the construction limits. Therefore, defendant argued Jurgensen 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 Jurgensen nor DOT had any notice of any problem with the road surface at milepost 0.04 prior to plaintiff's incident. Defendant related DOT "records indicate no calls or complaints were received at the Hamilton and Warren County Garage regarding the pavement in question prior to her incident." Defendant noted three complaints were received in reference to State Route 22, but these complaints do not address pavement conditions caused by construction. Defendant argued liability cannot be established when requisite notice of a damage-causing roadway condition cannot be proven. Defendant contended plaintiff failed to provide proof that DOT "in a general sense maintains its highways negligently."

Furthermore, defendant reasoned plaintiff did not offer sufficient evidence to prove any conduct on the part of Jurgensen or DOT caused the October 4, 2008 property damage occurrence.

{¶ 4} Defendant submitted a statement from Jurgensen Project Manager, Jason M. Mudd, regarding his findings about roadway conditions in the construction project area. Mudd noted, "The John R. Jurgensen Company performed all work according to the Contract Documents" with DOT. Additionally, Mudd maintained Jurgensen was not "notified of inaccuracies in the construction or alerted to precarious conditions" on Montgomery Road on or about October 14, 2008.

{¶ 5} Plaintiff filed a response insisting the damage to her automobile was caused by an uneven pavement condition on Montgomery Road created by Jurgensen in preparation for repaving. Plaintiff did not produce any evidence to establish the work performed by Jurgensen was in noncompliance with DOT requirements and specifications and did not meet DOT approval standards.

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

{¶ 7} 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.

{¶ 8} 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. Although defendant's contractor created the roadway condition that allegedly caused damage to the vehicle plaintiff drove, evidence submitted does not support the fact that the condition created was particularly dangerous based on the circumstances attendant to a roadway construction zone.

{¶ 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 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. Evidence available seems to point out the roadway area 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. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190.

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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
4/22
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