[Cite as *Nesselhauf v. Ohio Dept. of Transp.*, 2009-Ohio-5107.]

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
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DANIEL NESSELHAUF

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11061-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Daniel Nesselhauf, asserted that he sustained substantial body damage to his "show room condition (and) perfect" 2008 Mazda Mx-5 Miata while traveling through a roadway construction area on Interstate 71 South at milemarker 155 around Fredricktown on the night of October 20, 2008. Specifically, plaintiff related that his car that he purchased on October 20, 2008 was pelted with concrete debris emanating from a roadway construction site on Interstate 71 where a construction crew as "working around 2 bridges at night." Plaintiff recalled that as he approached the site, which was illuminated, he observed a "large cloud" spanning the roadway and as he traveled "through the cloud (he) heard (debris) hitting (his) car." Plaintiff pointed out that this cloud like condition was caused by the roadway construction work. Plaintiff stated that he continued traveling on Interstate 71 to his residence in Kentucky where he parked his new car in his garage and noticed "the whole car covered with tiny chips (and) some places you could see that pieces of concrete were (embedded) into the clearcoat" finish.

{¶ 2} Plaintiff contended that the body damage to his automobile was

proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain Interstate 71 free of debris during roadway construction. Consequently, plaintiff filed this complaint seeking to recover damages in the amount of $500.00 to $1,000.00 representing his stated insurance coverage deductible for automotive repair, car rental expense, and his "time dealing with this." Plaintiff did not submit any documentation supporting his claims for rental reimbursement or lost time such as time missed from work. Plaintiff paid the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 3} Defendant acknowledged that the area where plaintiff's described damage event occurred was located within the limits of a construction project under the control of DOT contractor, The Ruhlin Company (Ruhlin). Defendant explained that the particular construction project "dealt with grading, draining, resurfacing with asphalt concrete and rehabilitating six structures on I-71 between . . . state mileposts 144.10 to 157.20 in Morrow County." All project work was to be performed by Ruhlin in accordance with DOT mandated requirements and specifications and subject to DOT inspection approval. Defendant asserted that Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction project limits. Therefore, defendant argued that Ruhlin is the proper party defendant in this action. Defendant implied that 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 that neither DOT nor Ruhlin had any "notice of a cloud of flying debris on I-71 prior to plaintiff's incident." Defendant related

that plaintiff reported the "cloud" incident to the DOT Columbus Office on November 3, 2008. Defendant submitted a copy of the written record compiled at the time, which noted that plaintiff reported there was a cloud spanning the roadway and when he arrived home he observed white spots on his black automobile. Defendant asserted that DOT records show no other calls or complaints were received about a "cloud of flying debris" across the roadway despite the fact "that this portion of I-71 has an average daily traffic volume of between 29,080 and 41,900."

{¶ 5} 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.

{¶ 6} Generally, 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. Plaintiff, in the instant claim, has alleged that the damage to his vehicle was directly caused by construction activity of DOT's contractor on October 20, 2008.

{¶ 7} Defendant contended that plaintiff failed to offer sufficient evidence to prove his property damage was caused by negligent roadway maintenance. Additionally, defendant contended that plaintiff failed to produce evidence to establish that his damage was proximately caused by conduct attributable to DOT or Ruhlin. Defendant submitted a copy of a written statement from Ruhlin Project Manager, Mark Myers, regarding the Ruhlin work schedule for October 20, 2008 on Interstate 71. Myers confirmed that "[o]n the night of 10/20/08 we were in fact placing concrete for the

southbound I-71 bridge deck over Township Road 95 at about mile 157 and were using lights as described in (plaintiff's) complaint." However, upon conducting his investigation into the work performed, Myers related that he was informed by the on-site workers "that at no time were we creating a cloud nor did we have any operation that would cause debris to affect the passing traffic." Furthermore, Myers offered the following narrative description of the work operation conducted on October 20, 2008:

{¶ 8} "The concrete pump truck was operating from the road below, well away from traffic. All concrete was delivered to the site from the local roads below. We had no material delivery trucks entering or exiting the work zone from the mainline I-71. At all time during the pour, the pump hose was keep close to the deck which would have eliminated any possible splash of concrete. In addition, the deck being placed was well away from traffic (8' minimum) and separated by a concrete barrier."

{¶ 9} Myers noted that the DOT inspector (Tina M. Fosnaugh) was on-site during the concrete work. Myers suggested that the damage plaintiff claimed from stone chips could have emanated from any road or source.

{¶ 10} Defendant submitted a written statement from DOT Inspector, Tina M. Fosnaugh, who recorded that Ruhlin performed "[c]oncrete placement on the southbound structure" at milemarker 157 on Interstate 71 at the approximate time of plaintiff's stated incident. Fosnaugh offered the following narrative description of the concrete placement operation coupled with her observations regarding potential damage caused by concrete:

{¶ 11} "On the night in question, the only operations going on at the time the plaintiff claims to have gone through the project was concrete placement, finishing & clean up. Placement of concrete with a pump (that's base -where the concrete is loaded in from the trucks- was down under I 71 on Perry Township Road #95) does not spray concrete out forcefully enough to send it into traffic 8 foot away, at the closest point, and over 32 inches high to clear the portable concrete barrier. If, by chance, it did, the concrete would not create the damages that the plaintiff claimed, it would just stick to the vehicle and harden. With this, I have personal experience. With finishing concrete, there is no splatter. Men & women are smoothing out the concrete with hand trowels & brooms and the concrete is then covered with wet burlap and plastic. Soaker hoses are placed prior to the placement of the plastic. Furthermore, with clean up,

there may be splatter, but I distinctly remember that the contractor's workers were facing away from traffic while spraying the equipment with water hoses."

{¶ 12} Additionally, defendant offered a written statement from DOT Project Engineer, Leslie Montgomery, who expressed the following observations and opinions regarding concrete placement and resulting damage potential to motorists:

{¶ 13} "The work was a concrete deck pour using a concrete pump. There is nothing in that operation that could cause a cloud of dust or vapor. The only possibility is that concrete could splash out of the deck and hit the car.

{¶ 14} "This is unlikely because traffic was a minimum of 9' feet away from the pump nozzle which is kept at a height of 2' or so above the rebar. The concrete would have to splash with enough energy to clear the 32" portable barrier and travel over 9' to get the car.

{¶ 15} "If concrete were to splash up it would not cause a cloud of destruction or chips all over the car."

{¶ 16} 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. 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.

{¶ 17} 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.

{¶ 18} Plaintiff, in the instant claim, asserted that the damage to his automobile was caused by the concrete placement operation conducted by DOT's contractor in the presence of DOT's inspector. Defendant disputed plaintiff's allegation that his property damage was caused by negligent performance of roadway construction activities or negligent inspection.

{¶ 19} "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 that his 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 that the concrete placement operations was performed properly under DOT specifications. Plaintiff failed to prove that his 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.

_____
MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
4/28
Filed 5/29/09
Sent to S.C. reporter 9/29/09