[Cite as *Mullins v. Ohio Dept. of Transp., Dist. 8*, 2009-Ohio-5110.]

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

BRENDA MULLINS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2008-11371-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Brenda Mullins, related she lives at a residence in Loveland, Ohio adjacent to State Route 22/3 in an area where the roadway was being widened from two lanes to four lanes and existing lanes were scheduled for repaving. Plaintiff noted that the end of the driveway to her residence abuts State Route 22/3 where roadway construction work was performed between October 8, 2008 to October 17, 2008. Plaintiff asserted the construction workers who prepared the roadway near her residence for repaving graded the entrance to her driveway "too steep causing damage to my car." Plaintiff stated her 2008 Toyota Yaris "would drag under (the) front bumper-entering and leaving" the driveway area where the pavement on State Route 22/3 had been milled. Plaintiff pointed out the spoiler on her car was damaged as a result of scraping on the driveway entrance. Plaintiff contended her property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT") , in maintaining the roadway free of defective conditions in a construction project area on State Route 22/3 in Warren County. Consequently, plaintiff filed this complaint seeking to recover $145.63, her cost of automotive repair. The filing

fee was paid.

{¶ 2} 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, John R. Jurgensen Company ("Jurgensen"). Defendant explained the construction project "dealt with widening from two lanes to four lanes, including new storm sewer system and full-depth pavement of SR 22/3 in Hamilton and Warren Counties." Defendant located plaintiff's described incident on State Route 22/3 at approximately milepost 0.50, a location within the limits of the construction project. Defendant asserted this particular construction project area of State Route 22/3 was under the control of Jurgensen and consequently, DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant further asserted that Jurgensen, by contractual agreement, was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT approval, specifications and requirements. 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 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} Defendant denied Jurgensen was ever notified by plaintiff about a problem with her driveway entrance being graded too steep to avoid damage to the underside of her car. However, defendant acknowledged "[p]laintiff spoke many times with ODOT's Project Inspector, Cory Carfora about her driveway and he made sure the grade was done properly but she never mentioned that she had bumper damage." Defendant contended that plaintiff failed to provide proof that DOT "in a general sense maintains its highways negligently." Furthermore, defendant argued plaintiff did not offer sufficient evidence to prove any conduct on the part of Jurgensen or DOT caused the property

damage claimed.

{¶ 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 State Route 22/3 during October 2008.

{¶ 5} Plaintiff filed a response explaining she was advised by Jurgensen personnel to contact DOT Project Manager, Cory Carfora, concerning the problem with her driveway created by the road repaving work. Plaintiff recalled she notified Carfora about her automotive damage and he recommended she file this claim.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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. Defendant professed liability cannot be established when requisite notice of the damage-causing 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 a dangerous condition is not necessary when defendant's own agents actively cause such condition, as it appears to be the situation in the instant matter. 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 produced sufficient evidence to prove her property damage was caused by a defective condition created by DOT's agents. See *McTear v. Ohio Dept. of Transp., Dist. 12,* Ct. of Cl. No. 2008-09139-AD, 2008-Ohio-7118.

{¶ 9} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. In the instant action, the trier of fact finds that the statements of plaintiff concerning the origin of the damage-causing condition are persuasive. Consequently, defendant is liable to plaintiff for the damages claimed, $145.63, plus the $25.00 filing fee which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $170.63, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
4/22
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