[Cite as *Fountain v. Dept. of Transp., Dist. 12*, 2009-Ohio-6604.]

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

RAYMOND FOUNTAIN

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-10935-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} Plaintiff, Raymond Fountain stated that "I was driving on Interstate I-480 near the Forbes Road [o]r near I-480 and 271 in the months of August and September (2008) (and) the white paint from the (new) white lines they were putting down got all over the right side of my mini van and (also) the rear end." Plaintiff implied that the paint damage to his 1999 Dodge Caravan was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in conducting edge line painting operations on Interstate 480 in Cuyahoga County. Consequently, plaintiff filed this complaint seeking to recover $1,339.33, the total cost of repairing paint damage to his van. Plaintiff submitted an estimate for repair costs dated November 12, 2008. The filing fee was paid.

{¶ 2} Defendant explained that a DOT representative contacted plaintiff to obtain a better description regarding a more specific time and particular roadway section in reference to when and where the claimed paint damage incident occurred. Defendant asserted that plaintiff stated "that he was westbound on I-480 going towards

northbound I-271 and it happened around his birthday which is August 23rd." Defendant related that DOT maintenance records were checked for the period August 1 to September 30, 2008 and no DOT crews conducted painting operations on the described section of roadway during the time period. Defendant submitted copies of the maintenance records covering the August 1 to September 30, 2008 time frame. Defendant denied receiving any calls or complaints regarding problems with paint on the roadway. Defendant submitted DOT complaint records from the period March 1 to September 30, 2008.

{¶ 3} Defendant pointed out that DOT contractor Aero-Mark, Inc. conducted permanent pavement marking painting operations on Interstate 271 from October 7 through October 11, 2008. A & A Safety, a subcontractor of Aero-Mark, Inc., conducted temporary pavement marking painting operations on Interstate 271 at an earlier date. Defendant submitted a copy of a DOT record, "Diary Remarks For Project" for the dates from August 11, 2008 to September 30, 2008. An entry dated September 22, 2008 bore the notation "came back late to work on 2nd application of fast dry pavement markings along 271 local lanes from I480-I90. Told Aeromark to just apply approx, 200 miles of lane lines and 150 miles of edgelines."

{¶ 4} Defendant recalled that a second construction project on Interstate 271 was under the control of DOT contractor, Kokosing Construction Company ("Kokosing"). Defendant filed a statement from Kokosing representative, Pam J. LeBlanc, regarding work performed on Interstate 271 between August 18, 2008 and August 25, 2008. According to LeBlanc, during the specified time frame, Kokosing was working on the southbound lanes of Interstate 271 and Kokosing subcontractor performed paint striping operations on these southbound lanes in the early morning hours. LeBlanc noted that Kokosing did not work on August 23 and August 24, 2008.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 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} Plaintiff has the burden of proof to show that his property damage was the direct result of the failure of defendant to exercise ordinary care in conducting roadway painting operations. *Brake v. Department of Transportation* (2000), 99-12545-AD. A failure to exercise ordinary care may be shown in situations where motorists do not receive adequate or effective advisement of a DOT painting activity. See *Hosmer v. Ohio Department of Transportation*, Ct. of Cl. No. 2002-08301-AD, 2003-Ohio-1921. In the instant claim, plaintiff has failed to prove DOT conducted any painting activity during the described time period.

{¶ 8} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his injury was proximately caused by defendant's negligence. Plaintiff has failed to show that his property damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the area, or that there was 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.

{¶ 9} This court has previously held DOT cannot be held liable for any alleged negligence on the part of Aero-Mark, Inc. or other contractors in conducting painting operations on state roadways. DOT may by contract delegate its duty of care in situations where an independent contractor such as Aero-Mark, Inc. undertakes roadway painting projects. See *Henderson v. Ohio Dept. of Transportation*, 2003-

11496-AD, 2004-Ohio-1839, adopting the rationale expressed in *Gore v. Ohio Dept. of Trans*., Franklin App. No. 02-AP-996, 2003-Ohio-1648. DOT is not the proper party defendant in this action and therefore, this claim is dismissed.

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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
7/17
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