

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

PETER D. GREENBERG

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-06466-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Peter D. Greenberg, filed this action against defendant, Department of Transportation (“DOT”), claiming his boat trailer was damaged on April 24, 2008, as a proximate cause of negligence on the part of DOT in maintaining the roadway at the intersection of State Route 98 and State Route 95 through a construction zone. In his complaint, plaintiff provided a narrative description of the damage incident. Plaintiff wrote: “I was driving north on SR 98 in my 2001 Cadillac Deville and was towing my fishing boat on the way to Lake Erie. As I approached the intersection of SR 98 and SR 95 I slowed down to 25 mph-30 mph when I saw the gravel trench in the road. The car came through with no problem. But when my trailer entered the trench it bounced and tore the driver side axle off the frame and it became positioned under the back of the boat.” Apparently the damage incident occurred in an area where the existing asphalt roadway pavement had been removed in preparation for adding a turn lane on State Route 98. There were actually two areas on State Route 98 where existing pavement had been removed and filled with gravel. The cut out pavement areas were approximately 4’2” wide and spanned both roadway lanes of

State Route 98. Plaintiff related that as a result of the described incident involving roadway conditions, he not only damaged his boat trailer but also damaged boat accessories. Plaintiff filed this complaint seeking to recover \$2,002.66, an amount representing expenses he incurred for property loss and related costs. The filing fee was paid.

{¶ 2} With his complaint, plaintiff submitted photographs depicting the roadway condition on State Route 98. The photographs, taken on April 24, 2008, show areas where existing pavement has been removed and filled with what appears to be gravel aggregate. Despite plaintiff's contention, the trier of fact finds after review the photographs, that the areas depicted do not constitute a "trench" or "ditch." The areas where the pavement has been removed appear to be almost flush with the existing paved roadway surface. The transition from paved to unpaved portion may not have been smooth, but the photographs do not depict a transition that is particularly precipitous or uneven. Loose stone, seemingly used as filler, is present on the unpaved roadway portion and throughout the construction area depicted.

{¶ 3} Defendant acknowledged the described incident occurred within a construction project area under the control of DOT contractor, Shelly & Sands, Inc. ("Shelly"). Defendant explained the particular project "dealt with grading, draining, paving with asphalt concrete on an aggregate base, upgrade traffic signals, and by widening in part on SR 95 in Marion County." Defendant noted "[p]laintiff's description of the incident area at SR 95 and SR 98 places him at milepost 19.97 which is within the project limits." Defendant asserted Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction area and was responsible "for any occurrences or mishaps in the area in which they are working." Therefore, DOT argued Shelly is the proper party defendant in this specific action despite the fact all construction work was to be performed in accordance with DOT requirements, specifications, and approval. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, 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 the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 4} Alternatively, defendant denied neither Shelly nor DOT had any "notice of the pavement on SR 98 prior to plaintiff's incident." Defendant recalled no other complaints were received regarding roadway conditions despite the fact "this portion of SR 95 @ SR 98 has an average daily traffic volume between 3,910 and 4,310." Defendant asserted plaintiff has failed to produce evidence to establish the roadway was negligently maintained and he has also failed to prove his damage was caused by conduct attributable to either Shelly or DOT.

{¶ 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. 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 difference 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.

{¶ 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} Defendant submitted a letter from Shelly representative, Danielle Taylor, in reference to roadway conditions within the project area on April 24, 2008. Taylor noted Shelly project foreman, Rodney Schmittler, was contacted and he recalled Shelly employees did not work at the roadway crossover on April 24, 2008 but it was inspected daily until permanently paved. According to Taylor, Schmittler reported DOT personnel were in the area daily and inspected the site where the pavement was removed on a consistent basis to note any deficiencies.

{¶ 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 boat trailer, evidence submitted does not support the fact that the condition created was particularly dangerous based on the circumstances attendant to a roadway construction zone. See *Wellington v. Ohio Dept. of Transp.* (2009), 2008-09155-AD.

{¶ 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 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; Nicastro v. Ohio*

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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:

Peter D. Greenberg
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RDK/laa
7/30
Filed 8/21/09
Sent to S.C. reporter 12/18/09

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