[Cite as *Gdovichin v. Ohio Dept. of Transp.*, 2009-Ohio-6732.]

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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THEODORE GDOVICHIN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03100-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Theodore Gdovichin, filed this action against defendant, Department of Transportation (DOT), alleging that his 2008 Pontiac Vibe was damaged while traveling through a construction zone on Interstate 90 in Lake County. Plaintiff described the property damage incident noting that: "[o]n Friday May 30, 2008 I was on my way to work on Rt. 90 Westbound at 6:31 a.m, I was in sight of the Rt 615 overpass (milemarker W90 195/8) when I encountered an extreme amount of abrasive material on the road, which coincided with the freshly painted lines on the road. This situation lasted until after passing Rt. 306 (milemarker W90 193/0), which is where the freshly painted lines ended. No matter what evasive action I took, I could hear this abrasive material hitting my car-especially the windshield." Plaintiff claimed that the described abrasive material "sandblasted" his vehicle's windshield and both headlight assemblies and chipped paint on the car's hood. The filing fee was paid.

{¶ 2} 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, Anthony Allega Cement Contractor, Inc. (Allega). Defendant explained that the particular construction project "dealt with major reconstruction of I-90 in the Cities of Mentor, Willoughby and Kirtland and these would relate to *** state mileposts 192.80 to 200.77 in Lake County." All project work was to be performed by Allega in accordance with DOT mandated requirements and specifications and subject to DOT inspection approval. Defendant asserted that Allega, 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.

{¶ 3} Alternatively defendant denied that neither DOT nor Allega had any "notice of abrasive material on I-90 prior to plaintiff's incident." Defendant asserted that DOT records show no calls or complaints were received regarding abrasive material on the roadway prior to plaintiff's incident. Defendant pointed out that the only complaint of abrasive material was the one filed by plaintiff despite the fact that "this portion of I-90 has an average daily traffic volume between 42,210 and 74,980."

{¶ 4} 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.

{¶ 5} 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 prior to May 30, 2008.

{¶ 6} Defendant contended that plaintiff failed to offer sufficient evidence to prove that 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 Allega. Defendant submitted documentation showing that Allega subcontractor, Trafftech, Inc., performed pavement markings work on the project on May 29, 2008 starting at 6:30 p.m. and completing work at 4:00 a.m. on May 30, 2008. Plaintiff stated that his damage incident occurred at approximately 6:31 a.m. on May 30, 2008. Defendant filed a written statement from Trafftech, Inc. President, William J. Porter, who offered an explanation of the pavement markings work performed between milemarkers 192.8 and 196.2 on Interstate 90. Porter prepared the following description of the work:

{¶ 7} "sand blast prep, water blasting prep, and scarify prep are all acceptable methods of preparing the surface for markings. Trafftech uses the scarify prep method. This method lightly abrades the surface to enhance the bonding of material. It creates a fine 'dust' which must be cleaned up before any markings can be applied.

{¶ 8} "The scarify prep method was used on this project. We had no sandblasting equipment on tis [sic] project and performed no sandblasting."

{¶ 9} Additionally, Porter noted that "In my 20 years of pavement marking, our work process has never caused a 'blasting effect' incident onto automobile traffic." Porter suggested that any abrasive material that may have damaged plaintiff's vehicle

was likely deposited on the roadway by an unidentified third party motorists not affiliated with Trafftech, Inc.

{¶ 10} 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 the 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.

{¶ 11} 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.

{¶ 12} Plaintiff, in the instant claim, asserted that the damage to his automobile was caused by the pavement markings procedure conducted on May 29 and May 30, 2008. Defendant disputed plaintiff's allegation that his property damage was caused by negligent performance of roadway construction activities.

{¶ 13} "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 pavement markings operations were performed properly under DOT specifications and did not create any abrasive material posing any danger or damage-causing potential to motorists on the roadway. 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
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