[Cite as *Steele v. Ohio Dept. of Transp.*, 2009-Ohio-6355.]

Court of Claims of Ohio

The Ohio Judicial Center
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RICHARD W. STEELE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11559-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On August 19, 2008, at approximately 1:30 p.m., plaintiff, Richard W. Steele, was traveling west on U.S. Route 20 "near the intersection of Garfield Rd and Mentor Ave" through a construction zone, when the 2004 Jeep Cherokee he was driving struck a raised manhole cover causing tire damage. The roadway area through the construction zone had been milled in preparation for repavement and numerous existing manhole covers were left higher than the roadway surface due to the milling process. Submitted photographs depict signage was in place advising motorists of the raised manhole covers or castings. The signage in place bore the advisements "Raised Castings In Pavement" and "Caution Raised Castings." Plaintiff implied the property damage he sustained was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining hazardous roadway conditions in a construction area on U.S. Route 20 in Lake County. Plaintiff seeks damages in the amount of $191.50, the cost of a replacement tire. The filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant acknowledged the area where plaintiff's stated damage event

occurred was located within a construction zone maintained by DOT contractor, Burton Scot Contractors ("BSC"). Defendant related the construction "project dealt with draining, planning and resurfacing with asphalt concrete of US 20 in Lake County." Defendant asserted BSC, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore DOT argued BSC is the proper party defendant in this 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.

{¶ 3} 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. *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.

{¶ 4} Alternatively, defendant denied neither DOT nor BSC had any knowledge "of any problems with the manhole covers on this project." Defendant explained DOT records "indicate that no calls or complaints were received at the Lake County Garage regarding the manhole cover in question prior to (plaintiff's) incident." Defendant contended plaintiff failed to offer sufficient evidence to prove the roadway was negligently maintained or that the damage claimed was the result of conduct attributable to either DOT or BSC.

{¶ 5} Defendant submitted a written statement from BSC Safety Officer, Bea

Rausch regarding the condition of U.S. Route 20 in the construction project limits on December 4, 2008. Rausch pointed out the construction area was posted and set in accordance with DOT regulations and "extra signage had been placed and castings were padded with asphalt." Accompanying photographs (take August 19, 2008) depict asphalt padding around manhole covers (castings) on the milled roadway surface. Rausch noted BSC made "[e]very effort was made to insure the safety of both vehicle and pedestrian traffic." Furthermore, according to Rausch "all phases of the project (which include, but were not limited to the milling, paving and the castings), were performed according to the Ohio Department of Transportation specifications."

{¶ 6} 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. 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 notice of a dangerous condition is not necessary when defendant's own agents actively caused 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. However, evidence

has not shown defendant's agents created a hazardous condition by milling the roadway surface in accordance with DOT specifications. Furthermore, evidence has been presented to establish plaintiff was notified about the pavement conditions and was responsible for taking some driving precautions based on road conditions. *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232-AD, 2008-Ohio-4190.

{¶ 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 both under 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*.

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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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Mentor, Ohio 44060

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RDK/laa
7/14
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