

# 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

ANTON FLONNORY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-06253-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Anton Flonnory, stated that he was traveling on Interstate 271 on May 12, 2008 and “[u]pon exiting Rockside Road (Exit 26) the debris from construction project 7-08 hit the windshield of my 2005 Acura.” Plaintiff maintained that the roadway debris material caused a small crack in the windshield of his vehicle. Plaintiff contended that the property damage claimed was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in maintaining a construction area on Interstate 271 in Cuyahoga County. Consequently, plaintiff filed this complaint seeking to recover \$1,500.00, the total cost of a replacement windshield and car rental expenses. The filing fee was paid.

{¶ 2} Defendant acknowledged that the described incident occurred within a construction zone, Project Number 466(07), where major roadway reconstruction was being performed. Defendant explained that DOT contractor, Karvo Paving Company (Karvo), had control over the roadway construction area on Interstate 271. Defendant asserted that Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued that Karvo is the proper party defendant in this action. Defendant implied that 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 section of roadway. All work by the contractor was to be performed in accordance with DOT mandated specifications and requirements. Defendant contended that plaintiff failed to produce sufficient evidence to prove the damage to his automobile windshield was caused by roadway conditions created by DOT or its contractor.

{¶ 3} Alternatively, defendant denied that neither DOT nor Karvo had any notice of any debris material on the traveled portion of Interstate 271 prior to plaintiff's property damage occurrence. Defendant located plaintiff's incident at county milepost 4.17 on Interstate 271, a location within the construction project limits and an area where paving preparation work was performed days before the May 12, 2008 damage occurrence. Defendant submitted a written statement from Karvo Safety Risk Manager, Cathleen Geddes, regarding the paving preparation work performed in the vicinity of county milepost 4.17 on Interstate 271. Geddes noted that Karvo employees began milling roadway pavement in this area on May 9, 2008 and a Karvo sub contractor swept any milling debris from the roadway. According to Geddes, milling and roadway clean up operations were completed by 7:30 a.m. on May 10, 2008. Geddes recorded that thousands of vehicles traveled on the roadway after the milling operation and prior to plaintiff's May 12, 2008 incident. Geddes also recorded that all DOT mandated traffic control including required notification signage was in place at the site. Defendant maintained that plaintiff failed to prove that his May 12, 2008 property damage was caused by any debris left on the roadway from the milling operation that occurred on May 9 and May 10, 2008.

{¶ 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. 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. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT

did not owe any duty in regard to the construction project, defendant was charged with duties 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. No. 00AP-1119. No evidence other than plaintiff's assertion has been produced to show that a hazardous condition was maintained by Karvo 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 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 failed to produce sufficient evidence to prove that his property damage was caused by a defective condition created by DOT's agents. Evidence at best is inconclusive regarding the origin of the debris which damaged plaintiff's vehicle. Defendant insisted that the debris condition was not caused by maintenance or construction activity.

{¶ 6} Generally, in order to recover in any suit involving injury proximately caused by roadway conditions including debris, plaintiff must prove that either: 1) defendant had actual or constructive notice of the debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the debris condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show that defendant had actual notice of the debris. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication that defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer that defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶ 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 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. Plaintiff, in the instant claim has failed to prove that defendant or its agents breached any duty of care which resulted in property damage. Evidence available seems to point out that the roadway area was relatively clean of debris and was maintained properly under DOT specifications. Plaintiff failed to prove that his damage was proximately caused by any negligent act or omission on the part of DOT or its agents.

# 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

ANTON FLONNORY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-06253-AD

Clerk Miles C. Durfey

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

Entry cc:

Anton Flonnory  
542 East 108th Street, Apt. 107  
Cleveland, Ohio 44108

James G. Beasley, Director  
Department of Transportation  
1980 West Broad Street  
Columbus, Ohio 43223

RDK/laa  
10/21  
Filed 12/18/08  
Sent to S.C. reporter 3/6/09

