

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

CATHERINE A. ELLWOOD-RITCHIE

Case No. 2007-02700-AD

Plaintiff

Clerk Miles C. Durfey

v.

MEMORANDUM DECISION

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

FINDINGS OF FACT

{¶1} 1) On January 24, 2007, at approximately 3:00 p.m., Rachel A. Ritchie, was driving a 2002 Toyota Corolla LE east on Interstate 270 through a construction zone, “near the 161 overpass,” when the vehicle struck a large pothole in the traveled portion of the roadway. The pothole caused tire and wheel damage to the 2002 Toyota Corolla LE, owned by plaintiff, Catherine A. Ellwood-Ritchie, the mother of Rachel A. Ritchie. Plaintiff related that the damage-causing pothole, “was over 18” in diameter and was more than 5” deep.”

{¶2} 2) Plaintiff filed this complaint seeking to recover \$267.71, the cost of replacement parts resulting from the January 24, 2007, incident. Plaintiff asserted that she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation (DOT), in maintaining the roadway in a construction zone on Interstate 270 in Franklin County. The filing fee was paid.

{¶3} 3) Defendant observed that the area where plaintiff’s damage occurred

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was located within a construction area under the control of DOT contractor, National Engineering & Contracting Company (National). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor National had any knowledge of the roadway defect plaintiff's vehicle struck. Defendant contended that no calls or complaints were received regarding defective roadway conditions prior to plaintiff's incident. Defendant located the particular damage-causing condition at milepost 30.52 on Interstate 270. According to DOT's information the construction zone maintained by National covered Interstate 270 between mileposts 29.50 and 31.20.

{¶4} 4) Defendant asserted that National, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that National 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 construction was to be performed to DOT requirements and specifications.

{¶5} 5) Defendant noted that neither DOT nor National has any record of a pothole near milepost 30.52 on Interstate 270 on or before January 24, 2007.

{¶6} 6) Plaintiff filed a response on July 5, 2007, noting she originally misstated the location of the damage-causing pothole, "in the eastbound lane of I-270 near the I-161 overpass." Plaintiff observed the damage-causing pothole was actually and correctly located, "in the eastbound lane of I-161 (State Route 161) near the I-270 intersection."

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Additionally, plaintiff related that she has since the January 24, 2007, incident discovered additional damage to her car and requested that her complaint be amended to reflect this further damage claim of \$273.11, as well as the original damage claim. Plaintiff did not submit any evidence to establish the length of time the damage-causing pothole (relocated on State Route 161) existed prior to the January 24, 2007, incident. Plaintiff submitted photographs depicting numerous pothole patches on State Route 161. Plaintiff did not submit a photograph of the particular pothole, either repaired or unrepaired, that caused her property damage.

{¶17} 7) On July 18, 2007, defendant filed a reply to plaintiff's response and a supplemental investigation report. Defendant reviewed the location plaintiff provided in her response and found that neither the defendant nor National had received any complaints concerning a pothole in that location prior to plaintiff's damage-causing incident.

CONCLUSIONS OF LAW

{¶18} 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, 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.

{¶19} In order to prove a breach of duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive

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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, 507 N.E. 2d 1179. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. However, plaintiff failed to produce sufficient evidence to establish DOT or DOT's agents had either actual or constructive notice of the damage-causing pothole.

{¶10} 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*, 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. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. No. 00AP-1119. However, no evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained on the pavement project.

{¶11} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty,

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and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. Plaintiff has the burden of proving, by a preponderance of the evidence, that she 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, 61 N.E. 2d 198, approved and followed.

{¶12} 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, 465; *Rhodus*, supra, at 729; *Feichtner*, supra, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove her

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property damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction area, or that there was any negligence on the part of defendant or its agents. *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. Consequently, plaintiff's claim is denied.

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OHIO DEPARTMENT OF
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ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant

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:

Catherine A. Ellwood-Ritchie
5546 Beecher Road S.W.
Granville, Ohio 43023

James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
7/11
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