

[Cite as *Gilbert v. Ohio Dept. of Transp.*, 2002-Ohio-4556.]

IN THE COURT OF CLAIMS OF OHIO

|                          |   |                        |
|--------------------------|---|------------------------|
| DORIS GILBERT            | : |                        |
| 215 Mill Street          | : |                        |
| Morrow, Ohio 45152       | : | Case No. 2002-01179-AD |
| Plaintiff                | : | MEMORANDUM DECISION    |
| v.                       | : |                        |
| DEPT. OF TRANSPORTATION- | : |                        |
| DIV. OF HIGHWAYS         | : |                        |
| Defendant                | : |                        |

: : : : : : : : : : : : : : : :

For Defendant: Gordon Proctor, Director  
 Department of Transportation  
 1980 West Broad Street  
 Columbus, Ohio 43223  
 : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶1} Plaintiff, Doris Gilbert, has alleged that at some unspecified time during 2001, her home received structural damage as a result of road construction activities conducted by Complete General Construction Company (Complete General), a contractor of defendant, Department of Transportation. Specifically, plaintiff's property was damaged when plaster from an original ceiling in her house collapsed onto a false ceiling below. Plaintiff asserted the falling plaster was caused by vibrations created from Complete General's construction vehicles performing bridge work on State Route 123 within fifty feet of plaintiff's house. Although

plaintiff claimed Complete General's equipment caused the damage to her property, she has not offered any evidence to establish the falling plaster in her home resulted from nearby roadway construction activities. Plaintiff filed this complaint seeking to recover \$126.63, the cost of repairing her damaged property. Plaintiff submitted the filing fee with the complaint.

{¶2} Defendant has denied liability in this matter. Defendant acknowledged Complete General performed construction work on State Route 123 in the Village of Morrow, Warren County near plaintiff's home on Mill Street. Defendant explained work on the construction project began on August 10, 2000. Defendant related it first received notice of the damage in plaintiff's house on or about December 1, 2001. Defendant has contended plaintiff has failed to provide sufficient evidence to show the proximate cause of her property damage was roadway construction on State Route 123.

#### CONCLUSIONS OF LAW

{¶3} Defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside construction activities to protect property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio

App. 3d 723.

{¶4} This court concludes plaintiff has presented a claim grounded in nuisance. To constitute a nuisance, the thing or act complained of must either cause injury to the property of another, obstruct the reasonable use or enjoyment of such property, or cause physical discomfort to such person. *Dorrow v. Kendrick* (1987), 30 Ohio Misc. 2d 40. Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence act. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274 at 275, 595 N.E. 2d 855.

{¶5} "[A] civil action based upon the maintenance of a qualified nuisance is essentially an action in tort for the negligent maintenance of a condition, which, of itself, creates an unreasonable risk of harm, ultimately resulting in injury. The dangerous condition constitutes the nuisance. The action for damages is predicated upon carelessly or negligently allowing such condition to exist. *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176, 180."

{¶6} 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, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed. In the instant claim, plaintiff has failed to present sufficient evidence to establish her property damage was caused by the operations of defendant's contractor. Consequently, her claim is denied.

{¶7} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶8} IT IS ORDERED THAT:

{¶9} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶10} 2) Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT  
Deputy Clerk