[Cite as *Perkins v. Dayton*, 2003-Ohio-5313.]

IN THE COURT OF CLAIMS OF OHIO

JAMES H. PERKINS	:	
Plaintiff	:	CASE NO. 2002-08955-PR Judge J. Warren Bettis
v.	:	
		DECISION
CITY OF DAYTON, et al.	:	
Defendants	:	
and	:	
A & A SAFETY, INC., et al.	:	
Defendants/Third-Party Plaintiffs	:	
v.	:	
OHIO DEPARTMENT OF TRANSPORTATION, et al.	:	
Third-Party Defendants	:	

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{¶1} On June 19, 2003, defendant/third-party plaintiff, A & A Safety, Inc. (A & A), filed a motion for summary judgment pursuant to Civ.R. 56(B). On July 14, 2003, the court granted plaintiff leave until August 18, 2003, to respond to the motion. To date, plaintiff has not responded. The case is now before the court for a non-oral hearing on the motion for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} In his complaint, plaintiff alleges that on April 17, 2000, he suffered personal injury and property loss when his vehicle came into contact with a large pothole while he was driving in the left northbound lane of I-75 near the Edwin C. Moses exit in the city of Dayton. There is no dispute that I-75 is a state highway; that the portion of I-75 where plaintiff's accident occurred was undergoing reconstruction by the Ohio Department of Transportation (ODOT) at the time of plaintiff's accident; and that A & A had been hired by Complete General Construction, Co. (CGC), one of ODOT's general contractors, to provide traffic control during the project.

{¶5} Plaintiff alleges that A & A owed him a duty to exercise due care to assure that the paved portion of the roadway was

reasonably safe for use by the traveling public and free of any nuisance; that A & A breached that duty by allowing a large pothole to exist in the roadway; and that A & A's negligence proximately caused his damages.

{¶6} To prevail on a claim of negligence, a plaintiff must show by a preponderance of the evidence that defendant owed him a duty, that defendant breached that duty, and that the breach proximately caused his injury. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. As a general rule, ODOT has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Dept. of Transportation* (1976), 49 Ohio App.2d 335. See, also, *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723.

{¶7} In support of the motion for summary judgment, A & A submitted the affidavit of Raymond Brink, an A & A project manager, and a copy of the purchase order executed by A & A and CGC for the construction project at issue. The affidavit and purchase order supported A & A's contention that it did not assume any obligation to perform paving or other maintenance work on this project and that any such obligation was expressly excluded thereby. Additionally, Brink's affidavit supported A & A's contention that it had neither actual or constructive notice or knowledge of the existence of the pothole prior to plaintiff's accident.

{¶8} The Tenth District Court of Appeals has stated:

{¶9} "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on a material element of one or more of the nonmoving party's claims for relief. *Dresher v. Burt*

(1996), 75 Ohio St.3d 280, 292, ***. If the moving party satisfies this initial burden by presenting or identifying appropriate Civ.R. 56(C) evidence, the nonmoving party must then present similarly appropriate evidence to rebut the motion with a showing that a genuine issue of material fact must be preserved for trial. *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1, 2, ***. The nonmoving party does not need to try the case at this juncture, but its burden is to produce more than a scintilla of evidence in support of its claims. *McBroom v. Columbia Gas of Ohio, Inc.* (June 28, 2001), Franklin App. No. 00AP-1110, ***." *Nu-Trend Homes, Inc. et al. v. Law Offices of DeLibera, Lyons & Bibbo et al.*, Franklin App. No. 01AP-1137, 2003-Ohio-1633.

{¶10} As stated above, plaintiff has not responded to A & A's motion for summary judgment. Thus, applying the appropriate standard of review, the court finds that the only reasonable conclusion to be drawn from the undisputed evidence set forth above is that A & A is not liable to plaintiff under a negligence theory. Consequently, there are no genuine issues of material fact for trial and A & A is entitled to judgment as a matter of law.

{¶11} For the foregoing reasons, the motion for summary judgment shall be GRANTED.

{¶12} A non-oral hearing was conducted in this case upon defendant/third-party plaintiff's, A & A Safety, Inc., motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant/third-party plaintiff's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant/third-party plaintiff.

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J. WARREN BETTIS
Judge

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