

{¶ 3} In order for plaintiffs to prevail upon their claim of negligence, they must prove by a preponderance of the evidence that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. As a general rule, defendant has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transportation* (1976), 49 Ohio App.2d 335. See, also, *Rhodus v. Ohio Dept. of Transportation* (1990), 67 Ohio App.3d 723. However, defendant is not an insurer of the safety of state highways. *Rhodus*, supra, at 730. In order for liability to attach to defendant for damages caused by hazards upon the roadway, plaintiffs must demonstrate that defendant had actual or constructive notice of the existence of such hazard. See *McClellan v. Ohio Dept. of Transportation* (1986), 34 Ohio App.3d 247; *Knickel*, supra; *Pearson v. Ohio Dept. of Transportation* (Nov. 6, 1997), Court of Claims No. 96-06773.

{¶ 4} Plaintiffs contend that defendant breached its duty of care by leaving an excessive amount of gravel in the roadway, thereby creating a hazard to motorists. Joseph Thompson testified that he saw the loose gravel on the roadway seconds before he drove over it and lost control. He also testified that he had not encountered gravel on that area of the road before. According to Thompson, SR 646 was generally well-maintained, but occasionally had patches of loose gravel. Thompson testified that he would not ride his motorcycle on SR 646 after a rainstorm because he had observed gravel on other areas of the roadway following a storm. Thompson further testified that it had rained approximately two to three days prior to the incident.

{¶ 5} The incident was witnessed by David Wright, a motorist who was following plaintiffs. Wright testified that he became frustrated and "backed off" because he estimated that plaintiffs were traveling at only 35 to 40 miles per hour. Although Wright could not recall the road condition at the time of the incident, he recalled seeing a "ball of dust" before plaintiffs' motorcycle left the roadway.

{¶ 6} Defendant contends that plaintiffs have not established that loose gravel caused the accident. The court notes that Joseph Thompson testified that the gravel he gathered and offered as evidence was collected from SR 646 several weeks after the accident. Nevertheless, the court finds the testimony of plaintiffs regarding the loose gravel to be credible. Kimberly Thompson testified that just prior to the accident, her husband advised her to "hang onto him tight" because there was a patch of gravel. Additionally, the court finds that the testimony of David Wright was consistent with Joseph Thompson's explanation that he lost control of his motorcycle when its tires skidded on loose gravel. However, even assuming that loose gravel at the site of the incident was a danger to motorists, plaintiffs must also establish that defendant had notice of such a hazard.

{¶ 7} Plaintiffs contend that defendant was aware of loose gravel on SR 646 and that it used liquid asphalt to prevent gravel from washing onto the roadway.

{¶ 8} With regard to notice, Mark Davis, defendant's Roadway Services Manager for District 11, testified that he was responsible for supervising all maintenance on SR 646. Davis testified that he had reviewed defendant's records for similar accidents in the vicinity of the incident and that he found no public complaints

concerning gravel or debris. Davis also testified that defendant had no record of maintenance actions taken to remove gravel or debris from the highway.

{¶ 9} With regard to shoulder maintenance, Davis testified that defendant had always "backed up" highway shoulders by applying aggregate material at the edge of the roadway and compacting the aggregate by running over it with the truck's tires. Davis explained that defendant began to use liquid asphalt to cover the aggregate some time after the incident to strengthen the berm material and to prevent heavier vehicles from "dropping through" the shoulder. Davis emphasized that defendant's use of asphalt was not prompted by any concern that loose aggregate material was drifting onto the roadway. Davis reviewed plaintiffs' photographs that were taken in January 2004 and testified that the surface debris depicted in the photos was most likely a "50/50 mix of salt and grits" that is used to prevent icing. (Plaintiffs' Exhibit 2A-2D.)

{¶ 10} Although plaintiffs contend that defendant was aware of gravel on the roadway, Davis' testimony established that defendant had not received any complaints regarding debris on the roadway in the vicinity of the accident. Even plaintiffs agreed that the roadway was generally well-maintained. Furthermore, Joseph Thompson testified that he had traveled through the area in question many times over a 30-year period and that he had not previously noticed any gravel near the curve where the accident occurred. Based upon the testimony and evidence, the court finds that plaintiffs have failed to prove by a preponderance of the evidence that defendant had either actual or constructive notice of any defect on SR 646 in the area where the incident occurred.

Therefore, defendant cannot be held liable for any damages that plaintiffs allege were caused by a dangerous highway condition.

{¶ 11} Moreover, even if defendant were negligent, the court is convinced that Joseph Thompson's own negligent conduct proximately contributed to the cause of plaintiffs' injuries under the circumstances of this case. Although plaintiffs assert that the gravel on the highway was the sole cause of the accident, the court finds that Thompson's negligence in failing to maintain reasonable control of his motorcycle was greater than defendant's negligence. Consequently, plaintiffs are barred from recovery by operation of Ohio's comparative negligence statute. See R.C. 2315.19.²

{¶ 12} Upon review, the court finds that plaintiffs failed to prove by a preponderance of the evidence that defendant's actions or inactions under the circumstances of this case give rise to liability for the injuries sustained by plaintiffs. Accordingly, judgment is recommended in favor of defendant as to plaintiffs' complaint. It is recommended that defendant's counterclaim be dismissed.

{¶ 13} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

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R.C. 2315.19 was repealed effective April 9, 2003; however, the statute applies to causes of action that accrued before its repeal.

ANDERSON M. RENICK
Magistrate

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