



deep construction pot hole causing my wheel rim to rip on the concrete curb.” A new concrete curb had been installed at the service station exit/entrance and US Route 22 as part of the construction project. The hole plaintiff’s van hit was near the end of the newly installed curb and the established traffic lane of US Route 22. Plaintiff explained the hole was uncovered and unmarked although she noticed an orange traffic control barrel positioned, “before the hole on its side.” Plaintiff implied she did not see this pothole before she turned onto US Route 22.

{¶ 3} Plaintiff submitted several photographs depicting the hole her van struck as well as the newly installed curb and traffic control devices in position. It appears from these photographs that the damage causing pothole was marked by orange traffic control barrels and clearly visible. Furthermore, the submitted photographs clearly depict the newly installed curb.

{¶ 4} As a result of striking the pothole abutting the installed curb, plaintiff sustained substantial damage to her vehicle including tire, rim, suspension, and steering damage. Plaintiff asserted all damages to her vehicle were proximately caused by negligent maintenance of the construction zone on US Route 22. Specifically, plaintiff alluded this negligent maintenance was demonstrated by not providing traffic lanes of sufficient width to allow motorists to safely merge on the roadway. Additionally, plaintiff contended the pothole her van struck was not marked and therefore, she was not adequately warned of the condition. Plaintiff suggested defendant, Department of Transportation (DOT), as the entity in charge of the construction project at US Route 22 and State Route 48, should bear responsibility for the damage suffered on May 27, 2004. Consequently, plaintiff filed this complaint seeking to recover \$724.38, the total cost of automotive repair resulting from striking the pothole. The requisite material filing fee was paid.

{¶ 5} Defendant denied any liability in this matter. Defendant explained plaintiff’s property damage event occurred in a roadway construction zone under the control of DOT’s contractor, Barrett Paving Materials, Inc.(Barrett). Defendant asserted Barrett, by contractual agreement, was responsible for maintaining the portion of US Route 22 within the construction area. Therefore, DOT argued Barrett is the proper party defendant in this action. Defendant implied 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 the independent contractor, Barrett, took control over the particular section of US Route 22 in Warren County.

{¶ 6} Furthermore, defendant contended neither Barrett nor DOT had any knowledge of the pothole plaintiff's van struck. Defendant related no calls or complaints about the pothole were received prior to plaintiff's incident. The court finds defendant's position concerning lack of notice of the defective condition disingenuous considering evidence has shown Barrett created the condition when new curbs were installed and some traffic control barrels were positioned around the pothole to warn motorists.

{¶ 7} Plaintiff pointed out the pothole her van struck, "was a deliberately made hole due to construction of a cement curb." Plaintiff stated the damage-causing pothole, "was extremely deep and only covered by a small rubber ring." From an examination of available photographic-evidence, it appears this rubber ring was actually the base of a traffic control barrel. Plaintiff's submitted photographs of the pothole depict a rubber ring in the pothole and a damaged traffic control barrel positioned near the pothole. Plaintiff related traffic control barrels were not positioned in a correct manner near the pothole. Plaintiff noted, "[o]ne of the barrels was lying on its side obstructing the view of the hole and there were no barrels around the hole to outline the danger." Photographs show traffic control barrels around the curb area where the pothole was located.

{¶ 8} 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. See *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD, jud.

{¶ 9} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. 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.

{¶ 10} Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that



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