

[Cite as *Abraham v. Ohio Dept. of Transp.*, 2006-Ohio-7241.]

IN THE COURT OF CLAIMS OF OHIO

KENYA ABRAHAM	:	
Plaintiff	:	
v.	:	CASE NO. 2006-02242-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	

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{¶ 1} Plaintiff, Kenya Abraham, stated she was traveling east on Interstate 70, through a construction zone, on January 7, 2006, at about 2:30 p.m., when her truck was damaged by construction material debris which had been discarded in the roadway. Plaintiff described the debris as "wood boards that are being used in construction." Plaintiff related a van proceeding in front of her drove over two pieces of wood debris and propelled the pieces of wood into the path of her truck. Plaintiff further related one piece of wood struck the underside of her vehicle and the second piece hit the windshield and side of her truck. According to plaintiff, the wood debris cracked the truck's windshield, caused damage to the vehicle's all wheel drive system, and caused other minor body damage to the vehicle. Plaintiff filed this complaint against defendant, Department of Transportation ("DOT"), alleging the January 7, 2006, property damage to her vehicle was the result of negligent roadway maintenance on the part of DOT. Plaintiff seeks \$1,722.97 in damages for automotive repair. The filing fee was paid.

{¶ 2} Defendant acknowledged the described incident occurred

within a construction zone which DOT located at about milepost 1.20 on I-70 in Madison County. Defendant explained DOT contractor Kokosing Construction Company, Inc. ("Kokosing") had control over the roadway construction area on Interstate 70. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kokosing 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 an independent contractor takes control over a particular section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove her damage was proximately caused by roadway conditions created by DOT or its contractor.

{¶ 3} Alternatively, defendant denied that neither DOT nor Kokosing had any notice of any debris material on the traveled portion of the roadway prior to plaintiff's property damage occurrence. Furthermore, defendant denied the damage-causing debris were construction material used by Kokosing or connected to any construction activity of DOT's contractor. Plaintiff did not present any evidence to determine the length of time the debris material was present on the roadway prior to 2:30 p.m. on January 7, 2006. Defendant contended plaintiff failed to produce evidence of negligent roadway maintenance.

{¶ 4} 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*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 5} Defendant has the duty to maintain its highways in a reasonable 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 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.

{¶ 6} Further, 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 maintenance or construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Plaintiff, in the instant claim, has failed to prove defendant negligently maintained the roadway.

{¶ 7} In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the roadway debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. For constructive notice to be proven, plaintiff must show sufficient time has elapsed after the dangerous condition appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Department of Transportation* (1978), 78-0126-AD. 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 debris appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. Evidence has shown defendant did not have any notice, either actual or constructive, of the damage-causing debris on the roadway.

{¶ 8} 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. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. 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.

{¶ 9} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing debris 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 : ENTRY OF ADMINISTRATIVE
TRANSPORTATION : DETERMINATION
Defendant :

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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Plaintiff, Pro se

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For Defendant

RDK/laa

7/6

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