[Cite as *Hinkle v. Ohio Dept. of Transp.*, 2007-Ohio-2402.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ROBIN HINKLE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2006-07015-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Robin Hinkle, asserted her automobile was damaged from traveling over rough road through a roadway construction area on Interstate 71 in Franklin County. Plaintiff stated she, "was driving northbound on I-71 just before exit 97 when the smooth newly surfaced road just drop into a [rough] surface causing the car to dip then suddenly the front [tire] hit what seem like a curb in the road causing the [tires] to flatten and bending the rims, also causing the air bag light to come on and will not go off." Plaintiff related that after this described incident she was able to pull her car over to the side of the road without further mishap. Plaintiff noted she did not observe any signs posted to warn motorists of any change in roadway conditions. Plaintiff also noted she did not see any construction zone speed limit signs and believed the speed limit on this particular section of Interstate 71 was not reduced, but remained at 65 mph. Plaintiff recalled the property damage to her 1995 Volkswagen Jetta occurred on August 14, 2006, at approximately 6:18 a.m.

{¶2} Plaintiff contended the August 14, 2006, property damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway through a construction area. Plaintiff implied the property damage she suffered was the result of a failure to place signs advising motorists of roadway conditions and reduced speed limits. Plaintiff has seemingly argued the roadway resurfacing on Intestate 71 was negligently done, considering the roadway abruptly changed from a resurfaced area to an area described as a drop into a rough surface; thereby creating a hazardous condition. Consequently, plaintiff filed this complaint seeking to recover $348.00, the total replacement cost of car rims and a tire, plus $847.19, for repairing the air bag control module on her vehicle. Plaintiff also requested $25.00 for filing fee reimbursement. Plaintiff submitted a bill dated September 21, 2006, for the replacement car rims and tire. A repair estimate dated October 31, 2006, for the air bag control module was filed. The filing fee was submitted with plaintiff's complaint.

{¶3} Defendant acknowledged the area of Interstate 71 where plaintiff stated her property damage occurred was located within a construction zone scheduled for roadway resurfacing. Defendant explained the resurfacing project was under the control of DOT contractor Shelly & Sands, Inc. ("Shelly"). Defendant asserted Shelly was responsible under contract for maintaining Interstate 71 within the resurfacing construction limits, although work was to be performed subject to DOT specifications, inspections, satisfaction, and approval.

{¶4} Shelly conducted roadway resurfacing on Interstate 71 North from milepost 91.5 to 93.3, starting at 7:00 p.m. on August 13, 2006, and finishing the work phase at 6:00 a.m. on August 14, 2006. During this eleven hour work shift, the pavement on Interstate 71 was first milled 1 ½" and then paved. Before paving was performed all existing potholes or other roadway defects were repaired. The repaving process stopped several miles south of milepost 97 which is the location plaintiff related her property damage occurred. Neither DOT nor Shelly could explain what type of condition caused the damage to plaintiff's car. Defendant contended plaintiff has failed to produce sufficient evidence to prove her damage was caused by any roadway condition under the control of DOT or Shelly. Defendant asserted no DOT personnel were aware of any rough roadway surface on Interstate 71 on the morning of August 14, 2006.

{¶5} Plaintiff filed a response in which she noted two of her co-workers traveled on Interstate 71 North near exit 97 in August, 2006 and both, "experienced the change in the smooth newly surfaced road suddenly dropping off to [a] very rough surface then back to [a] smooth new surface." Plaintiff stated her co-workers experienced the particularly described roadway condition for a period of two days. It is unclear if either of the two co-workers sustained any damage to their vehicles driving over the roadway on Interstate 71. Plaintiff's response form contained two signatures, presumedly the signatures of her two mentioned co-workers. Plaintiff did not submit a statement from either co-worker. The information contained in plaintiff's response has limited probative value.

{¶6} 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, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864. 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. *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. No. 00AP-1119, 2001 Ohio App. LEXIS 2854. Insufficient evidence has been produced to show a hazardous condition was created by the roadway resurfacing activity conducted from August 13, to August 14, 2006.

{¶7} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346, 683 N.E. 2d 112. In fact, the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic conditions and during highway construction projects. See, e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462, 465. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Evidence available does not prove plaintiff's damage was proximately caused by any negligent act or omission on the part of DOT. *Vanderson v. Ohio Dept. of Transportation*, 2005-09961-AD, 2006-Ohio-7163.

{¶8} 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, 423 N.E. 2d 467, 469. This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 471 N.E. 2d 477. 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 proximate cause of her property damage 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.

{¶9} Plaintiff has also presented a claim in which she appears to allege the repaving project resulted in a nuisance condition on the roadway. 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, 508 N.E. 2d 684.

{¶10} "[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 exit." *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176, 180, 297 N.E. 2d 105, 109. Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274, 595 N.E. 2d 855. Plaintiff has failed to prove, by a preponderance of the evidence, that the roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to her car. *Hall v. Ohio Dept. of Transportation* (2000), 99-12863-AD. The evidence presented does not prove any nuisance condition existed.

{¶11} Furthermore, evidence has been presented by defendant to show signs were in place to notify motorists of construction activity and roadway condition. Although plaintiff claimed she did not observe any signs along the roadway, Shelly asserted "Bump" signs

were in position on Interstate 71 where resurfacing was being conducted. Plaintiff has failed to prove proper signage was not in place along the roadway and alternatively, plaintiff has failed to produce evidence showing that a lack of posted signs was a proximate cause of her property damage.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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:

Robin Hinkle
2722 McGuffey Road
Columbus, Ohio 43211

James Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
3/23
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