[Cite as *Rutherford v. Ohio Dept. of Transp.*, 2007-Ohio-4499.]

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

MARVA RUTHERFORD

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-02688-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Marva Rutherford, related she was traveling south on Interstate 270, through a construction zone on February 27, 2007, at approximately 11:50 a.m., when her automobile wheel was damaged from striking a hole or uneven pavement condition on the right lane of the roadway. Plaintiff stated the particular roadway condition that caused her property damage was, "a section where the pavement was lower or a hole." According to plaintiff, the location of the damage-causing pavement condition was, "approximately ½ mile from the Easton Exit, coming up right after the Worthington & 161 W. Exits, [r]ight before the (Easton) exit."

{¶2} 2) Consequently, plaintiff filed this complaint seeking to recover $681.89, for replacement parts and automotive repair costs resulting from the February 27, 2007, property damage incident. Plaintiff implied she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway in a construction zone on Interstate 270 in Franklin County. Plaintiff submitted the $25.00 filing fee with the complaint and requested reimbursement of that amount along with her damage claim.

{¶3} 3) Defendant observed that the area where plaintiff's damage occurred was located within a construction area under the control of DOT contractor, National Engineering & Contracting Company (National). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor National had any knowledge of the roadway defect plaintiff's vehicle struck. Defendant contended that no calls or complaints were received regarding defective roadway conditions prior to plaintiff's incident. Defendant located the particular damage-causing condition after milepost 30.52 on Interstate 270 South. According to DOT's information the construction zone maintained by National covered Interstate 270 between mileposts 29.50 and 31.20.

{¶4} 4) Defendant asserted that National, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that National is the proper party defendant in this action. Defendant implied that 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. All construction was to be performed to DOT requirements and specifications.

{¶5} 5) Defendant explained agents of National performed pothole patching operations on Interstate 270 on February 27, 2007, within the construction area. Apparently, no roadway defects were discovered at milepost 30.52 during the pothole patching operations on February 27, 2007.

{¶6} 6) Plaintiff filed a response relating her property damage was not caused by a pothole, but by, "a section of sunken pavement going under a construction wall, and the lane was not blocked off, it was open." A notation from a construction diary submitted by defendant recorded, "2/27, dug out 270 SB Rt Lane Today." Plaintiff reiterated the damage to her vehicle was caused by "sunken pavement with the crack in it as it went under the construction wall." Plaintiff did not submit any photographic evidence of the pavement condition that caused the damage to her car. There is no indication construction work was not performed in accordance with DOT specifications and standards.

CONCLUSIONS OF LAW

{¶7} Defendant has the duty to maintain its highways 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.

{¶8} In order to prove a breach of duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247. Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. However, proof of notice of a dangerous condition is not necessary when defendant's own

agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶9} 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. However, no evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained on the pavement project regarding height variations between "dug out" lanes and existing roadway surfaces.

{¶10} 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, ¶8 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 fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶11} 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. 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; *Rhodus*, supra, at 729; *Feichtner*, supra, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove 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. Consequently, plaintiff's claim is denied.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Marva Rutherford
4911 Strawberry Glade Road
Gahanna, Ohio 43230

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RDK/laa
6/5
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