

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

NADIA ZAIDAN

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-04320-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On February 21, 2007, at approximately 5:20 p.m., plaintiff, Nadia Zaidan, was traveling west, “on Montgomery Road/State Rt. 22 at approximately address 7505,” through a roadway construction area, when her automobile struck a large pothole causing tire and rim damage. Plaintiff pointed out several other motorists suffered property damage from this pothole around the same time as her incident.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$157.51, the cost of replacement parts and repair expenses that she incurred as a result of her vehicle striking the pothole in the roadway. Plaintiff implied that 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 US Route 22 in Hamilton County. The filing fee was paid.

{¶3} 3) Defendant observed that the area where plaintiff’s damage occurred was located within a construction project zone under the control of DOT contractor, Barrett Paving Materials Incorporated (Barrett). Additionally, defendant denied liability in this matter based on the contention that neither DOT nor Barrett had any knowledge of the particular pothole plaintiff’s car struck. Defendant has no record of receiving any prior calls or complaints regarding the particular damage-causing pothole on US Route 22 prior to February 21, 2007. According to defendant’s information, the construction zone maintained by Barrett covered US Route 22 (Montgomery Road) between mileposts 10.21 to 11.07, which included 7505 Montgomery Road.

{¶4} 4) Defendant submitted a written statement dated May 31, 2007, from Barrett representative, Dennis Brunton, concerning the pothole at 7505 Montgomery Road. Brunton recorded that this pothole was located in an area where Barrett had not performed any repaving work and had probably been repaired by some entity other than Barrett. Brunton denied having any prior knowledge of the pothole that he estimated was originally twelve inches wide and thirty inches long. Photographs of the patched pothole were submitted. The photographs were taken well after February 21, 2007.

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

Case No. 2007-04320-AD	- 3 -	MEMORANDUM DECISION
------------------------	-------	---------------------

as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects were delegated to an independent contractor when that contractor takes control over a particular section of roadway.

CONCLUSIONS OF LAW

{¶6} 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, 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.

{¶7} In order to prove a breach of the 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, 517 N.E. 2d 1388. Defendant is only liable for roadway condition of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 507 N.E. 2d 1179. 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, 577 N.E. 2d 458. 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, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶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. *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

Case No. 2007-04320-AD	- 4 -	MEMORANDUM DECISION
------------------------	-------	---------------------

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. 00AP-1119. However, no evidence other than plaintiff's assertion has been produced to show that a known hazardous condition was maintained.

{¶9} 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 breach 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, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. 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, 61 N.E. 2d 198, approved and followed.

{¶10} 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, 466; *Rhodus*, supra, at 729; *Feichtner*, supra, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its

Case No. 2007-04320-AD	- 5 -	MEMORANDUM DECISION
------------------------	-------	---------------------

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.

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

NADIA ZAIDAN

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-04320-AD

Clerk Miles C. Dufrey

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.

MILES C. DUFREY
Clerk

Entry cc:

Nadia Zaidan
7427 Montgomery Road
Apt. 28
Cincinnati, Ohio 45236

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

RDK/laa
7/25
Filed 8/15/07
Sent to S.C. reporter 10/30/07