[Cite as *Harding v. Ohio Dept. of Transp.*, 2007-Ohio-7190.]

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

TRUDY HARDING

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-04737-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On December 13, 2006, at approximately 6:30 p.m., plaintiff, Trudy Harding, was traveling east on US Route 30 at milepost 6 in Massillon, "right before the Massillon Exit 21," when her automobile struck a pothole in the traveled portion of the roadway. Plaintiff related the pothole was located in a roadway area under construction and cement barriers were emplaced on each side of the road creating a narrow lane for vehicular travel. Plaintiff asserted the pothole caused tire and wheel damage to her vehicle.

{¶2} 2) Plaintiff implied her property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway within a construction zone on US Route 30 in Stark County. Consequently, plaintiff filed this complaint seeking to recover $474.30, the total cost of replacement parts and related automotive repair expense resulting from the December 13, 2006, incident.

{¶3} 3) Defendant observed the area where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, The Ruhlin Company ("Ruhlin"). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Ruhlin had any prior knowledge of the roadway defect

plaintiff's car struck. Defendant contended no calls or complaints were received regarding this particular pothole prior to plaintiff's incident. Defendant explained the construction project involved roadway improvements between mileposts 6.06 to 13.30 on US Route 30 in Stark County. Defendant located plaintiff's incident near milepost 6.00 on US Route 30 in Stark County.

{¶4} 4) Defendant asserted Ruhlin by contractual agreement was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Ruhlin 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 submitted a written statement from DOT Area Engineer Michael Williams regarding the US Route 30 construction project and any problems with potholes. Williams noted work was performed on construction up to December 22, 2006, and no documented problems regarding potholes were recorded. Subsequent pothole problems did occur. Williams suggested, "it is unlikely that the project is responsible for (plaintiff's) damage to her vehicle on December 13, 2006 as the result of a pothole within the project limits."

{¶6} 6) Defendant's records show DOT conducted pothole repair operations on US Route 30 in the area of plaintiff's incident on November 24, 2006. No pothole patching activity was performed in the particular area of US Route 30 after that date.

{¶7} 7) Despite filing a response, plaintiff did not produce evidence to establish the length of time the pothole existed prior to her property damage occurrence.

CONCLUSIONS OF LAW

{¶8} 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, 3 O.O. 3d 413, 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*, Ct. of Cl. No. 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.

{¶9} 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. 2d 39, 42, 564 N.E. 2d 462.

{¶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, 788 N.E. 2d 1088 ¶8, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707. Plaintiff has the burden of proving, by a preponderance of the evidence, that he 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.

{¶11} To prove a breach of the duty by defendant to maintain the highways plaintiff must establish, by a preponderance of the evidence, that DOT 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 conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. No evidence has shown defendant had actual notice of the damage-causing pothole.

{¶12} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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.

{¶13} In order for there to be constructive notice, 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. Dept. of Transportation* (1978), 78-0126-AD. Size of the defect is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 587 N.E. 2d 891. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set-time standard for the discovery of certain road hazards." *Bussard*, 31 Ohio Misc. 2d at 4, 31 O.B.R. 64, 507 N.E. 2d 1179. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept.*

of Transp. (Feb. 4, 1993), Franklin App. 92AP-1183. No evidence has shown DOT had constructive notice of the pothole. Plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff has failed to prove that her property damage was connected to any conduct under the control of defendant, 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:

Trudy Harding
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RDK/laa

9/27
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