

Court of Claims of Ohio

The Ohio Judicial Center
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VICTORIA L. SOBCZAK

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2004-08324

Judge Joseph T. Clark
Magistrate Holly True Shaver

MAGISTRATE DECISION

{¶ 1} On October 20, 2008, defendant Ohio Department of Transportation (ODOT) filed a motion for summary judgment, pursuant to Civ.R. 56(B). Plaintiff filed a response on November 13, 2008. The case came before the court on January 14, 2009, for an oral hearing on defendant's motion.

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to

have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} Plaintiff was injured in a car accident on August 19, 2002. Plaintiff lost control of her vehicle while she attempted to merge onto southbound State Route 23 from a highway entrance ramp located in the city of Sylvania. Plaintiff filed her complaint alleging that ODOT negligently designed and constructed the entrance ramp, that the ramp was a known hazard, and that ODOT failed to make improvements to the ramp. Defendant maintains that it designed and constructed the ramp according to engineering standards that were in effect at the time of the construction and that it had no duty to reconstruct the ramp.

{¶ 5} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed her a duty, that defendant's acts or omissions resulted in a breach of 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 St.3d 75, 77.

{¶ 6} In her memorandum contra defendant's motion for summary judgment, plaintiff concedes that ODOT's design met the standards in effect at the time the ramp was constructed. Plaintiff also acknowledges that ODOT is not required to reconstruct roadways to current design standards. Nevertheless, plaintiff argues that ODOT's duty to make improvements to the ramp arose once ODOT received notice from Sylvania city officials that the ramp had been the site of many accidents over a period of years.

{¶ 7} In essence, plaintiff argues that ODOT maintained a nuisance with regard to the highway entrance ramp. According to plaintiff, the alleged dangerous conditions included the configuration of the curvature of the ramp, the surface of the pavement,

and the absence of a concrete barrier wall.¹ The court notes that plaintiff's purported nuisance claim is premised upon an exception to the governmental immunity provisions set forth under former R.C. 723.01 and 2744.02(B)(3). Inasmuch as those statutes pertain to liability of political subdivisions, and not to state agencies, they are inapplicable to the instant case. Indeed, there is no similar nuisance exception to the state's discretionary immunity. See *Rahman v. Ohio Dept. of Transp.*, Franklin App. No. 05AP-439, 2006-Ohio-3013, ¶27. Thus, ODOT's notice or knowledge of other accidents at the site does not give rise to a duty to reconstruct the ramp. The decision to implement any improvements was at all times subject to the discretion of ODOT.

{¶ 8} Plaintiff also argues that ODOT had a duty to act in response to the city of Sylvania's requests to reconstruct or to reconfigure the entrance ramp. Such argument is not persuasive. In *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App.3d 143, the Tenth District Court of Appeals addressed a similar situation wherein the city of Cleveland had repeatedly sought to have ODOT upgrade a highway. Plaintiff in that case argued that ODOT had a mandatory duty "to implement improvements on a state highway once the city involved makes a reasonable request for improvements." However, the court held that ODOT did not have a statutory duty to reconstruct the highway. The court reasoned that "R.C. 5501.11(D) merely authorizes participation, but does not mandate it, in light of the statement of 'no duty' of R.C. 5511.01 and 5501.31."²

¹It is undisputed that all of these conditions had existed since the ramp was constructed in the 1950s.

²R.C. 5511.01 provides, in pertinent part:

"No duty of constructing, reconstructing, maintaining, and repairing such state highways within municipal corporations shall attach to or rest upon the director; but he may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair the same."

R.C. 5501.31 provides:

"The director of transportation shall have general supervision of all roads comprising the state highways system. He may alter, widen, straighten, realign, relocate, establish, construct, reconstruct, improve, maintain, repair, and preserve any road or highway on the state highway system, and, in connection therewith, relocate, alter, widen, deepen, clean out, or straighten the channel of any

Thus, the court concluded that ODOT is not mandated to reconstruct or improve roadways, and that therefore, “there was no breach of the ‘duty’ to cooperate.” *Id.*

{¶ 9} Further, in *Wiebelt v. Ohio Dept. of Transp.* (June 24, 1993), Franklin App. No. 93AP-117, the Tenth District Court of Appeals held that “duty to maintain state highways is distinguishable from a duty to redesign or reconstruct. Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements.” See also *Galay v. Ohio Dept. of Transp.*, Franklin App. No.05AP-383, 2006-Ohio- 4113, (finding that ODOT’s failure to perform an engineering study and its failure to reconstruct the intersection did not constitute a breach of a duty of care).

{¶ 10} Finally, to the extent that plaintiff argued that ODOT was negligent when, in 1998, it chose to install delineators rather than to erect a concrete barrier wall, the court notes that ODOT is immune from liability as to the choice of traffic control device implemented. The law in Ohio is clear, “decisions concerning what traffic control devices and whether extra traffic control devices are necessary at a given intersection is a decision which rests within the sound discretion of ODOT and to which ODOT is entitled to immunity.” *Cushman v. Ohio Dept. of Transp.* (Mar. 14, 1996), Franklin App.

watercourse as he deems necessary, and purchase or appropriate property for the disposal of surplus materials or borrow pits, and, where an established road has been relocated, establish, construct, and maintain such connecting roads between the old and new location as will provide reasonable access thereto.

“* * *

“Except in the case of maintaining, repairing, or centerline painting of state highways within villages, which shall be mandatory as required by section 5521.01 of the Revised Code, no duty of constructing, reconstructing, widening, resurfacing, maintaining, or repairing state highways within municipal corporations, or the bridges and culverts thereon, shall attach to or rest upon the director, but he may construct, reconstruct, widen, resurface, maintain, and repair the same with or without the co-operation of any municipal corporation, or with or without the co-operation of boards of county commissioners upon each municipal corporation consenting thereto.”

No. 95API07-8844; see also *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App.3d 30, 33-34.

{¶ 11} Accordingly, for the foregoing reasons, the magistrate recommends that defendant's motion for summary judgment be granted.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

HOLLY TRUE SHAVER
Magistrate

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SJM/cmd
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