

[Cite as *Downs v. Ohio Dept. of Transp.*, 2005-Ohio-2051.]

IN THE COURT OF CLAIMS OF OHIO

MELISSA DOWNS :
Plaintiff :
v. : CASE NO. 2004-01915-AD
OHIO DEPT. OF TRANSPORTATION : MEMORANDUM DECISION
Defendant :

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{¶1} On August 26, 2003 and August 27, 2003, defendant, Department of Transportation ("DOT"), engaged in a culvert replacement operation on US Route 50 at about milemarker 34.568 in Ross County. The entire culvert replacement project was completed in two phases. On August 26, 2003, at approximately 8:00 p.m., DOT personnel began work on the initial phase of replacing the culvert spanning US Route 50. This first work phase involved defendant's work crews digging out the exiting culvert, installing a replacement, and filling the remaining excavation with stone aggregate. The roadway was closed to traffic during this first construction phase which was finished at 3:00 a.m. on August 27, 2003. Before the roadway was opened at the completion of the first installation phase, DOT personnel positioned "Bump" signs about 250 feet away from each side of the culvert installation site as an advisory warning to motorists traveling on US Route 50. According to defendant, the entire culvert replacement operation was completed by 4:00 p.m. on August 27, 2003, after eight inches of hot mix asphalt replacing the temporary stone aggregate filling was poured into the excavation and laid flush with the grade of the

existing pavement. During this second asphalt pouring phase of the project roadway traffic was controlled by DOT crews. The installation excavation filled with stone aggregate remained in that state until defendant's personnel began pouring asphalt at 7:30 a.m. on August 27, 2003.

{¶2} At approximately 6:45 a.m., on August 27, 2003, plaintiff Melissa Downs, was traveling west on US Route 50 in Londonderry, Ohio when she drove over the culvert replacement site running the width of the roadway that had undergone initial phase repairs. Plaintiff described the culvert replacement site as a "huge hole in the road." Plaintiff asserted, when she drove over this depression in the roadway, all four tires and rims of her vehicle were damaged. Plaintiff estimated the speed of her automobile as she drove over this construction area at 45 mph. Posted roadway speed limits were set at 55 mph. Plaintiff did not relate if she noticed any advisory signs posted, but did note it was foggy and dark at the time of her property damage incident. Plaintiff did not provide any statements from other individuals regarding roadway conditions on US Route 50. Plaintiff did not produce any photographic evidence depicting the construction site as it looked on the morning of August 27, 2003.

{¶3} Consequently, plaintiff filed this complaint seeking to recover \$500.00, her insurance coverage deductible for automotive repair relating to the August 27, 2003, property damage event. Plaintiff has asserted her damage was proximately caused by negligence on the part of defendant in maintaining a hazardous roadway condition after initiating a culvert replacement operation. The filing fee was paid.

{¶4} Defendant has denied any liability in this matter.

Defendant related the culvert on US Route 50 was installed, "in an acceptable manner in compliance with ordinary culvert replacement standards." Defendant asserted no calls or complaints were received concerning any dangerous roadway conditions caused by the culvert replacement activity. Defendant argued plaintiff has failed to produce sufficient evidence to establish her property damage was caused by a roadway condition attributable to DOT maintenance activity. Defendant stated "bump" signs were in place to warn motorists of the construction. Defendant implied all precautions were taken to satisfy its duty of care to motorists in regard to the roadway construction project. Defendant has argued plaintiff did not prove any DOT conduct or inattention proximately caused the property damage claimed.

{¶5} 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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189. Furthermore, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. When conducting construction projects, defendant's personnel must operate equipment in a safe manner. *State Farm Mutual Ins. v. Department of Transportation* (1998), 97-11011-AD.

{¶6} 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. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282,285. 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶7} Plaintiff has failed to provide sufficient evidence to prove defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of the property damage claimed. See *Hale v. Ohio Dept. of Transportation, District 9*; Court of Claims No. 2003-10431-AD, 2004-Ohio-2101. Plaintiff has failed to prove by a preponderance of the evidence, that defendant's construction 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 Department of Transportation* (2000), 99-12863-AD.

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OHIO DEPT. OF TRANSPORTATION : ENTRY OF ADMINISTRATIVE
Defendant : DETERMINATION

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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:

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For Defendant

RDK/laa
3/23
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