**[Cite as *Peel v. Ohio Dept. of Transp.*, 2009-Ohio-3781.]**

# Court of Claims of Ohio

The Ohio Judicial Center
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PAULA PEEL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11401-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

**{¶ 1}** On November 4, 2008, plaintiff, Paula Peel, sustained property damage to a 1985 Toyota Corolla while traveling through a roadway construction area on US Route 22/3 at Crestview Drive in Warren County. Plaintiff related that the property damage incident occurred when she turned right from US Route 22/3 onto Crestview Drive and drove the vehicle over a raised exposed water main cover on Crestview Drive. Plaintiff stated, "[a]ll of a sudden my car came to an abrupt halt and stopped running." After the car stopped, plaintiff got out and inspected the underside of the vehicle. Plaintiff noted, "[u]nderneath the car I could see a small manhole-like cover on a sort of pipe-like thing sticking out of the ground." Plaintiff maintained the raised exposed water main cover was not marked by roadway construction workers who were in the area conducting repaving operations on US Route 22/3. Apparently, plaintiff did not see the raised exposed water main cover as she turned the car right from US Route 22/3 onto Crestview Drive. The transmission and motor shaft on the 1985 Toyota Corolla were damaged as a result of striking the raised water main cover in the roadway.

**{¶ 2}** The property damage incident was investigated by the local Ohio State

Highway Patrol ("OSHP") and OSHP Trooper Jacques Illanz compiled a Traffic Crash Report (copy submitted). In the Traffic Crash Report Trooper Illanz recorded: "Roadway was currently under construction. Reduced speed zones and uneven roadway present. Cones and signs were present informing the motorists" of the roadway condition. The Traffic Crash Report also contained a written statement from plaintiff regarding her recollection of the property damage occurrence. Plaintiff provided the following description: "I was driving down 23 & 3 around 7:45 (a.m.) I made a right hand turn onto Crestview and was slow (estimated 5 mph) as the roadway is uneven due to construction. The car made a loud noise and came to an abrupt halt. I hit the windshield with my head. The car was not running."

**{¶ 3}** Plaintiff contended the damage to the 1985 Toyota Corolla was proximately caused by negligence on the part of defendant, Department of Transportation("DOT), in maintaining the roadway in a construction zone. Plaintiff filed this complaint seeking to recover $1,181.09, the cost of repairing the vehicle, plus $120.0 for work loss. The $25.00 filing fee was paid.

**{¶ 4}** Defendant acknowledged the roadway area where plaintiff's incident occurred was within the limits of a working construction project under the control of DOT contractor John R. Jurgensen Company ("Jurgensen"). Defendant explained the construction project "dealt with widening from two lanes to four lanes, including new storm sewer system and full-depth pavement of US 22/3 in Hamilton and Warren Counties." Defendant located plaintiff's described incident on US 22/3 at Crestview Drive at approximately milepost 0.21, a location within the limits of the construction project. Defendant asserted this particular construction project area of US Route 22/3 was under the control of Jurgensen and consequently, DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant further asserted that Jurgensen, by contractual agreement, was responsible for maintaining the roadway in the construction area, although all work performed was subject to DOT specifications and requirements. Defendant implied all duties, such as the duty to warn, the duty to maintain, the duty to inspect, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor charged with roadway construction. See *Cowell*

*v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty 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.

**{¶ 5}** Alternatively, defendant denied neither DOT nor Jurgensen had any notice "of the manhole cover" on US Route 22/3 prior to plaintiff's incident. Defendant denied receiving any calls or complaints "regarding the manhole cover in question" prior to 7:45 a.m. on November 4, 2008. Defendant argued liability cannot be established when requisite notice of a damage-causing roadway condition cannot be proven. Defendant contended plaintiff failed to provide proof that DOT "in a general sense maintains its highways negligently." Furthermore, defendant argued plaintiff did not offer sufficient evidence to prove any conduct on the part of Jurgensen or DOT caused the November 4, 2008 property damage event.

**{¶ 6}** Defendant submitted a letter from Jurgensen Project Manager, Jason M. Mudd, who verified repaving work was performed at the intersection of US Route 22/3 and Crestview Drive on November 3, 2008 and November 4, 2008. In his letter Mudd provided the following information:

**{¶ 7}** "We had a paving crew placing asphalt on mainline US-22/3 along with a crew installing asphalt wedges on side roads and around manholes and valves boxes. I have also attached pictures from November 4, 2008 to illustrate the scene at the time of the accident. As the pictures point out, asphalt wedges were in place along with traffic cones to indicate a construction area."

**{¶ 8}** Defendant submitted the photographs referenced in Jason M. Mudd's letter. The photographs depict the roadway repavement site, the entrance to Crestview Drive, and the actual damage-causing water main cover. The roadway area depicted is uneven, but the water main cover at Crestview Drive appears to be ramped although it is raised. Traffic control cones are shown in place throughout the area. General roadway conditions appear noticeable and are not obscured.

**{¶ 9}** Defendant suggested plaintiff's damage incident was caused by plaintiff driving too fast for the roadway conditions present. Plaintiff estimated she was traveling

at 5 mph at the time the car she was driving hit the raised water main cover. Plaintiff related the impact of striking the raised water main cover caused her to hit her head on the windshield of the car she was driving.

**{¶ 10}** Plaintiff filed a response asserting the damage-causing raised water main cover should have been marked with a traffic control cone. The water main cover is located in the near center of the entrance to Crestview Drive. Plaintiff specifically denied she was driving too fast for the roadway conditions presented. Plaintiff stated that when she turned from US Route 22/3 onto Crestview Drive, "I drove slowly so as not to hit anyone or anything." Plaintiff pointed out the roadway around the damage site is uneven and she attempted to enter Crestview Drive at a slow rate of speed, but despite her attempt the "car hit the obstruction and stopped running."

**{¶ 11}** 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, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. 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, 30 O.O. 415, 61 N.E. 2d 198, approved and followed. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

**{¶ 12}** 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.

**{¶ 13}** Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. 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. Although defendant's contractor created the roadway condition that caused damage to the vehicle plaintiff drove, the condition itself did not appear to be particularly dangerous based on the circumstances attendant to a roadway construction zone.

**{¶ 14}** 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 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. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Evidence available seems to point out the roadway area was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09232, 2008-Ohio-4190.

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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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
3/20
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