

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

DELIA M. DEAN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-07101-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 16, 2008, at approximately 1:30 p.m., plaintiff, Delia M. Dean, was traveling south on Interstate 75 south of the Monroe exit through a construction zone, when her automobile struck a “huge pot hole” causing tire damage to the vehicle. Plaintiff stated the approximate location of the damage-causing pothole was “I-75 (Cincinnati, OH) south bound between the Monroe OH/Lebanon, OH Ext 29 and the Hamilton, OH Ext 24.”

{¶ 2} 2) Plaintiff asserted the damage to her vehicle was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway free of hazardous defects. Plaintiff filed this complaint seeking to recover \$242.88, the total cost of replacement parts she incurred. The filing fee was paid.

{¶ 3} 3) Defendant acknowledged plaintiff’s damage incident occurred within the limits of a construction project under the control of DOT contractor John R. Jurgensen Company (“Jurgensen”). Defendant pointed out the construction project

dealt with widening Interstate 75 between mileposts 21.0 to 32.0 in Butler and Warren Counties. Defendant located plaintiff's damage occurrence near milepost 24.0 on Interstate 75 Butler County. Defendant asserted Jurgensen bore responsibility for pothole repair within the limits of the construction project. Furthermore, defendant denied liability based on the contention that neither DOT nor Jurgensen had any prior knowledge of the pothole plaintiff's vehicle struck. Defendant has no record of receiving any calls or complaints about a pothole at milepost 24.0 on Interstate 75 prior to plaintiff's incident.

{¶ 4} 4) Defendant contended plaintiff did not produce evidence to establish the damage-causing pothole was formed by any conduct attributable to either DOT or Jurgensen. All construction operations within the project limits was to be performed to DOT requirements and specifications. Defendant maintained a DOT Project Engineer at the construction operations. Defendant related Jurgensen personnel "are contractually responsible for any occurrences or mishaps in the area in which they are working." Defendant implied 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 conducts construction operations on a particular section of roadway.

{¶ 5} 5) Defendant submitted a copy of a "daily journal" recorded by Jurgensen Project Manager, Kate Hardig. An entry in this journal for May 16, 2008 notes a report of four bad areas of potholes on Interstate 75 south was received at 8:36 a.m. Hardig recorded she responded to this notification by conducting a roadway inspection, locating the potholes, and subsequently dispatching work crews to patch the observed potholes. Another journal entry reported work on pothole patching started around 4:30 p.m. Defendant also submitted a copy of a DOT "Daily Diary Report" for May 16, 2008 compiled on May 19, 2008 by DOT Project Engineer, Mark Wilson. Under the "General Remarks" section of this report is the notation: "JRJ patched potholes starting in the afternoon and thru the evening." Wilson had apparently inspected southbound Interstate 75 on May 16, 2008 and "found one bad pothole." Wilson recorded that "[n]umerous reports of vehicle accidents from potholes" which in his opinion had "formed overnight." Wilson also recorded heavy rain had fallen in the area overnight.

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, 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 contention that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the particular 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.

{¶ 7} 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. Defendant professed liability cannot be established when requisite notice of damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Ohio Dept. of Transp.* (1986), 61

Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. Evidence has shown notice of the pothole was received at 8:36 a.m. and plaintiff's damage event occurred at 1:30 p.m.

{¶ 8} 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 to 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 an 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, 564 N.E. 2d 462; *Rhodus*, 67 Ohio App. 3d 723, 588 N.E. 2d 864; *Feichtner*, at 354.

{¶ 9} 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. In order to recover in any suit involving injury proximately caused by roadway conditions plaintiff must prove either: 1) defendant had actual or constructive notice of the condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Actual notice of the damage-causing pothole was received at 8:36 a.m. on May 16, 2008, nearly five hours before plaintiff's incident. The trier of fact finds sufficient evidence of actual notice of the pothole was offered to invoke liability based on the rationale of *McClellan* and *Denis*. Defendant is consequently liable to plaintiff for the damage claimed, \$242.88, plus the \$25.00 filing fee which may be awarded as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of \$267.88, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Delia M. Dean
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James G. Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
9/10

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