[Cite as *Majors v. Ohio Dept. of Transp., Dist. 8,* 2009-Ohio-7074.]

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

KATHY MAJORS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2009-02901-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 9, 2009, at approximately 2:40 p.m., plaintiff, Kathy Majors, was traveling south on Interstate 75 through a construction zone "in the right lane just south of the Rt. 63/Monroe/Lebanon exit" when her 2003 Oldsmobile Silhouette Minivan struck "a huge pothole" causing tire and rim damage to the vehicle.

{¶ 2} 2) Plaintiff implied the damage to her car 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 damages in the amount of $242.01, the total cost of replacement parts she incurred. The filing fee was paid and plaintiff requested reimbursement of that cost along with her damage claim.

{¶ 3} 3) Defendant acknowledged that 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 that the construction project dealt with widening Interstate 75 between state mileposts 21.0 and 32.2 in Butler and

Warren Counties. Defendant located plaintiff's damage occurrence near milepost 29.3 on Interstate 75 in Warren County. Defendant asserted that 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 denied having any record of receiving any calls or complaints about a pothole at milepost 29.3 on Interstate 75 prior to plaintiff's incident.

{¶ 4} 4) Defendant contended that plaintiff did not produce any evidence to establish that the damage-causing pothole was formed by any conduct attributable to either DOT or Jurgensen. All construction operations within the project limits were to be performed to DOT approval, requirements, and specifications. Defendant maintained a DOT Project Engineer at the construction operation. Defendant related that Jurgensen personnel "are contractually responsible for any occurrences or mishaps in the area in which they are working." Defendant implied that all duties, such as the duty to maintain, and the duty to repair defects were delegated when an independent contractor conducts 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 February 9, 2009 notes that a DOT representative called at 3:29 p.m. regarding prior complaints about a pothole "SB @ Mason" forwarded by the Ohio State Highway Patrol. Hardig entered other notations recording her actions to have the roadway lane closed and the pothole repaired. Hardig recorded she received notification the roadway lane was closed by 4:30 p.m. on February 9, 2009.

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. 00AP-1119.

{¶ 7} 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. Evidence has shown both DOT and Jurgensen had actual notice of the pothole less than an hour before plaintiff's incident. This amount of actual notice is insufficient to invoke liability.

{¶ 8} Therefore, to find liability plaintiff must prove that 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. There is no indication defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Size of the defect (pothole) 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.

{¶ 9} 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 79, 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 the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard*, 61 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 479. Notice was not established to such a degree to invoke liability.

{¶ 10} 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 both under 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 at 729, 588 N.E. 2d 864; *Feichtner* at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove that 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:

Kathy Majors
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RDK/laa
7/28
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