[Cite as *Schetzel v. Ohio Dept. of Transp.*, 2009-Ohio-7145.]

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

CHERYL SCHETZEL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-06117-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On June 24, 2009 and June 25, 2009, employees of defendant, Department of Transportation (ODOT), excavated and replaced a culvert pipe spanning U.S. Route 36 at milepost 21.92 in Knox County. According to ODOT work records in reference to the culvert betterment, thirteen tons of "#9 Gravel" and three tons of "Asphalt Grindings" were used to fill in the excavation around the replaced culvert on June 24, 2009. Work records for June 25, 2009 list materials used on the project included two tons of "Dump Rock D" and two hundred pounds of "Asphalt Grindings." At some point during the project, ODOT personnel positioned "Bump" signs along U.S. Route 36 to advise and warn motorists of the uneven pavement condition created by replacing the culvert and filling in the excavated area. Work on the culvert betterment stopped at approximately 3:00 p.m. on June 25, 2009. Heavy rain fell during the evening hours of June 25, 2009.

{¶ 2} At approximately 9:20 p.m. on that same day, plaintiff, Cheryl Schetzel, was traveling east on State Route 36 when her 1997 Pontiac Grand AM struck a roadway depression at the culvert replacement site causing substantial damage to the

vehicle. Plaintiff described the incident noting that: "I went over a section of road that was dug up to place a drain pipe. The rain washed out the fill and I struck the ditch in the road at 40 mph." Posted speed limits for State Route 36 were set at 55 mph. Plaintiff asserted that the damage to her car was proximately caused by negligence on the part of defendant in maintaining a hazardous condition of State Route 36 and in failing to adequately patch the culvert replacement site. Plaintiff filed this complaint seeking to recover $722.91, her total cost of automotive repair she incurred resulting from the June 25, 2009 damage occurrence. The filing fee was paid.

{¶ 3} Defendant denied liability in this matter based on the contention that no ODOT personnel had any knowledge of a "ditch" condition at the culvert replacement site prior to plaintiff's property damage event. Defendant explained that culvert repairs were made on June 24, 2009 and the site "was checked and brought back up to level before they (ODOT personnel) left on June 25, 2009 at 3:00 p.m." Defendant reported that "Bump" signs were installed at the site but these signs were blown down by high winds accompanying thunderstorms on the evening of June 25, 2009. Defendant recalled that the ODOT Knox County Manager first received notice of the hazardous condition at the culvert replacement site on the night of June 25, 2009 when the local Ohio State Highway Patrol reported "that the pavement had settled" and an ODOT work crew was dispatched to the site "to fix the problem at 9:30 p.m. on June 25, 2009." According to defendant, the ditch condition at the culvert replacement site was improved when the ODOT "crew dug down 6-8 inches on June 26, 2008 and top it with asphalt." The ODOT "Daily Worksheet Report" for June 26, 2009 (copy submitted) indicates that crews worked from 6:30 a.m. to 3:00 p.m. and "3.07 tons" of "448 type 1 Asphalt" were used to patch the roadway depression. According to the "Daily Worksheet Report" (copy submitted) for the night of June 25, 2009, two ODOT employees worked at the site from 9:30 p.m. to 11:00 p.m., used ½ ton of "Asphalt Grindings" to fill in "ruts," and reset the "Bump" signs blown down during the earlier storm activity. Defendant argued that it cannot be held liable for plaintiff's damage due to the fact that it "did not received notice of the subject condition." Defendant stated that it "has no way of knowing how long the sinking culvert repair existed prior to Plaintiff Schetzel's incident" and suggested that "it is more likely than not that the sinking culvert repair existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} Furthermore, defendant argued that plaintiff has failed to offer sufficient evidence to establish her property damage was attributable to any conduct on the part of ODOT personnel in conducting culvert repairs. Defendant related that ODOT "work crews replaced the culvert in accordance with standard installation procedures." Defendant contended that plaintiff failed to prove her damage was caused by any negligent act or omission on the part of ODOT.

{¶ 5} Plaintiff filed a response noting that she "was only traveling 40 mph in a 55 mph zone" when her vehicle struck the roadway depression and she "could not see where the road work had been done or how deep it (depression) was until I struck it." Plaintiff insisted that her driving actions did not constitute any cause of the property damage she sustained.

{¶ 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. *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 the 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.

{¶ 7} 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.

{¶ 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 ODOT 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 an unreasonable risk of harm is the precise duty owed by ODOT 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, 42, 564 N.E. 2d 462.

{¶ 9} Defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD; *Phillips v. Dept. of Transp.* (2009), 2008-10374-AD, 2009-Ohio-5106. Reasonable or ordinary care is that degree of caution and foresight which an ordinary prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310, 31 O.O. 2d 573, 209 N.E. 2d 142.

{¶ 10} Defendant professed that 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 correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. However, proof 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. Plaintiff has presented sufficient evidence to prove that the defective condition was created by defendant. *Bickerstaff v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-05451-AD, 2008-Ohio-6458; *McTear v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2008-09139-AD, 2008-Ohio-7118; *Mullins v. Ohio Dept. of Transp., Dist. 8*, Ct. of Claims No. 2008-11371-AD, 2009-Ohio-5110. Evidence has shown that defendant negligently maintained the culvert repair when insufficient fill was used to withstand deterioration from a rain storm and accompanying weather conditions.

{¶ 11} Ordinarily in a claim involving roadway defects, plaintiff must prove that

either: 1) defendant had actual or constructive notice of the defective 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. Defendant acknowledged that the damage-causing condition that plaintiff's vehicle struck was a defect that had been previously patched and deteriorated. This fact alone does not provide proof of negligent maintenance. In claims involving pothole repairs, a pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-01270-AD, 2003-Ohio-2618. Concomitantly, the court concludes that in claims involving defects created from culvert repair, a fill that rapidly deteriorates, thereby forming a dangerous roadway hazard, constitutes negligent maintenance. Defendant is therefore liable to plaintiff for the damage claimed, $722.91, 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 $747.91, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
9/29
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