

[Cite as *Smith v. Ohio Dept. of Transp.*, 2004-Ohio-901.]

IN THE COURT OF CLAIMS OF OHIO

JAMES SMITH	:	
Plaintiff	:	
v.	:	CASE NO. 2003-09319-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
	:	

FINDINGS OF FACT

¶1 1) On May 13, 2003, plaintiff, James Smith, was traveling west on U.S. Route 35 through a roadway construction zone, demarcated by traffic control barrels, when his automobile struck a pothole causing tire and rim damage to the vehicle.

{¶2} 2) Consequently, plaintiff filed this complaint seeking to recover \$413.97 for automotive repairs resulting from the May 13, 2003 incident, plus \$69.76 for lodging, \$37.00 for meals, \$8.00 for transportation, \$15.00 for photo expenses and a copy of a police report, and \$25.00 for filing fees. Plaintiff has asserted he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation (DOT), in maintaining the roadway in a construction zone on U.S. Route 35 in Ross County.

{¶3} 3) Defendant explained the area where plaintiff's damage occurred was located within a construction area under the control of DOT contractor, Kokosing Construction Company, Inc. (Kokosing). Defendant further explained the pothole which plaintiff's car struck was situated off the traveled portion of the roadway in an area not designated for roadway traffic. Defendant asserted plaintiff generally cannot recover

damages when his car strikes a pothole located off the traveled portion of the roadway. Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Kokosing had any knowledge of the pothole plaintiff's vehicle struck.

{¶4} 4) On January 8, 2004, plaintiff filed a response to defendant's investigation report. Plaintiff denied the pothole his vehicle struck was located off the traveled portion of the roadway. Plaintiff contended the pothole was located in a designated lane of travel. Plaintiff did not submit any evidence to establish the length of time the pothole was on the roadway prior to his property damage incident.

{¶5} 5) On January 16, 2004, defendant filed a reply to plaintiff's response. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Kokosing is the proper party defendant in this action. 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 takes control over a particular section of roadway.

{¶6} 6) Furthermore, defendant again denied having any notice of the damage-causing pothole. Defendant contended plaintiff failed to introduce evidence proving any requisite notice.

CONCLUSIONS OF LAW

{¶7} 1) 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. See *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD.

{¶8} 2) 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; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶9} 3) 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 pothole 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.

{¶10} 4) 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.

{¶11} 5) Plaintiff has not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the pothole. Additionally, 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 pothole appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶12} 6) Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing pothole was connected to any conduct under the control of defendant, that 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.

{¶13} 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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1/22
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