

[Cite as *Marble v. Ohio Dept. of Transp.*, 2005-Ohio-3072.]

IN THE COURT OF CLAIMS OF OHIO

KEVIN I. MARBLE :
Plaintiff :
v. : CASE NO. 2005-02681-AD
OHIO DEPARTMENT OF : MEMORANDUM DECISION
TRANSPORTATION :
Defendant :
: : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶ 1} 1) On January 10, 2005, at approximately 5:15 p.m., plaintiff, Kevin I. Marble, was traveling west on Interstate 270, between Interstate 71 and the Grove City exit in Franklin County, when his automobile struck a pothole causing tire and rim damage to the vehicle. Plaintiff submitted photographs depicting the pothole his car hit. Plaintiff also submitted photographs showing the damage to his automobile tire and rim.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$125.00, the cost of a replacement tire and rim, which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. The \$25.00 filing fee was paid.

{¶ 3} 3) Defendant explained the area where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, Complete General Construction Company ("Complete"). Defendant asserted Complete, by contractual agreement, was responsible for roadway maintenance within the construction area. Therefore, defendant argued Complete is the

proper party defendant in this action.

{¶ 4} 4) Alternatively, defendant denied liability in this matter based on the contention DOT did not have any knowledge of the roadway defect plaintiff's vehicle struck. Defendant denied receiving any calls or complaints regarding potholes on Interstate 270, between Interstate 71 and the Grove City exit prior to January 10, 2005. Defendant asserted DOT did not breach any duties owed to plaintiff.

{¶ 5} 5) Defendant pointed out Complete personnel repaired potholes on Interstate 270 on January 6, 2005, four days before plaintiff's property damage event. Defendant submitted documents showing Interstate 270 potholes were repaired with cold patch material. These patched potholes were located in, "the west bound lanes from the beginning of the project to the end with the larger areas of potholes being under Gantz Rd." The pothole plaintiff's car struck was located at some point within the construction project area of Interstate 270 in Franklin County.

{¶ 6} 6) The photographs of the roadway and pothole plaintiff's automobile hit were taken on January 10, 2005, the same day as plaintiff's incident. These photographs depict numerous potholes in various degrees of deterioration. From viewing the photographs, it appears the potholes had been previously repaired and the repair material had eroded away. The photographs show substances that appear to be cold patch material laying on the roadway near a pothole partially filled with rain water.

{¶ 7} 7) Plaintiff did not submit any evidence to establish the length of time the roadway defect was present prior to his property damage incident.¹ Plaintiff related, "[a]ccording to your statement (written submission from Complete Safety Director to

¹ Plaintiff filed a response on April 7, 2005.

DOT), the potholes that I hit was not filled when your records say they were."

CONCLUSIONS OF LAW

{¶ 8} 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*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 9} 2) 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. 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.

{¶ 10} 3) In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (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.

{¶ 11} 4) For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 12} 5) Although liability based on notice of the defects may present an unresolved issue in this claim, plaintiff has proven, by a preponderance of the evidence, that defendant did in a general sense, maintain the highway negligently. *Denis*, supra. The fact defendant's agents needed to repair numerous defects in a

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