

[Cite as *McInturff v. Ohio Dept. of Transp.*, 2007-Ohio-1991.]

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

AMANDA MCINTURFF

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2006-07333-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On October 25, 2006, at approximately 7:40 a.m., plaintiff, Amanda McInturff, was traveling on US Route 35 through a construction zone near the Jefferson exit ramp in Montgomery County, when her automobile struck a pothole causing tire and rim damage to the vehicle.

{¶ 2} 2) Consequently, plaintiff filed this complaint seeking to recover \$229.48, for automotive repairs and filing expenses resulting from the October 25, 2006, incident. Plaintiff asserted she 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 US Route 35 in Montgomery County. The \$25.00 filing fee was paid.

{¶ 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”). 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) Plaintiff did not submit any evidence to establish the length of time the pothole was on the roadway prior to her property damage incident.

{¶ 5} 5) 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 defective condition. Defendant contended plaintiff failed to introduce evidence proving any requisite notice. Defendant asserted all potholes within the construction zone were promptly patched after discovery. Evidence has shown notice of this particular pothole was received at about 9:00 a.m. on October 25, 2006. The pothole was patched within one hour of actual notice being received.

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

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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.

{¶ 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 prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant 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. 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.

{¶ 10} 4) 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. Ohio 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.

{¶ 11} 5) 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

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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 or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD; *Weininger v. Department of Transportation* (1999), 99-10909-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. 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:

Amanda McInturff
119 Murray Drive
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James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
3/23
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