

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

CHARLES R. MOORE

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-01231-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On December 25, 2006, at approximately 5:30 p.m., plaintiff, Charles R. Moore, was traveling south on Interstate 270 through a construction zone in Franklin County, when his automobile struck a large pothole causing tire and rim damage to the vehicle. Plaintiff pointed out that the damage-causing pothole was located, “approximately 1-2 miles from the Easton Way exit,” in the construction zone. Plaintiff related that ten to fifteen other vehicles struck the same pothole causing mostly tire and rim damage. Plaintiff recalled that he was told by a Franklin County Deputy Sheriff at the scene that the particular section of Interstate 270 was about to be closed in order for pothole patching repairs to be made.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$265.38 for replacement parts, automotive repair, and filing expenses resulting from the December 25, 2006, incident. Plaintiff has asserted that 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 Interstate 270 in Franklin County. Plaintiff submitted the filing fee with the complaint.

{¶3} 3) Defendant related that the area where plaintiff’s damage occurred was located within a construction area under the control of DOT contractor, National Engineering & Contracting Company (National). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor National had any knowledge of the roadway defect plaintiff’s vehicle struck. Defendant contended that no calls or complaints were received regarding the damage-causing pothole prior to plaintiff’s incident. Additionally, DOT asserted that National, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that National is the proper party defendant in this action. Defendant implied that 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 over construction activities on a particular section of roadway. All construction was to be performed to DOT requirements and specifications.

{¶4} 4) Defendant explained that a representative from National was contacted by DOT around 3:30 p.m. on December 25, 2006, and informed that there was standing water on Interstate 270 within the construction area due to heavy rainfall during the day.

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Upon receiving this information, National dispatched an employee to the area to deal with the water on the roadway. After arriving at the scene, the National employee discovered potholes in the roadway, including a pothole at milepost 29.52, the location of the pothole plaintiff's vehicle struck. "High Water" warning signs were positioned by the National employee to notify motorists of the standing water and then this National employee, "began to gather assistance, materials, and equipment necessary to fix the pothole." Local law enforcement arrived at the particular roadway area between 6:00 p.m. and 6:30 p.m. to close traveling lanes in order to facilitate the efforts of National personnel in conducting pothole patching operations.

{¶15} 5) Defendant submitted notes from DOT Project Inspector, Christine Dicke, regarding the situation on Interstate 270 on December 25, 2006. Christine Dicke recorded that she received a call from the DOT radio room at 5:38 p.m. about a pothole on, "270 SB under 161." Dicke wrote that she called the National employee who was at the scene for the high water problem and notified him of the pothole problem. According to Project Inspector Dicke, the National employee called her back at 7:16 p.m. on December 25, 2006, and told her that the pothole had been repaired. Defendant contended that, based on the evidence presented, the plaintiff has failed to prove either DOT or National acted negligently in responding to the roadway problems on Interstate 270 on December 25, 2006. Defendant asserted all potholes within the construction zone were promptly patched after discovery.

CONCLUSIONS OF LAW

{¶16} 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*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶17} Defendant has the duty to maintain its highways in a reasonably safe

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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 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.

{¶8} 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.

{¶9} Plaintiff has not produced sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the pothole for a sufficient length of time to invoke liability. 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. 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.

{¶10} 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 condition was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction area, or that there was any negligent response to conditions

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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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OHIO DEPARTMENT OF
TRANSPORTATION

ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant

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.

MILES C. DURFEY
Clerk

Entry cc:

Charles R. Moore
149 Seagull Lane S.E.
New Philadelphia, Ohio 44663

James Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
3/22
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