

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

WILLIAM R. LING

Plaintiff

v.

DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-04478-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On April 1, 2007, at approximately 1:00 p.m., plaintiff, William R. Ling, was traveling north on Interstate 270, “between Morse & 161 Roads,” through a construction zone, when his automobile struck a huge pothole causing tire and wheel damage to the vehicle.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$229.46, the cost of replacement parts resulting from the April 1, 2007, property damage incident. Plaintiff implied 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 \$25.00 filing fee.

{¶3} 3) Defendant observed 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 prior knowledge of the roadway defect plaintiff’s vehicle struck. Defendant contended that no calls or complaints were received regarding defective roadway conditions prior to plaintiff’s incident. Defendant located the particular damage-causing condition between mileposts 32.27 to 30.52 on Interstate 270. According to DOT’s information the construction zone maintained by National covered Interstate 270 between mileposts 29.50 and 31.20. National reported the particular pothole plaintiff’s car struck was patched within hours after plaintiff’s incident.

{¶4} 4) Defendant 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 control over a particular section of roadway. All construction was to be performed to DOT requirements and specification.

{¶5} 5) On July 12, 2007, plaintiff submitted a response to defendant’s investigation report, however, he offered no evidence concerning the time the pothole existed prior to his damage-causing incident.

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CONCLUSIONS OF LAW

{¶6} 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, 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.

{¶7} 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, 517 N.E. 2d 1388. Defendant is only liable for roadway condition of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 507 N.E. 2d 1179. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. No evidence has been presented to show defendant had actual or constructive notice of the pothole.

{¶8} 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. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. No. 00AP-1119.

{¶9} For plaintiff to prevail on a claim of negligence, he must prove, by a

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preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. Plaintiff has the burden of proving, by a preponderance of the evidence, that he 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, 61 N.E. 2d 198, approved and followed.

{¶10} 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 DOT 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 unreasonable risk of harm is the precise duty owed by DOT 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, 466; *Rhodus*, supra, at 729; *Feichtner*, supra, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove his property damage 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.* (1999), 99-10909-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

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

William R. Ling
7197 Steeldust Drive
New Albany, Ohio 43054

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

RDK/laa
7/25
Filed 8/21/07
Sent to S.C. reporter 10/30/07