

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

BRUCE G. HONSAKER

Case No. 2007-03307-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 8

Defendant

FINDINGS OF FACT

{¶1} 1) Plaintiff, Bruce G. Honsaker, stated he was traveling west near 7501 Montgomery Road (US Route 22) on February 21, 2007, at approximately 9:00 p.m., when his automobile struck a pothole causing substantial damage to the vehicle. Plaintiff recalled he was traveling on US Route 22 at about 30 mph and did not see the pothole. Plaintiff noted he reported the pothole to the Silverton Police Department and also to the Hamilton County Sheriff's Office. Furthermore, plaintiff related that when he reported the pothole to the Silverton Police Department he discovered they had already been informed about the pothole.

{¶2} 2) Plaintiff filed this complaint seeking to recover repair costs and related expenses resulting from the February 21, 2007, property damage incident. Plaintiff implied the property damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway in a construction area on US Route 22 in Hamilton County. The filing fee was paid.

{¶3} 3) Defendant explained that the area of US Route 22 or Montgomery Road where plaintiff's damage occurred was located within a construction zone under

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the control of DOT contractor, Barrett Paving Materials Incorporated (“Barrett”). Defendant further explained the construction zone maintained by Barrett spanned mileposts 10.21 to 11.07 on US Route 22 in Hamilton County, which included 7501 Montgomery Road within the limits of the construction project. Defendant denied liability in this matter based on the contention that neither DOT nor Barrett had any knowledge of the particular pothole plaintiff’s car struck. Defendant argued plaintiff failed to produce any evidence to establish the roadway was negligently maintained. Defendant has no record of receiving any calls or complaints regarding a pothole at 7501 Montgomery Road.

{¶4} 4) Defendant submitted photographs and a written statement dated May 24, 2007, from Barrett representative, Dennis Brunton, concerning the pothole at 7501 Montgomery Road. A submitted photograph of this location was taken and no roadway defects or repaired defects are depicted. Additional submitted photographs depict the roadway outside the construction project limit near 7501 Montgomery Road. These photographs do depict a patched pothole. This particular repaired pothole is located within the city of Silverton, Ohio, outside the maintenance jurisdiction of either DOT or Barrett. Brunton denied any potholes or evidence of repaired potholes could be observed at the location given by plaintiff within the limits of the construction project.

{¶5} 5) Defendant asserted that Barrett, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Barrett 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.

{¶6} 6) Plaintiff filed a response relating the damage-causing pothole his vehicle struck was actually located within the construction zone limits on US Route 22 north of 7501 Montgomery Road. Plaintiff did not produce any evidence to indicate the length of time the particular pothole existed prior to his property damage incident.

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Plaintiff suggested the pothole, due to its size, formed some time prior to February 21, 2007. Plaintiff again noted local law enforcement had knowledge of the pothole prior to 9:00 p.m. on February 21, 2007.

CONCLUSIONS OF LAW

{¶7} 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*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151.

{¶8} 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, 3 O.O. 3d 413, 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.

{¶9} 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, 31 OBR 64, 507 N.E. 2d 1179.

{¶10} 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. Although plaintiff asserted local law enforcement agents had actual notice of the pothole this particular allegation of actual notice cannot be imputed to defendant. Actual notice of a roadway defect to a public safety governmental entity does not constitute actual

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notice of the defect to DOT without evidence DOT received notice of the defect from the governmental entity. See *McClellan; Geilinger v. Dept. of Transp.*, Ct. of Cl. No. 2004-02211-AD, 2004-Ohio-2890. There has been no proof DOT or its agents received actual notice of the pothole plaintiff's car struck.

{¶11} Moreover, 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, 577 N.E. 2d 458. 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 pothole is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 587 N.E. 2d 891. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set-time standard for the discovery of certain road hazards." *Bussard*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. 92AP-1183. No evidence of constructive notice was provided. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 105 N.E. 2d 429.

{¶12} Plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show his property damage was connected to any conduct under the control of defendant or any negligence on the part of defendant or DOT's agents. *Taylor v. Transportation Dept.* (1998), 97-10989-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio*

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Dept. of Transportation (2000), 2000-04758-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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Bruce G. Honsaker
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James G. Beasley, Director
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RDK/laa

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