[Cite as *Cook v. Ohio State Dept. of Transp.*, 2008-Ohio-6450.]

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

RONNIE MERRILL COOK

Plaintiff

v.

OHIO STATE DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-04145-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} Plaintiff, Ronnie M. Cook, filed this complaint against defendant, Department of Transportation ("DOT"), alleging that he suffered personal injury as a proximate cause of negligence on the part of DOT in maintaining a defective sewer grate located at the corner of State Route 163 and Leutz Road in Oak Harbor, Ohio. Plaintiff, who resides at 8977 W. SR 163 in Oak Harbor, relates that he was injured at approximately 3:30 p.m. on August 30, 2007, while mowing grass at his residence along State Route 163 and Leutz Road. Specifically, plaintiff suffered a laceration and contusion of his right knee when he stepped into a sewer grate located at the southwest corner of his property. The sewer grate was apparently within the roadway right of way and was consequently maintained by defendant. Plaintiff asserts that the sewer grate was damaged, pointing out that "one grate was missing" at the time of his personal injury incident. Plaintiff further asserts that the sewer grate "was obviously improperly maintained" by defendant. Plaintiff seeks damages in the amount of $1,063.84 for medical expenses that he incurred as a result of his leg injury. The filing fee was paid.

{¶ 2} Defendant denies liability in this matter based on the contention that no DOT personnel had any knowledge regarding a "damaged" sewer grate prior to plaintiff's August 30, 2007 personal injury incident. Defendant suggests that the damage to the sewer grate probably occurred sometime during the interval when plaintiff last mowed his grass before August 30, 2007 and August 30, 2007, the day when plaintiff was injured. Defendant acknowledges being responsible for the maintenance of the sewer grate on the roadway right-of-way extending onto plaintiff's property. Defendant asserts that plaintiff failed to offer sufficient evidence to establish the length of time that the sewer grate was in a damaged state prior to his personal injury incident. Although defendant acknowledges that the sewer grate was damaged, defendant denies that any DOT personnel knew about the damaged condition. Defendant did not provide any record to indicate how frequently the sewer grate area had been inspected by DOT personnel or, if the grate had been inspected, the condition

noted the last time prior to August 30, 2007 that an inspection was made. Defendant did provide photographs depicting the sewer grate area after the grate had been replaced.

{¶ 3} Defendant has a statutory duty to maintain the state roadways in a reasonably safe condition. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462; *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335, 3 O.O. 3d 413, 361 N.E. 2d 486. This duty extends to maintaining in a safe condition areas adjacent to the traveled portion of the roadway that remain under the control of defendant. See *Imburgia v. Ohio Dept. of Transp.* (1999), 114 Ohio Misc. 2d 38, 759 N.E. 2d 482. However, defendant is not an insurer of the safety of state highways under DOT control. *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶ 4} In *Imburgia*, at 41, this court stated: "[a]lthough the state is not an insurer of the safety of its highways, once it becomes aware of a dangerous condition on the highway, it is required to take the reasonable care that is necessary to ensure that the traveling public is protected from injury. However, plaintiffs bear the burden of proof to demonstrate that defendant was on notice or aware of any dangerous condition."

{¶ 5} The legal concept of notice is of two distinguishable types, actual and constructive.

{¶ 6} "The distinction between actual and constructive notice is in the manner in which the notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 47 O.O. 231, 105 N.E. 2d 429, paragraph two of the syllabus.

{¶ 7} In the instant claim no evidence has been provided by plaintiff to establish that defendant had actual knowledge of the state of disrepair presented by the sewer grate. Defendant specifically denied that any DOT personnel had any knowledge regarding the condition of the sewer grate on August 30, 2007. In fact, no reports regarding the condition of the grate from the date of installation up to August 30, 2007

were produced.

{¶ 8} "If a plaintiff cannot show that a defendant had actual knowledge of an existent hazard, evidence as to the length of time the hazard had existed is necessary to support an inference that defendant had constructive notice." *Dickerson v. Food World* (December 17, 1998), Franklin App. No. 98AP-287, unreported, citing *Presley v. Norwood* (1973), 36 Ohio St. 2d 29, 32, 65 O.O. 2d 129, 303 N.E. 2d 81. If evidence supports a finding of constructive notice of a hazardous condition, defendant is charged with a duty to remove or correct the hazard or warn persons such as plaintiff of the concealed defect. See *Crabtree v. Shultz* (1977), 57 Ohio App. 2d 33, 11 O.O. 3d 31, 384 N.E. 2d 1294; *Durst v. Van Gundy* (1982), 8 Ohio App. 3d 72, 8 OBR 103, 455 N.E. 2d 1319; also *Salemi v. Duffy Construction Corporation* (1965), 3 Ohio St. 2d 169, 32 O.O. 2d 171, 209 N.E. 2d 566. When evidence supports a finding of constructive notice of a hazardous condition, then an inference may be made that the failure to warn against it or remove it was attributable to a want of ordinary care. *Salemi,* following *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589, 26 O.O. 161, 49 N.E. 2d 925.

{¶ 9} In the instant claim, plaintiff states that the sewer grate was "damaged" and provided a description of the damage reporting "one grate was missing." Plaintiff provided some evidence regarding the condition of defendant's sewer grate on August 30, 2007. Conversely, defendant did not offer any evidence to show any DOT personnel ever had any knowledge in regard to the condition of the sewer grate from the time of installation to August 30, 2007. Plaintiff's evidence that consists of the statement "one grate was missing" from the sewer grate at the time of the personal injury incident is insufficient to prove notice of a defective condition on the part of DOT. Plaintiff has not offered any evidence to establish the length of time "one grate was missing" from the sewer grate prior to August 30, 2007. Consequently, without any proof of prior notice liability cannot be proven. Plaintiff's claim is therefore 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.

MILES C. DURFEY
Clerk

Entry cc:

Ronnie Merrill Cook
8977 W. SR 163
Oak Harbor, Ohio 43449

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

RDK/laa
7/16
Filed 9/25/08
Sent to S.C. reporter 12/3/08