[Cite as *Morris v. Ohio Dept. of Transp.*, 2008-Ohio-650.]

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

KEVIN E. MORRIS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-06756-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Kevin E. Morris, stated he was traveling south "on Ohio Route 8 at the Interstate 271 interchange" when his automobile struck "an unavoidable pothole" causing substantial damage to the vehicle. Plaintiff recalled the property damage incident occurred on March 16, 2007, at about 6:30 a.m. Plaintiff noted the damage-causing pothole was located within a construction area and the general stretch of roadway was poorly maintained due to constant construction related truck traffic.

{¶2} 2) Plaintiff implied the damage to his car from the pothole was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway within a construction zone in Summit County. Consequently, plaintiff filed this complaint seeking to recover $326.67, the estimated cost of automotive repair he obtained on June 23, 2007, which he asserted resulted from the March 16, 2007, described damage occurrence. Plaintiff also seeks reimbursement of the $25.00 filing fee. The filing fee was submitted with the complaint.

{¶3} 3) Defendant explained that the area of State Route 8 where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, Beaver Excavating Company ("Beaver"). Defendant further explained the

construction zone maintained by Beaver spanned mileposts 15.63 to 18.05 on State Route 8 in Summit County. Plaintiff's damage event occurred at approximately milepost 17.93 which was within the limits of the construction project. Defendant denied liability in this matter based on the contention that neither DOT nor Beaver had any knowledge of the particular pothole plaintiff's car struck. Defendant has no record of receiving any calls or complaints regarding a pothole at milepost 17.93 prior to plaintiff's incident. Defendant argued plaintiff failed to produce any evidence to establish the roadway was negligently maintained.

{¶4} 4) All construction was to be performed to DOT requirements and specifications. Defendant asserted that Beaver, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Beaver 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 to an independent contractor when that contractor takes control over a particular section of roadway.

{¶5} 5) Plaintiff filed a response expressing his disbelief that DOT had not received prior complaints about roadway conditions on State Route 8. Plaintiff submitted photographs of particular roadway sections depicting numerous potholes and pothole patch repairs. Plaintiff related the "road has been neglected for the past two years [and] [t]hey are not keeping this road in good repair because they know the road is being replaced by 2009." Plaintiff did not submit evidence to indicate the length of time the pothole his car struck existed prior to 6:30 a.m. on March 16, 2007.

CONCLUSIONS OF LAW

{¶6} 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, 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. 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. 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.

{¶7} 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 both under normal traffic conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 49, 42, 564 N.E. 2d 462.

{¶8} For plaintiff to prevail on a claim of negligence, he must prove, by a 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, 788 N.E. 2d 1088, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707. 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.

{¶9} To prove a breach of the duty by defendant to maintain the highways plaintiff must establish, by a preponderance of the evidence, that DOT 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 conditions 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. No evidence has shown defendant had actual notice of the damage-causing pothole.

{¶10} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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.

{¶11} In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD. Size of the defect 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 O.B.R. 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 has shown DOT had constructive notice of the pothole. Plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition.

Plaintiff has failed to prove that his property damage was connected to any conduct under the control of defendant, 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.* (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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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:

Kevin E. Morris
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RDK/laa

12/19
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