**[Cite as *Bailey v. Ohio Dept. of Transp.*, 2008-Ohio-6866.]**

# 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

EUGENE BAILEY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-06377-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

## FINDINGS OF FACT

**{¶ 1}** 1) Plaintiff, Eugene Bailey, stated, "[o]n May 16, 2008 at 5:33 a.m. I was driving southbound (on) I-75 north of Exit 24 in the far right lane when I drove in a very deep pothole" causing tire and rim damage to his 2007 Kia Rio. Plaintiff pointed out the roadway area where the damage-causing pothole was located was under construction.

**{¶ 2}** 2) Plaintiff asserted the damage to his vehicle was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of defects. Plaintiff filed this complaint seeking to recover damages in the amount of $518.71, the cost he incurred for replacement parts. The $25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

**{¶ 3}** 3) Defendant denied any liability in this matter. Defendant explained plaintiff's property damage event occurred within a construction zone under the control of DOT contractor John R. Jurgensen Company ("Jurgensen"). Defendant indicated the

roadway construction project spanned from state mileposts 21.0 to 32.0 on Interstate 75 in both Butler and Warren Counties. Defendant located the approximate area of plaintiff's incident around milepost 24.0 on Interstate 75 in Butler County, a roadway area within the construction project limits. Defendant asserted Jurgensen bore responsibility for pothole repair within the limits of the construction project. Defendant denied liability based on the contention that neither DOT nor Jurgensen had any prior knowledge of the pothole plaintiff's vehicle struck. Defendant has no record of receiving any calls or complaints about a pothole on Interstate 75 prior to plaintiff's incident.

**{¶ 4}** 4) Defendant contended plaintiff failed to produce evidence to establish the damage-causing pothole was attributable to the conduct of either DOT or Jurgensen. All construction on Interstate 75 was to be performed to DOT requirements and specifications. Defendant stated Jurgensen "are contractually responsible for any occurrences or mishaps in the area in which they are working." Defendant implied 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.

**{¶ 5}** 5) Defendant submitted a copy of a "daily journal" recorded by Jurgensen Project Manager Kate Hardig. An entry in this journal for May 16, 2008 notes a report of potholes on Interstate 75 was received at 8:36 a.m. Hardig recorded responding to this notice by inspecting the area and subsequently dispatching work crews to patch the observed potholes. Another entry in the journal reports work started around 4:30 p.m. Defendant also submitted a copy of a DOT "Daily Diary Report" for May 16, 2008 compiled on May 19, 2008. Under the "General Remarks" section of this report is the notation: "JRJ patched potholes starting in the afternoon thru evening." The "Daily Diary Report" was recorded by DOT Project Engineer Mark Wilson who apparently inspected the construction area of Interstate 75 on May 16, 2008 and found "one bad pothole" Wilson did record reports had been received of "vehicle accidents from potholes which formed overnight" on May 16, 2008. Wilson also pointed out that heavy rain had fallen in the area overnight.

**{¶ 6}** 6) Despite filing a response, plaintiff did not produce any evidence to establish the length of time the pothole at milepost 24.0 on Intestate 75 existed prior to 5:33 a.m. on May 16, 2008.

CONCLUSIONS OF LAW

**{¶ 7}** 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. 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 contention that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the particular 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.

**{¶ 8}** 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 that defendant had actual notice of the damage-causing pothole.

**{¶ 9}** Therefore, to find liability plaintiff must prove that 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. 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, 587 N.E. 2d 891.

**{¶ 10}** 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, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 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, 30 O.O. 415, 61 N.E. 2d 198, approved and followed. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477. Defendant professed liability cannot be established when requisite notice of damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard*, 61 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 479. Notice was not established.

**{¶ 11}** 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 to 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 an 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, 564 N.E. 2d 462; *Rhodus*, 67 Ohio App. 3d at 729, 588 N.E. 2d 864; *Feichtner*, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove that 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 fo 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:

Eugene Bailey
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RDK/laa
9/10
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