

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

ROHIT VERMA

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-10455-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Rohit Verma, related he was traveling “from the I-275 off-ramp on to Lebanon Road” (US Route 42) through a construction area on May 15, 2008, when his 2005 BMW 330xi struck a pothole causing substantial damage to his vehicle. Plaintiff estimated the size of the damage-causing pothole at “approximately 3 feet in diameter.”

{¶ 2} Plaintiff implied the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining a hazardous roadway condition on Interstate 275 in a construction area. Plaintiff filed this complaint seeking to recover damages in the amount of \$102.24, the cost of a replacement tire he purchased on May 15, 2008.¹ The filing fee was paid.

{¶ 3} Defendant acknowledged the roadway area where plaintiff’s incident occurred was within the limits of a working construction project under the control of DOT contractor, Kokosing Construction Company (“Kokosing”). Defendant explained the

¹ Originally plaintiff filed a complaint seeking to recover damages for automotive repair in the amount of \$2,430.69 resulting from a July 22, 2008 roadway incident. Subsequently, plaintiff asserted his vehicle struck a pothole on May 15, 2008 and he filed a receipt dated May 15, 2008 for the cost of a

construction project “dealt with grading, draining, rubbilize and roll, paving with warranty asphalt, widening mainline I-275, upgrading lighting and traffic control and reconstructing 20 mainline structures and several bridges over I-275” between mileposts 21.52 to 28.73 in Hamilton County. Defendant asserted this particular construction project on Interstate 275 was under the control of Kokosing and consequently DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kokosing is the proper party defendant in this action. 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. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by DOT or its contractors. All construction work was to be performed in accordance with DOT requirements and specifications and subject to DOT approval.

{¶ 4} 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. No evidence other than plaintiff’s own assertion has been produced to show a hazardous condition was maintained by either

replacement tire. Plaintiff’s damage claim is modified to reflect expenses incurred on May 15, 2008.

Kokosing or DOT.

{¶ 5} Defendant denied that neither DOT nor Kokosing had any notice of the particular damage-causing roadway defect prior to May 15, 2008. Defendant pointed out the roadway defect which caused plaintiff's property damage was a pothole. Defendant denied receiving any prior calls or complaints about the specific pothole on Interstate 275. Defendant submitted evidence showing Kokosing personnel were working on State Route 747 on May 15, 2008, a roadway area almost four miles away from the area where plaintiff's damage event occurred.

{¶ 6} Plaintiff filed a response asserting both Kokosing and DOT were "made aware of a hazardous road condition from an ODOT road construction project along the I-275 & US 42 bridge." Plaintiff referenced a letter he submitted from Tom Loosekamp, Public Works Director of the City of Sharonville to DOT Project Engineer Dennis Stemler. In this letter dated February 25, 2008, Loosekamp referred to "deteriorating pavement on the (southbound) end of the Rt. 42 bridge spanning I-275." Defendant submitted documentation showing the referenced roadway area was subject to a "full depth repair" in July 2008. No evidence was submitted to establish if any temporary patching repairs were made at the southbound end of the US Route 42 bridge spanning Interstate 275 between February 25, 2008 and May 15, 2008. Plaintiff insisted DOT had knowledge of the pothole his car struck prior to May 15, 2008.

{¶ 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 pothole 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.

{¶ 8} Generally, in order to recover in any suit involving injury proximately caused by roadway conditions including potholes, plaintiff must prove either: 1) defendant had actual or constructive notice of the pothole and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Plaintiff has not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of

this claim. No evidence has been submitted to show defendant had actual notice of the pothole. Additionally, 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. Plaintiff failed to prove his damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12, Ct. of Cl. No. 2005-09481-AD*, 2006-Ohio-7162; *Nicastro v. Ohio Dept. of Transp., Ct. of Cl. No. 2007-09323-AD*, 2008-Ohio-4190.

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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:

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Jolene M. Molitoris, Director
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RDK/laa
5/8
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