

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

DIANE KROMKE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2009-04181-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On January 28, 2009, at approximately 6:00 a.m., plaintiff, Diane Kromke, was traveling north on Interstate 77 near milemarker 155 in Cuyahoga County through a construction zone, when her 2008 Subaru Impreza struck a pothole causing tire and rim damage. Plaintiff implied the damage to her vehicle was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition on Interstate 77. Plaintiff filed this complaint seeking to recover damages in the amount of \$594.31, the cost of replacement parts and related repair expenses.

{¶ 2} Defendant acknowledged the roadway area where plaintiff's damage event occurred was within the limits of a working construction project under the control of DOT contractor, Kokosing Construction Company, Inc. ("Kokosing"). Defendant explained the construction project "dealt with grading, pavement repair, planning, resurfacing with asphalt concrete and widening structures in Cuyahoga County on I-77" between mileposts 149.00 to 155.5. Defendant asserted this particular construction project on Interstate 77 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 contended Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Kokosing is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with DOT requirements, specifications, and approval. 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 roadway section. Although Kokosing performed construction work on Interstate 77 between mileposts 149.0 to 155.5, DOT personnel assumed the duty to perform pothole patching operations on the roadway. Defendant's submitted maintenance history record shows DOT crews patched potholes in the vicinity of plaintiff's incident on five occasions from July 16, 2008 to January 23, 2009 (July 16, 2008, December 10, 2008, December 30, 2008, January 22, 2009, and January 23, 2009). Defendant related DOT records indicate "that five (5) pothole repairs were made with their own forces in the northbound direction." 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. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection with the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 3} 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.

{¶ 4} 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 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. Alternatively, defendant denied that neither DOT nor Kokosing had notice of the pothole plaintiff's car struck. Evidence has shown Kokosing was not working in the area at the time of plaintiff's incident. Defendant contended plaintiff did not offer evidence to establish that her damage was caused by any conduct attributable to DOT or Kokosing. Furthermore, defendant contended plaintiff failed to prove her damage was proximately caused by negligent maintenance.

{¶ 5} 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 potholes 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. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶ 6} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff failed to prove her property was connected to any conduct under the control of

defendant, that defendant or its agents were negligent in maintaining the roadway 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:

Diane Kromke
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Parma, Ohio 44134-6508

Jolene M. Molitoris, Director
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RDK/laa
8/6
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