[Cite as *Search v. Ohio Dept.of Transp.*, 2014-Ohio-5886.]

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

VIRGIL SEARCH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2013-00726-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Virgil Search, filed this action against defendant, Ohio Department of Transportation ("ODOT"), contending that his vehicle was damaged when he hit a pothole while traveling southbound on I-270 near the exit for Rt. 23 (exit 52 B). Plaintiff noted the damage-causing incident occurred on October 18, 2013 around 7:00 p.m. Plaintiff asserted that the damage to his vehicle was a proximate result of negligence on the part of ODOT in maintaining a hazardous condition on I-270. Plaintiff seeks damages in the amount of $134.62, the total amount to repair his vehicle. Plaintiff submitted the $25.00 filing fee with the complaint.

{¶2} Defendant's investigation indicates that the location of the plaintiff's incident "would be between mile post 52.80 and 52.40 going southbound (westbound) on IR 270 in Franklin County." Defendant determined the roadway where plaintiff's incident occurred was within the limits of a working construction project under the control of ODOT contractor, Complete General Construction Co. ("Complete"). Defendant explained the construction project "is for improving section FRA-270-52.72, Interstate Route 270 in

Franklin County, Ohio, in accordance with plans and specifications by reconstruction of the mainline pavement and adding capacity in the Median using either asphalt concrete or concrete paving, etc." Defendant asserted: "ODOT has received four (4) complaints concerning holes in the area of the incident, in the six (6) months prior to plaintiff's alleged incident; one (1) on April 8, 201[3] and three (3) the day of Plaintiff's incident."

{¶3} Defendant asserted that this particular construction project was under the control of Complete and consequently ODOT had no responsibility for any occurrences or mishaps on the roadway within the construction project limits. Defendant argued that Complete, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, ODOT contended that Complete "is responsible for . . . Plaintiff's damage incident."

{¶4} 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 when an independent contractor takes control over a particular section of roadway. All construction work was to be performed in accordance with the contract between ODOT and Complete, and ODOT was entitled "to rely on their independent contractor to perform work properly and in a workman like manner." Therefore, any "failure on the part of Complete General Construction Co. cannot be imputed to ODOT." Furthermore, defendant contended that plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by ODOT or its contractors.

{¶5} Plaintiff did not file a response to defendant's investigation report.

CONCLUSIONS OF LAW

{¶6} 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.,* 15 Ohio St. 3d 75, 77, 472 N.E.2d 707 (1984). 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*, 76-0368-AD (1977). 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.*, 145 Ohio St. 198, 61 N.E.2d 198 (1945), approved and followed.

{¶7} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App. 2d 335, 361 N.E.2d 486 (10th Dist. 1976). However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford*, 112 Ohio App. 3d 189, 678 N.E.2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App. 3d 723, 588 N.E.2d 864 (10th Dist. 1990). The duty of ODOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. ODOT 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.

{¶8} Despite defendant's contentions that ODOT 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 the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 00AP-119 (June 28, 2001).

{¶9} Defendant admitted that it had notice of these particular damage-causing potholes as it received several complaints from the date of this incident (7:55am, 10:30am, and 4:10pm). Defendant contended plaintiff failed to offer any evidence to establish his damage was attributable to any conduct on either the part of ODOT or Complete. Defendant further contended plaintiff failed to produce any evidence to prove the construction area was negligently maintained.

{¶10} 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 ODOT 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.*, 114 Ohio App. 3d 346, 683 N.E.2d 112 (10th Dist. 1995). In fact, the duty to render the highway free from an unreasonable risk of harm is the precise duty owed by ODOT to the traveling public both under normal traffic and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.*, 56 Ohio St. 3d 39, 42, 564 N.E.2d 462 (1950).

{¶11} 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*, 34 Ohio App. 3d 247, 517 N.E.2d 1388 (10th Dist. 1986). Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E.2d 1179 (Ct. of Cl. 1986). The defendant had notice of this roadway condition at least eight hours prior to plaintiff's incident

{¶12} Defendant liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively caused such condition. See *Bello v. City of Cleveland*, 106 Ohio St. 94, 138 N.E. 526 (1922), at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation*, Ct. of Cl. No. 94-13861 (1996).

{¶13} Ordinarily, 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*, 75-0287-AD (1976). The defendant provided evidence that it had actual notice of the particular damage-causing pothole prior to plaintiff's incident. Even if defendant did not receive the complaints until later that day, or days later, plaintiff could offer proof of defendant's constructive notice of the condition or evidence to establish negligent maintenance.

{¶14} "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle*, 90 Ohio App. 195, 197-198, 105 N.E.2d 429 (6th Dist. 1950). "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*, at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.*, 10th Dist. No. 92AP-1183, (Feb. 4, 1993). In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that 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*,

78-0126-AD (1978).

{¶15} Plaintiff has not produced any evidence to indicate the length of time that the road condition was present on the roadway prior to the incident forming the basis of this claim. Also, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the pothole appeared on the roadway. *Spires v. Ohio Highway Department*, 61 Ohio Misc. 2d 262, 577 N.E.2d 458 (Ct. of Cl. 1988). Here, the court find that the defendant, or its agent, Complete, had constructive notice, as three incidents occurred throughout the day on October 18, 2013, apparently while Complete workers were present.

{¶16} 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 or conditions. *Herlihy v. Ohio Department of Transportation*, 99-07011-AD (1999). However, this court finds it unreasonable that this particular pothole caused damage to three vehicles prior to plaintiff's incident and it was not repaired or at least marked in some way to show the hazard.

{¶17} Plaintiff has proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, and that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff has shown that the damage-causing pothole at the time of the damage incident was connected to conduct under the control of defendant (or its agent) or any negligence on the part of defendant proximately caused the damage. *Herman v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2006-05730-AD (2006); *Husak v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-03963-AD, 2008-Ohio-5179.

{¶18} Based on the evidence presented, plaintiff has suffered damages in the amount of $134.62, plus the $25.00 filing fee, which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E.2d 990 (Ct. of Cl. No. 1990).

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

VIRGIL SEARCH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2013-00726-AD

Interim Clerk Daniel R. Borchert

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 plaintiff in the amount of $159.62, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Interim Clerk

Entry cc:

Virgil Search
453 W. 5th Street
Chillicothe, Ohio 45601

Jerry Wray, Director
Department of Transportation
1980 West Broad Street
Mail Stop 1500
Columbus, Ohio 43223

DM/laa
Filed 4/24/14

Sent to S.C. Reporter 9/8/15