[Cite as *Witham v. Ohio Dept. of Transp.*, 2014-Ohio-5892.]

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

B. DOUGLAS WITHAM

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00021-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, B. Douglas Witham, filed this action against defendant, Ohio Department of Transportation ("ODOT"), contending that his vehicle was damaged when he was "traveling East Bound on Rt 270 on Southside of Columbus Ohio just east of Route-23 at approx. 7:30 pm on Saturday 12-21-13 hit a huge pothole, which instantly blew-out the left rear tire." 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 IR 270.

{¶2} Plaintiff seeks damages in the amount of $130.50, the total amount to replace one damaged tire, plus mounting and balancing and four-wheel alignment check. Plaintiff submitted the $25.00 filing fee with the complaint.

{¶3} Defendant's investigation indicated that the location of the plaintiff's incident "would be between mile post 52.64 and 52.00 going eastbound (northbound) 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." ODOT contended that it did not receive any complaints concerning potholes in the area of plaintiff's incident in the six months prior to December 21, 2013, the date of the occurrence.

{¶4} Defendant asserted that this particular construction project was under the control of Complete and, consequently, ODOT had no responsibility for any damage or mishap 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 the proper party defendant in this action.

{¶5} 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 Company 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.

{¶6} Finally, defendant asserted that neither ODOT nor Complete had notice of any potholes on IR 270 prior to plaintiff's incident.

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

CONCLUSIONS OF LAW

{¶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, 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.

{¶9} 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.

{¶10} 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-1119 (June 28, 2001).

{¶11} Defendant denied that either ODOT or Complete had any notice of potholes on IR 270 prior to plaintiff's property-damage event. 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.

{¶12} 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 (1990).

{¶13} 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).

{¶14} 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*, 94-13861 (1996). Plaintiff has failed to produce any evidence to prove that his property damage was caused by a defective condition created by ODOT or that defendant knew about the particular pothole

prior to approximately 7:30 p.m. on December 21, 2013.

{¶15} 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 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*, 75-0287-AD (1976). Plaintiff has not provided any evidence to prove that ODOT had actual notice of the damage-causing condition. Defendant provided the complaint summary for this particular area of IR 270, and there are numerous complaints regarding potholes at this particular location. However, none of the incidents were reported to ODOT until after plaintiff's incident. In fact, according to the report, another driver apparently struck the same pothole at approximately 8:10 p.m. on Saturday, December 21, 2013, but did not report this to ODOT until the next morning, on Sunday, December 22, 2013 at 9:38 a.m. In the absence of actual notice, for the plaintiff to recover, there must be evidence that defendant had constructive notice of the pothole.

{¶16} "[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).

{¶17} 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). While the plaintiff has not provided any evidence regarding the length of time this pothole was present on the roadway, close inspection of the complaint summary provided by defendant indicated that there was a report of potholes at or near this location on December 22, 2013 at 11:19 a.m. Greg Lewis, the individual who reported the pothole related that his pothole incident occurred on December 8, 2013 at 7:00 p.m. He stated: "[n]ear construction area, and just before the lane change and traffic from High Street enters. Front right side of car vibrates when speed reached 65+ mph." The subject of this report is "pothole" and the location is 270E and High Street. Considering plaintiff's description of the location of the incident, "just East of Route 23 [High Street]," the court find that this is the same location as plaintiff's incident. Therefore, this damage-causing pothole was present in the roadway for several weeks before plaintiff's incident. As such, the court finds defendant had constructive notice of this pothole and his claim shall be granted.

{¶18} Accordingly, plaintiff is granted judgment in the amount of $130.50, plus the $25.00 filing fee costs. *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. 1990).

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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 plaintiff in the amount of $155.50, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Interim Clerk

Entry cc:

B. Douglas Witham
32 E. 1st Street
The Plains, Ohio 45780

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

DJM/laa
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