

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

MARK WYATT

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2008-10099-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Mark Wyatt, asserted the tires on his Ford Mustang were damaged as a result of roadway conditions in a construction zone on Interstate 275 in Hamilton County. Plaintiff recalled the damage to his car occurred on September 18, 2008 at approximately 6:00 a.m. Plaintiff provided a narrative description of the particular damage incident noting: “[w]hile traveling west-bound on I-275 near the Route 4 on ramp I encountered a 6 foot hole (approximate) in the road that was the result of construction in the area.” The impact of striking this “hole” in the roadway cause blow-outs on both right side tires of plaintiff’s car. Plaintiff related “the hole was not properly covered or filled.”

{¶ 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 \$444.14, his cost of replacement parts and related expenses for automotive repair. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage

claim.

{¶ 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 construction project "dealt with grading, draining, resurfacing with asphalt concrete and reconstructing numerous structures" 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 her 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.* (Jun 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 Kokosing or DOT.

{¶ 5} Defendant denied that neither DOT nor Kokosing had any notice of the particular damage-causing roadway defect prior to 6:00 a.m. on September 18, 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.

{¶ 6} Defendant submitted a statement from Kokosing representative, Pam J. LeBlanc, who recorded Kokosing received a report of a pothole "at 275 WB and Rt 4, just west of Rt 4 bridge" at 6:30 a.m. on September 18, 2008. LeBlanc advised the pothole was patched by Kokosing personnel at 7:30 a.m. on September 18, 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. Ohio 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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OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2008-10999-AD

Deputy 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 defendant. Court costs are assessed against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Mark Wyatt
5304 Concord Crossing Drive
Mason, Ohio 45040

RDK/laa
4/14
Filed 4/28/09
Sent to S.C. reporter 8/7/09

Jolene M. Molitoris, Director
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