[Cite as *Marlowe v. Ohio Dept. of Transp.*, 2009-Ohio-7072.]

Court of Claims of Ohio

The Ohio Judicial Center
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ERNEST MARLOWE, JR.

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-01301-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On December 10, 2008, at approximately 5:15 a.m., plaintiff, Ernest Marlowe, Jr., was traveling south on Interstate 75 "around Grand Ave. exit in Dayton, Ohio" through a construction area when his 1999 Mercury Cougar struck a pothole causing tire and rim damage to the vehicle. Plaintiff pointed out the particular section of roadway was closed for pothole patching repairs shortly after his property damage incident. Plaintiff filed this complaint seeking to recover $800.18, the cost of automotive repair resulting from the December 10, 2008 incident. Plaintiff contended he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway in a construction area. The filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant acknowledged the area where plaintiff's stated damage event occurred was located within a construction zone maintained by DOT contractor, Kokosing Construction Company, Inc. ("Kokosing"). Defendant related the construction project involved grading and resurfacing, plus construction of numerous structures in

Montgomery County on Interstate 75. The project was generally located between mileposts 13.11 and 14.58 on Interstate 75. Defendant asserted 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. 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. *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. Defendant asserted plaintiff failed to offer any evidence to prove his property damage was attributable to any conduct on either

the part of DOT or Kokosing.

{¶ 5} Defendant submitted a letter from Kokosing representative, Pam J. LeBlanc, summarizing her investigation of the events of December 10, 2008 in the Interstate 75 construction area. LeBlanc noted Kokosing was contacted by DOT at approximately 7:00 a.m. on December 10, 2008 about the particular damage-causing pothole "in the left part of the center lane on Southbound I-75, near the South end of the project." According to LeBlanc, Kokosing employees did not immediately respond to conduct pothole repair operations due to "two factors; it was raining that morning and the pavement was very wet; and because the area that the pothole was in had poor sight distance due to the curve in the road." Therefore, LeBlanc explained City of Dayton Police Officers were requested to be dispatched to the site to close the center and left lanes of Interstate 75 South to facilitate patching operations. LeBlanc relate the lane closures occurred at approximately 8:00 a.m., repairs were then initiated, and the pothole was completely patched by 9:00 a.m. Defendant submitted a copy of a Kokosing "Daily Job Report" for December 10, 2008 which bears the notation that a very large pot hole was patched on Interstate 75 South using 1500 lbs. of patching material. An additional submitted document, "Long Term Work Zone Review" for December 10, 2008 contains in the comment section a notation that a pothole was patched "on 75 Southbound south end and middle lane left."

{¶ 6} 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 DOT 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.* (1995), 114 Ohio App. 3d 346, 683 N.E. 2d 112. In fact, the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic and during highway construction projects. See e.g., *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage.

{¶ 7} 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. 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.

{¶ 8} 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 his property damage 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Ernest Marlowe, Jr.
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RDK/laa
7/23
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