

[Cite as *Lietzow v. Ohio Dept. of Transp., Dist. 3, 2005-Ohio-6280.*]

IN THE COURT OF CLAIMS OF OHIO

KIRTESS E. LIETZOW	:	
Plaintiff	:	
v.	:	CASE NO. 2005-07488-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT THREE	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
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FINDINGS OF FACT

{¶ 1} 1) On June 1, 2005, at approximately 6:50 a.m., plaintiff, Kirtess E. Lietzow, was traveling east on US Route 30 (E. Lincoln Way) approaching a roadway overpass under construction, when his automobile struck a large pothole causing tire and wheel damage to the vehicle. Plaintiff estimated the damage-causing pothole measured, "roughly 48 inches in length running with direction of traffic, 13 inches across the lane and maybe 3 inches deep." Plaintiff submitted several photographs of the pothole, which all depict a large defect in the traveled portion of the roadway. These photographs also show the pothole appeared to be located within a roadway area under construction.

{¶ 2} 2) Plaintiff has asserted his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain US Route 30 in a safe drivable condition. Consequently, plaintiff filed this complaint seeking to recover \$545.00, the cost of replacement automobile parts and related expenses incurred resulting from the June 1, 2005, incident. The filing fee was

paid.

{¶ 3} 3) Defendant denied any liability in this matter. Defendant located the damage-causing pothole at milepost 17.10 on US Route 30 in Wayne County. Defendant explained the area where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, The Beaver Excavating Company ("Beaver"). Defendant asserted Beaver, by contractual agreement, was responsible for maintaining the roadway within the construction zone that involved constructing a new US Route 30 over the existing US Route 30. The pothole plaintiff's car struck was located on the existing portion of US Route 30 and not a newly constructed portion. DOT contended Beaver is the proper party defendant in this action since the damage incident occurred within the confines of an area due for construction. 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 under the maintenance responsibility of DOT.

{¶ 4} 4) Defendant filed a copy of a letter from Beaver Safety Director, Norman Hostetler, to DOT's representative. In this correspondence, Hostetler outlined his impression concerning what entity had responsibility for the pothole maintenance in the US Route 30 construction zone. Hostetler noted:

{¶ 5} The photos attached to your inquiry letter clearly show that the defective area that caused the damage was in the old, existing pavement. Old Route 30 was not worked on by Beaver Excavating. Our contract for this project calls for asphalt patching 'as directed by the Engineer on all parts of this project.' I have enclosed copies of the General Notes and related pay items for this project. It is also my understanding that the ODOT Wayne County garage had been taking care of any 'pot hole'

problems that came up.”

{¶ 6} 5) Defendant insisted Beaver was responsible for pothole maintenance within the US Route 30 construction area, although defendant’s evidence shows DOT crews patched potholes within the construction zone limits on May 19, 2005, thirteen days before plaintiff’s incident. Defendant’s records show pothole patching in the specific area of plaintiff’s damage occurrence was last performed by DOT on April 20, 2005.

{¶ 7} 6) Alternatively, defendant denied having any notice of the damage-causing defective condition. Defendant contended plaintiff failed to introduce evidence proving any requisite notice of the pothole on the part of DOT. Plaintiff did not produce evidence establishing notice of the pothole by either DOT personnel or DOT contractors.

#### CONCLUSIONS OF LAW

{¶ 8} 1) 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*, 2003-09343-AD, jud., 2004-Ohio-151.

{¶ 9} 2) 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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 10} 3) 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. 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.

{¶ 11} 4) There is no evidence defendant had actual notice of the damage-causing pothole.

{¶ 12} 5) 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 defective condition (pothole) developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶ 13} 6) 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 297.

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

{¶ 15} 8) Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing pothole was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction 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.

IN THE COURT OF CLAIMS OF OHIO

KIRTESS E. LIETZOW	:	
Plaintiff	:	
v.	:	CASE NO. 2005-07488-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT THREE	:	<u>ENTRY OF ADMINISTRATIVE DETERMINATION</u>
Defendant	:	
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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

Kirtess E. Lietzow 1626 W. Highland Avenue Wooster, Ohio 44691	Plaintiff, Pro se
Gordon Proctor, Director Department of Transportation 1980 West Broad Street Columbus, Ohio 43223	For Defendant

RDK/laa

10/21

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Sent to S.C. reporter 11/22/05