

[Cite as *Pocker v. Ohio Dept. of Transp., Dist. 12, 2007-Ohio-1768.*]

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

RANDALL POCKER

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2005-09090-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On Friday, April 22, 2005, at approximately 11:00 p.m., plaintiff Randall Pocker, was traveling west on Interstate 90 through a construction zone in Cuyahoga County, when his automobile struck a pothole in the roadway causing substantial damage to the vehicle. Plaintiff related the roadway area where his property damage occurred was between the Riverside Drive to Valley View Drive Overpasses. The west bound and east bound lanes of Interstate 90 had been rerouted in this area with traveling permitted on the roadway berm. Plaintiff recalled he was driving in the berm lane of the roadway when his car struck the pothole.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$2,500.00 for replacement parts and repair expenses related to the April 22, 2005, incident. Plaintiff has asserted 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 zone on Interstate 90 in Cuyahoga County. The filing fee was paid.

{¶3} 3) Defendant explained the area where plaintiff’s damage occurred was located within a construction zone under the control of DOT contractor, Kokosing Construction Company, Inc. (“Kokosing”). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Kokosing had any knowledge of the pothole plaintiff’s vehicle struck. Defendant submitted evidence showing Kokosing repairs roadway defects as soon as notice of the defect is received.

{¶4} 4) Plaintiff did not submit any evidence to establish the length of time the pothole was on the roadway prior to the April 22, 2005, property damage event.

{¶5} 5) 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. 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.

{¶6} 6) Furthermore, defendant again denied having any notice of the damage-causing pothole. Defendant contended plaintiff failed to introduce evidence proving any requisite notice. The claim is devoid of evidence concerning actual or constructive notice of the particular pothole by DOT personnel or DOT contractors on April 22, 2005, although

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Kokosing acknowledged potholes were a problem on this particular section of Interstate 90. Potholes were promptly repaired once knowledge of the condition was received.

CONCLUSIONS OF LAW

{¶7} 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* (2004), 2003-09343-AD, jud, 2004-Ohio-151.

{¶8} 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.

{¶9} 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.

{¶10} 4) 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. 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

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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.

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Randall Pocker
4120 Diane Drive
Fairview Park, Ohio 44126

James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
2/8
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