

[Cite as *Ballinger v. Ohio Dept. of Transp.*, 2007-Ohio-2687.]

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

REX BALLINGER

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-01614-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On March 4, 2006, at sometime between 2:00 and 3:00 p.m., plaintiff, Rex Ballinger, was traveling north on Interstate 270 through a construction zone in Franklin County, when his automobile struck a large pothole causing wheel damage to the vehicle. Plaintiff related the damage-causing pothole was located, “just before 161” on Interstate 270.

{¶2} 2) Consequently, plaintiff filed this complaint seeking to recover \$1,279.30 for replacement parts, automotive repair, and rental expenses resulting from the March 4, 2006, 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 270 in Franklin County. Plaintiff submitted the filing fee with the complaint.

{¶3} 3) Defendant explained the area where plaintiff’s damage occurred was located within a construction area under the control of DOT contractor, National Engineering & Contracting Company (“National”). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor National had any knowledge of the roadway defect plaintiff’s vehicle struck.

{¶4} 4) Plaintiff did not submit any evidence to establish the length of time the defect was on the roadway prior to his property damage.

{¶5} 5) Defendant asserted National, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued National 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 sufficient notice of the damage-causing defective condition to induce liability. Defendant contended plaintiff failed to introduce evidence proving any requisite notice. Defendant asserted all potholes within the construction zone were promptly patched after discovery. Evidence has shown National was notified about the pothole around 2:30 p.m. on March 4, 2006, and the defect was repaired by 4:00 p.m.

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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. *Cowell v. Ohio Department of Transportation*, 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 sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the pothole for a sufficient length of time to invoke liability. 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 negligently or that defendant's acts

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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. 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

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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:

Rex Ballinger
687 Brook Run Court
Westerville, Ohio 43081

James Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
3/28
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