[Cite as *Weitzman v. Ohio Dept. of Transp.*, 2008-Ohio-7129.]

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

PAUL E. WEITZMAN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-07942-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On June 3, 2008, at approximately 3:30 a.m., plaintiff, Paul E. Weitzman, was traveling east on Interstate 480 in Cuyahoga County through a construction zone, when his automobile struck a large pothole causing tire damage to the vehicle. Plaintiff specifically located the damage occurrence at "I-480 and Tuxedo Rd overpass" in the center lane that was not blocked by construction barriers.

{¶ 2} 2) Plaintiff asserted his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover $421.79, the cost of replacement tires. The $25.00 filing fee was paid.

{¶ 3} 3) Defendant explained the section of roadway where plaintiff's incident occurred was located within a construction area under the control of DOT contractor, Kenmore Construction Company ("Kenmore"). The construction project which involved roadway grading, draining, paving, and structure repairs covered mileposts 15.81 to 18.39 on Interstate 480 in Cuyahoga County. The approximate location of plaintiff's

described incident was at milepost 15.94. Defendant asserted Kenmore, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Kenmore is the proper party defendant in this action.

{¶ 4} 4) Alternatively, defendant denied that neither DOT nor Kenmore had any notice of the particular pothole on Interstate 480 prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints regarding a pothole at milepost 15.94 on Interstate 480 prior to June 3, 2008. Defendant asserted plaintiff did not submit any evidence to determine the length of time the pothole existed on the roadway prior to June 3, 2008.

{¶ 5} 5) Defendant submitted evidence showing Kenmore employees were working in the immediate area of milepost 15.94 on Interstate 480 on June 2, 2008 and again on June 3, 2008. Although these Kenmore employees were in the immediate area of plaintiff's June 3, 2003 damage event, they were performing work behind a concrete barrier wall installed parallel to the contiguous traffic lane where the damage-causing pothole was located.

{¶ 6} 6) Plaintiff filed a response in which he submitted a copy of a police report from the Brooklyn Heights Police Department. This police report records an individual driving a motorcycle on Interstate 480 on June 1, 2008 at approximately 7:15 p.m., struck the same pothole plaintiff's car struck at 3:30 a.m. on June 3, 2008. This evidence establishes that the particular damage-causing pothole was present on the roadway for more than thirty-two hours prior to plaintiff's incident. The damage-causing pothole was on the roadway while Kenmore personnel were present in the same location for an entire work day (June 2, 2008). Furthermore, plaintiff requested his damage claim be amended to include the replacement cost of a wheel rim that he claimed was bent from striking the pothole on June 3, 2008. Plaintiff submitted an invoice for his bent rim dated September 26, 2008. It appears to the trier of fact that the cost of a replacement rim was listed at $185.00.

CONCLUSIONS OF LAW

{¶ 7} 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. 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.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 8} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. Actual notice was not established.

{¶ 9} 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 both under normal traffic conditions 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; *Rhodus*, 67 Ohio App. 3d at 729, 588 N.E. 2d 864; *Feichtner*, at 354.

{¶ 10} 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*, 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179.

{¶ 11} Plaintiff has 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's evidence has shown the pothole was present on the roadway for at least thirty-two hours before his property damage event. However, the evidence has not shown defendant had actual notice of the pothole. Therefore, any liability in this claim must be based on a finding of constructive notice. To prove constructive notice, plaintiff must show sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD. Size of the defect 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. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set time standard for the discovery of certain road hazards." *Bussard*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.*, Ct. of Cl. No. 90-05881, 1992-Ohio-264, affirmed, (Feb. 4, 1993), Franklin App. 92AP-11836. Plaintiff has produced sufficient evidence to prove DOT or Kenmore had constructive notice of the roadway condition. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Rahle*

(1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429. Constructive notice of roadway potholes has been determined in multiple claims involving less than a twenty-four hour time frame. See *McGuire v. Ohio Department of Transportation* (2002), 2001-08722-AD; *Piscioneri v. Ohio Dept. of Transportation, District 12*; Ct. of Cl. No. 2002-10836-AD, 2003-Ohio-2173, jud; *Kill v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-01512-AD, 2003-Ohio-2620, jud; *Zeigler v. Department of Transportation*, Ct. of Cl. No. 2003-01652-AD, 2003-Ohio-2625; *Sheaks v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-02179-AD, 2003-Ohio-2176, jud.

{¶ 12} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-02117-AD, jud; 2005-Ohio-3976, in a Motion for Court Review, the court concluded in reversing a determination by the Clerk that thirteen hours constructive notice of a defect is insufficient notice to invoke liability on DOT. The court, in reversing the finding of constructive notice, quoted and adopted DOT's argument: "It is inappropriate that ODOT be held negligent for not patrolling every square mile of roadway every twelve hours. Such a ruling is against all case law created outside the limited arena of these administrative decisions." (Defendant's motion for court review, page 7). In its reversal order the court also recognized a constructive notice standard involving down signage. The court noted in finding, "that evidence of a stop sign being down for less than 24 hours was not enough time to impute constructive notice of its condition to ODOT." See *Cushman v. Ohio Dept. of Transp.* (1995), 91-11591; affirmed (March 14, 1996), Franklin App. No. 95AP107-8844. The court, in the instant claim, determines constructive notice of the pothole was imputed considering the existing evidence establishing the pothole was present on the roadway for more than thirty-two hours before plaintiff's damage occurrence. Furthermore, the fact defendant's agents were in the immediate proximity of the damage-causing pothole the day before plaintiff's June 3, 2008 incident coupled with the evidence the pothole was present on June 1, 2008 is sufficient to invoke liability on the part of defendant. Defendant is liable to plaintiff in the amount of $606.79, plus the $25.00 filing fee, which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $631.79, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
10/22
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