

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

SHERRI CHENOWETH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-01506-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On December 9, 2008, at approximately 11:00 p.m., plaintiff, Sherri Chenoweth, was traveling south on Interstate 75 between mile markers 53 and 54 in the proximity of a construction zone, when her 2003 Nissan Sentra struck a large pothole causing rim damage to the vehicle. Plaintiff specifically located the pothole “at approximately mile marker 53.8 in the left lane” of Interstate 75.

{¶ 2} Plaintiff asserted the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (ODOT) in failing to maintain the roadway free of defects such as potholes. Plaintiff filed this complaint seeking to recover \$350.81, the cost of replacement parts and related repair expense. The filing fee was paid.

{¶ 3} Defendant explained the portion of roadway where plaintiff’s damage event occurred was located within the limits of a construction project under the control of ODOT contractor, Kokosing Construction Company, Inc. (Kokosing). Defendant stated the “project dealt with grading, draining, resurfacing with asphalt concrete and reconstructing numerous structures in Montgomery County on I-75” between mile

markers 53.88 to 55.50. Plaintiff located her damage incident at mile marker 53.80 which appears to be outside the construction project limits. Defendant asserted Kokosing, by contractual agreement, is responsible for any mishaps in the area where they are working. Defendant argued plaintiff's damage incident occurred within the limits of the construction project. Therefore, ODOT contended Kokosing is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with ODOT 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 ODOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. ODOT 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 ODOT 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.

{¶ 4} 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.

{¶ 5} 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 ODOT nor Kokosing

had notice of the pothole plaintiff's car struck. Defendant asserted plaintiff failed to offer any evidence to prove her property damage was attributable to any conduct on either the part of ODOT or Kokosing.

{¶ 6} 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 ODOT at approximately 7:00 a.m. on December 10, 2008 about a pothole "in the left part of the center lane on Southbound I-75, near the South end of the project." Plaintiff stated she struck a pothole in the left lane of Interstate 75 on December 9, 2009. 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 related the lane closures occurred at approximately 8:00 a.m., repairs were then initiated, and the pothole was completely patch by 9:00 a.m.

{¶ 7} Defendant submitted a copy of a Kokosing "Daily Job Report" for December 9, 2008 that is essentially illegible but appears to bear the notation that Kokosing personnel set up a left lane closure of north I-75 and a "triple shift sign on 75 SB Southend." There is no indication on this report at least from the sections that can be read that any potholes were discovered. Also, defendant submitted a copy of a Kokosing "Daily Job Report" for December 10, 2008 which bears the notation that a very large pothole was patched on Interstate 75 South using 1500 lbs. of patching material. An additional submitted document, an ODOT "Maintenance History" for the dates July 1, 2008 to December 9, 2008 records no potholes were patched in the vicinity of plaintiff's incident to the time frame reported.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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 her 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Sherri Chenoweth

Jolene M. Molitoris, Director

210 Ohio Avenue
Trenton, Ohio 45067

RDK/laa
9/18
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