[Cite as *Rieger v. Dept. of Transp.*, 2009-Ohio-7140.]

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

DAVID M. RIEGER

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-01514-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On December 30, 2008, plaintiff, David M. Rieger, was traveling south on Interstate 75 "one half mile before highway 129 (Michael Fox highway)" through a construction zone, when his 2006 Ford F350 truck hit a large pothole and "then hit several others" (potholes) causing tire and wheel damage to the vehicle. Plaintiff asserted that the damage to his truck was proximately caused by negligence on the part of defendant, Department of Transportation (ODOT), in failing to maintain the roadway free of hazardous defects in a construction area on Interstate 75 in Butler County. Plaintiff filed this complaint seeking to recover $1,065.25, the cost of replacement parts. The filing fee was paid.

{¶ 2} Defendant acknowledged that the roadway area where plaintiff's incident occurred was within the limits of a working construction project under the control of ODOT contractor, John R. Jurgensen Company (Jurgensen). Defendant explained that the particular construction project "dealt with widening of I-75 between Cincinnati-Dayton Road and SR 122" between state mileposts 21.0 to 32.0 in Butler and Warren Counties. Defendant located plaintiff's incident from his description around milepost

24.3 in Butler County within the project limits. Defendant asserted that this particular construction project was under the control of Jurgensen and consequently ODOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant argued that Jurgensen, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, ODOT contended that Jurgensen is the proper party defendant in this action. Defendant implied that 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. Furthermore, defendant contended that plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by ODOT or its contractors. All construction work was to be performed in accordance with ODOT requirements and specifications and subject to ODOT approval. Also evidence has been submitted to establish that ODOT personnel were present on site conducting inspection activities.

{¶ 3} Defendant had 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 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. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that ODOT 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.

{¶ 4} Alternatively, defendant denied that neither ODOT nor Jurgensen had any notice of roadway defects around milepost 24.0 on Interstate 75 prior to plaintiff's December 30, 2008 property damage occurrence. Defendant pointed out that ODOT records show no calls or complaints were received regarding any defects at or near

milepost 24.0 prior to December 30, 2008. Defendant contended that plaintiff failed to offer any evidence to establish his property damage was attributable to any conduct on the part of either ODOT or Jurgensen.

{¶ 5} Defendant submitted a written statement from Jurgensen Project Manager, Kate Hardig, in reference to work performed on Interstate 75 during the time frame of plaintiff's incident. Hardig noted that as of December 30, 2008, Jurgensen personnel were involved with "Part 1-Stage 3" phase of construction on Interstate 75 from mileposts 22.0 to 25.0. Hardig explained, "[i]'n Part-1 Stage 3, the area that the incident occurred, we had completed work up to the intermediate course of asphalt; on the inside lanes of northbound and southbound I-75." Hardig advised that the area where plaintiff's incident occurred was open to traffic "running on this intermediate course" on December 30, 2008. According to Hardig, Jurgensen Work Traffic Supervisor, Barry Trainer, did not report any pavement issues such as potholes around the time of plaintiff's described incident. Hardig observed that "[i]n all locations where traffic runs on the intermediate course, there are no indications of pavement failure or past pavement repair."

{¶ 6} Defendant also submitted a copy of ODOT Project Engineer, Mark Wilson's log book in reference to activity on Interstate 75 within the construction project limits. Wilson recorded that a pothole was patched on December 19, 2008 on Interstate 75 north of the Mason road bridge. The log book contains no record of any pothole repair activity near milepost 24.0 on or about December 30, 2008.

{¶ 7} 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 ODOT 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 an unreasonable risk of harm is the precise duty owed by ODOT 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.

{¶ 8} Ordinarily 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. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. There is no evidence to show that any roadway defects were created by construction activity on or about December 30, 2008.

{¶ 9} Generally, in order to recover in any suit involving injury proximately caused by roadway conditions including potholes, plaintiff must prove that 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 that the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show that 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 that 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 that defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer that defendant, in a general sense, maintains its highways negligently or that defendants acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Plaintiff failed to prove that his damage was proximately caused by any negligent act or omission on the part of ODOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09323-AD, 2008-Ohio-4190.

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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.

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MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
10/1
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