[Cite as *Vargo v. Ohio Dept. of Transp.*, 2009-Ohio-5743.]

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

JOHN VARGO

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-01760-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On January 8, 2009, at approximately 10:30 a.m., plaintiff, John Vargo, was traveling on Interstate 71 at milepost 147 through a construction area when his automobile struck a pothole causing tire and rim damage to the vehicle. Plaintiff implied the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition on Interstate 71 in a construction zone in Morrow County. Plaintiff filed this complaint seeking to recover damages in the amount of $1,176.52, his cost of replacement parts and related expenses for automotive repair. The $25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant acknowledged the roadway area where plaintiff's incident occurred was within the limits of a working construction project under the control of DOT contractor, The Ruhlin Company ("Ruhlin"). Defendant explained the construction project "dealt with grading, draining, resurfacing with asphalt concrete and rehabilitating six structures on I-71" between mileposts 144.10 to 157.20 in Morrow County. Defendant asserted this particular construction project on Interstate 71 was under the

control of Ruhlin and consequently DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant asserted Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT argued Ruhlin 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. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by DOT or its contractors. All construction work was to be performed in accordance with DOT requirements and specifications and subject to DOT approval.

{¶ 3} 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, 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. No. 00AP-1119. No evidence other than plaintiff's own assertion has been produced to show a hazardous condition was maintained by either Ruhlin or DOT.

{¶ 4} Defendant denied that neither DOT nor Ruhlin had any notice of the particular damage-causing roadway defect prior to 10:30 a.m. on January 8, 2009. Defendant pointed out the roadway defect which caused plaintiff's property damage was a pothole. Defendant denied receiving any prior calls or complaints about the specific pothole on Interstate 71.

{¶ 5} Defendant noted DOT requested Ruhlin repair a pothole between milepost 146 and 145 on Interstate 71 on December 24, 2008. The pothole was patched at sometime between December 24, 2008 and December 30, 2008. Defendant submitted a photograph depicting the patched pothole which was taken on March 25, 2009. Defendant explained Ruhlin purchased cold patch material on January 8, 2009, the date of plaintiff's incident. Presumedly the cold patch material was purchased to repair potholes. Defendant submitted records showing DOT patched potholes in the vicinity of plaintiff's incident on December 18, 2008 and December 23, 2008.

{¶ 6} 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 pothole 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.

{¶ 7} 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. Plaintiff failed to prove his damage was proximately caused by any negligent act or omission on the part of DOT 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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DANIEL R. BORCHERT

Deputy Clerk

Entry cc:

John Vargo
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Copley, Ohio 44321

Jolene M. Molitoris, Director
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RDK/laa
5/20
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