[Cite as *Christie v. Ohio Dept. of Transp., Dist. 12*, 2009-Ohio-6888.]

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

FRED CHRISTIE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2009-03924-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On April 3, 2009, at approximately 10:30 a.m., plaintiff, Fred Christie, was traveling on Interstate 77 through a construction zone, when his 2007 Toyota Avalon struck a pothole near the Pleasant Valley Road Exit causing tire damage to the vehicle. Plaintiff pointed out the damage-causing pothole was located on the roadway shoulder and he was directed to drive on the shoulder area due to construction activity. Plaintiff specified the damage-causing defect formed at the edge of a roadway bridge "where the concrete meets the asphalt." Plaintiff implied the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of defects in a roadway construction area. Consequently, plaintiff filed this complaint seeking to recover $161.56, the cost of a replacement tire. The filing fee was paid.

{¶ 2} Defendant acknowledged the area where plaintiff's described damage event occurred was located within a construction zone maintained by DOT contractor, Kokosing Construction Company, Inc. ("Kokosing"). Defendant related the construction project "dealt with grading, pavement repair, planning, resurfacing with asphalt concrete

and widening structures in I-77 in Cuyahoga County" between mileposts 149.0 to 155.5. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Kokosing is the proper party defendant in this action, despite the fact all construction work was to be performed in accordance with DOT 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 section of roadway.

{¶ 3} 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 road in 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.

{¶ 4} 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 DOT nor Kokosing had notice of the pothole plaintiff's car struck. Defendant's records show DOT received one prior complaint on October 31, 2008, about a "huge pothole in the middle lane of I-77 (before) the Pleasant Valley Exit." Apparently, according to DOT records, the

pothole was patched on December 10, 2008. Submitted records also show the pothole plaintiff's vehicle struck was not reported to any Kokosing representative prior to April 3, 2009. Kokosing records regarding "Long Term Work Zone Review" dated April 2, 2009, April 3, 2009, and April 4, 2009 do not reference any pothole or other defect on Interstate 77 near the Pleasant Valley Exit. Other records establish Kokosing employees were working in the vicinity of plaintiff's incident on April 3, 2009 and apparently no pothole was discovered near the Pleasant Valley Exit.

{¶ 5} 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.

{¶ 6} 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 to 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 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, 564 NE. 2d 462; *Rhodus*, 67 Ohio App. 3d 723, 588

N.E. 2d 864.

{¶ 7} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or construction notice of the defective condition 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.

{¶ 8} Evidence has established neither DOT nor Kokosing had actual notice of the pothole. Therefore, to find liability plaintiff must prove that DOT had constructive notice of the defect. 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 defective condition developed. *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.

{¶ 9} Defendant acknowledged the damage-causing pothole plaintiff's vehicle struck was a defect that had been previously patched and deteriorated. This fact alone does not provide proof of negligence maintenance. A pothole patch that deteriorates in less than ten days if prima facie evidence of specific negligent maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute in and of itself conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation*, Ct. of Cl. No. 2006-10343-AD, jud, 2006-Ohio-7173; *Lutz v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-06873-AD, 2008-Ohio-7029.

{¶ 10} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove that defendant or its agents maintained a known hazardous roadway condition. Plaintiff has failed to prove that his property damage was connected to any conduct under the control of defendant, defendant was negligent in maintaining the construction 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:

Fred Christie
3773 Heather Lane
Richfield, Ohio 44286

Jolene M. Molitoris, Director
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1980 West Broad Street
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RDK/laa
8/6
Filed 8/28/09
Sent to S.C. reporter 12/23/09