[Cite as *Pascuzzi v. Ohio Dept. of Transp.*, 2008-Ohio-7128.]

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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AMANDA R. PASCUZZI

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-07233-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Amanda R. Pascuzzi, asserted she suffered property damage to the front bumper of her automobile while traveling through a roadway construction area on State Route 170 in Columbia County at approximately 9:58 a.m. on June 5, 2008. Plaintiff described the specific damage incident recording, "I hit a very large pot hole which put a big rip and scrapes in my front bumper." Plaintiff stated, "I would assume it was the construction company who put the hole there since it was not there the day before (June 4, 2008)." Plaintiff pointed out construction crews worked on the particular section of State Route 170 "the night before." According to plaintiff, no signs were in position in the area to notify motorists of any adverse road conditions created by construction activity. Plaintiff recalled that immediately before her damage incident she "was stopping for a red light just a few feet in front of me so I wasn't going fast at all" when her vehicle struck the defect in the roadway. Additionally, plaintiff recalled an SUV traveling in front of her vehicle, a 1998 Mitsubishi Eclipse, obstructed her view of roadway pavement conditions and she therefore could not see the pothole condition until "it was too late and I hit it head on." Plaintiff noted she made a complaint regarding

the particular roadway hazard and "the construction company had filled in the pot hole within an hour of me calling about it."

{¶ 2} Plaintiff contended the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain State Route 170 free of defects in a construction project area. Plaintiff filed this complaint seeking to recover $344.40, her total automotive repair costs resulting from the June 5, 2008 incident. The filing fee was paid. Plaintiff submitted photographs and a video of the roadway area where her property damage occurred. The photographs depict defective roadway conditions where existing pavement has extensively deteriorated creating extreme uneven pavement contours resulting in a wavelike effect. This wavelike effect is also depicted in the submitted video which shows vehicles bouncing erratically on the roadway despite the fact the vehicles appear to be traveling at a slow rate of speed for the conditions present.

{¶ 3} Defendant observed that the area where plaintiff's damage occurred was located within a construction project zone under the control of DOT contractor Kirila Contractors, Inc. ("Kirila"). Defendant explained the construction "project dealt with grading, draining, paving with asphalt concrete and constructing seven cast-in-place concrete retaining walls in Columbiana County on SR 170 between mileposts 0.30 to 1.50." Defendant seemingly acknowledged Kirila was working in the area of plaintiff's incident during the hours from 7:00 p.m. on June 4, 2008 to 6:30 a.m. on June 5, 2008. All work was to be performed in accordance with DOT requirements and specifications. Defendant asserted Kirila, by contractual agreement, was responsible for maintaining the roadway within the construction project limits. Therefore, defendant argued Kirila is the proper party defendant in this action. Defendant implied all duties, such as the duty to warn, the duty to maintain, the duty to inspect, and the duty to repair defects, were delegated when an independent contractor takes control over a particular roadway section. 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. See *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT 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 particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 4} Alternatively, defendant denied neither DOT nor Kirila had notice of any pothole or other defective condition on State Route 170 prior to plaintiff's property damage event. Defendant denied receiving any prior calls or complaints regarding the particular defective condition in question. Defendant related plaintiff "did not stop and file a report with the contractor at the time of the alleged incident." Defendant contended plaintiff failed to produce sufficient evidence to establish her property damage was attributable to any conduct on the part of DOT or DOT's contractor, Kirila. Defendant argued plaintiff failed to show her car was damaged as a result of negligent roadway maintenance.

{¶ 5} Defendant submitted a copy of an e-mail from Kirila Comptroller, David Pringle, who denied having any knowledge in reference to plaintiff's damage claim. Pringle noted "[t]here was never a report filed with our superintendent, Dave Kirila, the job foreman, Chad Smith, any Kirila employee or the ODOT supervisor on the job." Pringle denied there was any record of any damage complaint made by plaintiff to Kirila. Pringle wrote "[a]ccording to our records, we were installing 15" storm type B from STA 65+00 to STA 162+70 on the left side of the road. I am not sure if this is the same location that she claims the damage occurred."

{¶ 6} Additionally, defendant submitted an e-mail statement from DOT Project Engineer, Mark Thomas, regarding his knowledge of the Kirila work schedule on June 5, 2008 and the condition of State Route 170 in the vicinity of plaintiff's incident. Thomas acknowledged that on or about June 5, 2008, Kirila crews worked on a roadway drainage in the area and installed a #3 manhole on State Route 170. Thomas wrote "[t]here were no remarks of a pothole realized thru this area and to the best of my knowledge no pothole was present."

{¶ 7} Plaintiff filed a response asserting that she did make a telephone report of the June 5, 2008 damage incident to a "guy named Dave at Kirila." Plaintiff submitted the phone number she called and insisted she made the phone report on June 5, 2008. In her response, plaintiff included photographs depicting the roadway defect her vehicle struck and the referenced video showing traffic moving through the area where the

roadway defect was located. Plaintiff explained her car "is very low to the ground" and this fact could have exacerbated the damage she suffered from traveling over the uneven roadway conditions on State Route 170. Plaintiff filed notice with the court that she has changed her name to Amanda Pascuzzi. The caption and docket in this claim, No. 2008-07233-AD, shall be corrected to reflect plaintiff's name change to Amanda R. Pascuzzi.

{¶ 8} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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. However, proof of a dangerous condition is not necessary when defendant's own agents actively cause such condition, as it appears to be the situation in the instant matter. See *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. In the instant claim, sufficient evidence has been presented to show defendant's agents created the defective roadway condition that caused the damage to plaintiff's car. Furthermore, evidence has shown both Kirila and DOT personnel were present in the area during June 5, 2008 and should

have discovered the problems with the pavement depicted in the video plaintiff submitted.

{¶ 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. Plaintiff has proven her property damage was proximately caused by conduct attributable to DOT's agents.

{¶ 10} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. In the instant action, the trier of fact finds the statements of DOT Project Engineer and the Kirila representatives are not persuasive in regard to the lack of knowledge concerning the presence of dangerous roadway conditions on State Route 170. It is clear from plaintiff's evidence that the particular section of roadway on State Route 170 contained defective pavement conditions on June 5, 2008. In the instant claim, the facts indicate defendant's agents were working within the immediate vicinity where the property damage incident occurred. This is sufficient to show constructive notice and resulting liability. *Jennings v. Ohio Dept. of Transportation* (1997), 96-10908-AD; *Maxwell v. Ohio Department of Transportation* (2000), 2000-01775-AD; *Hall v. Dept. of Transp.* (2000), 2000-05363-AD. Consequently, defendant is liable to plaintiff for the damages claimed, $344.40, 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 $369.40, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
11/13
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