[Cite as *Bordonaro v. Dept. of Transp.*, 2009-Ohio-7139.]

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

JAMES BORDONARO

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-11681-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On August 28, 2008, plaintiff, James Bordonaro, was traveling south on Interstate 71 through a construction zone driving his 2002 Chevrolet Avalanche and towing a trailer with the vehicle. Plaintiff stated, "I was following behind a truck and a car, when I saw a block of concrete, probably about 2 feet (long) 2 feet (wide), and 8 inches thick" laying on the traveled portion of the roadway. Plaintiff explained the 2002 Chevrolet Avalanche struck the "block of concrete" causing damage to the right front tire and then the trailer struck the block causing substantial damage to that vehicle. Plaintiff submitted photographs depicting the damage to his vehicles as well as a photograph of the "block of concrete," along with another photograph of a deteriorated pavement condition. It appears the damage-causing "block of concrete" emanated from the deteriorated pavement area where a defect had been patched, but the patching material deteriorated creating a new defect. A "Traffic Crash Report" compiled by the Ohio State Highway Patrol incident to plaintiff's damage occurrence noted the "block of concrete" was a loosened piece of roadway pavement.

{¶ 2} Plaintiff implied the damage to his vehicles was proximately caused by

negligence on the part of defendant, Department of Transportation (ODOT), in maintaining a hazardous condition in a construction area on Interstate 71 in Medina County. Plaintiff filed this complaint seeking to recover $1,274.09, the total cost of vehicle repair expense he incurred resulting from the August 28, 2008 described incident. The filing fee was paid.

{¶ 3} Defendant acknowledged the roadway area where plaintiff's damage event occurred was within the limits of a working construction project under the control of ODOT contractor, The Ruhlin Company (Ruhlin). Defendant explained the construction project "dealt with grading, draining, planning and resurfacing with asphalt concrete and repair several structures in Medina County on I-71 between state mileposts 208.06 to 213.77." Defendant asserted this particular construction project on Interstate 71 was under the control of Ruhlin and consequently ODOT had no responsibility for any damage or mishap on the roadway within the construction project limits. From plaintiff's description of the damage event, defendant located the incident at milepost 209.0, which is within the area under Ruhlin's control. Defendant contended Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, ODOT argued Ruhlin 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 that 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 ODOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. *St. Cyr v. Ohio Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2008-10803-AD, 2009-Ohio-4274; *Evanoski v. Dept. of Transp.* (2009), 2009-04998-AD.

{¶ 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. 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. Defendant maintained an onsite Project Engineer at the Interstate 71 construction project.

{¶ 5} Alternatively, defendant denied that neither ODOT nor Ruhlin had any knowledge of any roadway defects or debris prior to plaintiff's property damage event. Defendant report ODOT "records indicate that no calls or complaints were received at the Medina County Garage regarding the concrete debris in question prior to Plaintiff Bordonaro's incident." Defendant contended plaintiff has failed to offer any evidence to prove his property damage was attributable to any conduct on either the part of Ruhlin or ODOT. Defendant did not submit any maintenance history in reference to the pothole patching repairs made by either ODOT or Ruhlin at milepost 209.0 on Interstate 71 in Medina County. The file is devoid of any record of when the massive pothole at milepost 209.0 where the "block of concrete" emanated from was last patched prior to August 28, 2008.

{¶ 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 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 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.

{¶ 7} 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. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, at paragraph one of the syllabus. No evidence has been produced to prove that Ruhlin personnel actively caused the roadway defect during working operations in August 2009.

{¶ 8} In order to recover in any suit involving injury proximately caused by roadway conditions plaintiff must prove either: 1) defendant had actual or constructive 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. There is no evidence defendant or its agents had actual notice of any roadway defect at milepost 209.0 prior to plaintiff's incident. Defendant's evidence, specifically the ODOT "Daily Diary Report" (copy submitted) for August 28, 2008 indicates notice of defective condition at milepost 209.0 was received after plaintiff's vehicles were damaged.

{¶ 9} Furthermore, insufficient evidence has been offered to prove constructive notice of the damage-causing condition. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set time standard for the discovery of certain road hazards." *Bussard*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. 92AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047. In order to prove constructive notice, evidence has to be presented in respect to the time the defective condition first

appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no evidence of constructive notice of the damage-causing condition in the instant claim.

{¶ 10} Defendant submitted a transcript of a recorded statement plaintiff made to Ruhlin representatives in reference to the August 28, 2008 incident. Plaintiff stated "I saw a concrete slab moving around the road, like it got flipped up, over the, onto the road from the actual patch that it came from in the road." Plaintiff related it was his belief the semi-truck in front of his vehicle displaced the concrete slab from the deteriorated pothole patch on Interstate 71.

{¶ 11} Plaintiff has failed to produce sufficient evidence to prove his property damage was caused by negligent maintenance despite the fact the damage-causing condition in the instant claim emanated from a deteriorated pothole patch. *Mossevelde v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-08515-AD, 2008-Ohio-7116; *Christie v. Ohio Dept. of Transp., Dist. 12* (2009), 2009-03924-AD. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, Ct. of Cl. No. 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, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Plaintiff has failed to prove when the pothole that damage his vehicles had been previously patched or that the pothole was patched with material subject to rapid deterioration. Furthermore, plaintiff also failed to establish the general time frame when the roadway condition depicted in his photographs initially appeared. Plaintiff, in the instant claim, has not produced sufficient 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.

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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:

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RDK/laa
10/1
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