[Cite as *Moneypenny v. Ohio Dept. of Transp., Dist. 4*, 2009-Ohio-5752.]

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
614.387.9800 or 1.800.824.8263
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EDWARD MONEYPENNY

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DIST 4

Defendant

Case No. 2009-02499-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 1, 2009, at approximately 7:30 p.m., plaintiff, Edward Moneypenny, was traveling on Interstate 271 in Summit county through a construction area, when his 2009 Chevrolet Silverado 1500 pick-up truck struck a large pothole causing rim damage to the vehicle. Plaintiff specifically located the incident "southbound on Route 271 in Macedonia, Ohio, 1 mile before Brandywine ski resort in the left lane." Plaintiff pointed out his vehicle struck the pothole as he was "just driving out of the construction."

{¶ 2} 2) Plaintiff asserted the damage to his vehicle was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous roadway condition on Interstate 271 in a construction zone. Plaintiff filed this complaint seeking to recover damages in the amount of $250.00, his insurance coverage deductible for vehicle repair. Plaintiff paid the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 3} 3) Defendant observed the area where plaintiff's damage occurred was

actually on State Route 8 and Interstate 271. Defendant acknowledged the roadway area where plaintiff's damage incident occurred was located within a construction zone under the control of DOT contractor, Beaver Excavating Company ("Beaver"). Defendant explained the construction project "dealt with grading, draining, and paving with asphalt concrete on SR 8 between mileposts 15.63 and 18.05." Based on plaintiff's description, defendant located the damage-causing pothole at milepost 17.93 on State Route 8, within the construction project limits. Defendant related Beaver was "responsible for any occurrences or mishaps in the area in which they are working," including pothole repair. Therefore, defendant contended Beaver bore responsibility for maintaining the roadway within the construction project limits and consequently, DOT is not 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 conducts construction operations on a particular section of roadway. All work within the construction project was subject to DOT specifications, requirements, and approval.

{¶ 4} 4) Alternatively, defendant denied liability based on the contention that neither DOT nor Beaver had any prior knowledge of the pothole plaintiff's vehicle struck. Defendant has no record of receiving any calls or complaints about a pothole at milepost 17.93 on State Route 8 prior to plaintiff's incident. Defendant argued plaintiff failed to produce any evidence to establish the length of time the pothole existed prior to his February 1, 2009 property damage event. Defendant argued plaintiff failed to offer evidence to prove DOT negligently maintained the roadway.

{¶ 5} 5) Defendant submitted a written statement from Beaver Contract Administrator, Matt Sterling, wherein he recorded his observations and recollections of the events of February 1, 2009 after having a conversation with plaintiff. Sterling noted February 1, 2009, "was a very windy day and that there was 15" of snow on the ground that would have caused blowing and drifting." Sterling recalled from his conversation with plaintiff that he was advised the roadway section around milepost 17.93 on State Route 8 were snow covered earlier in the day on February 1, 2009, but were not snow covered at the time of the property damage incident (approximately 7:30 p.m.). From this information, Sterling surmised "we believe that the pothole in question must have been caused by the snow plow removing an existing asphalt patch as it cleared the

roads which in case The Beaver Excavating Company nor ODOT could have (possibly) been aware that the pothole existed."

{¶ 6} 6) Additionally, defendant submitted written information from DOT Project Engineer, Anne Powell, regarding her knowledge and recollection of the event forming the basis of this claim. Powell recorded she received a telephone call at her home "about 7:30 p.m. on Sunday 2.1.09" from another DOT employee regarding the pothole in question which had been reported to DOT by the Macedonia Police. Powell in turn reported she contacted Beaver representatives about the pothole and repairs were initiated at sometime after 11:30 p.m. on February 1, 2009. Powell provided the following information concerning the particular roadway section in question: "[t]his area has a newly placed shoulder (temp pavement) adjacent to the existing mainline lanes (concrete with asphalt overlay) the area is prone to spalling and ravelling. The project has cold patched the area before, . . . 12/27/08, 1/20/09, 2/1/09. The area in question does have a history of repairs, but none the size of the one on the particular call out." Powell noted inspectors had driven through the area on January 30, 2008 and the described project drive through "did not reveal any issues with the pavement area in question." Also Powell acknowledged "I know ODOT was in the area salting and plowing all weekend in the area, though we do not have a written record of this." Defendant submitted photographs depicting the repaired pothole. The photographs were taken on March 12, 2008. Defendant argued evidence has not been produced "which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the ODOT or Beaver Excavating Company was the cause of Plaintiff Moneypenny's incident."

{¶ 7} 7) Plaintiff filed a response pointing out defendant admitted the area where his damage incident occurred had prior pavement repairs with cold patch material on December 27, 2008 and January 10, 2009. Plaintiff also pointed out defendant acknowledged the roadway area in question "was prone to spalling and ravelling." Plaintiff contended these acknowledgments constitute sufficient evidence to prove defendant had constructive notice of the pothole his vehicle struck. Additionally, plaintiff observed Beaver opined that the pothole was caused by DOT snow plowing operations earlier in the day on February 1, 2009.

CONCLUSIONS OF LAW

{¶ 8} 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. Additionally, defendant has a duty to exercise reasonable care for the motoring public when conducting snow removal operations. *Andrews v. Ohio Department of Transportation* (1998), 97-07277-AD.

{¶ 9} The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to 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.

{¶ 10} 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 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.

{¶ 11} 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.

{¶ 12} Ordinarily in a claim involving roadway defects, 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. Evidence seemingly indicates 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 negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of 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, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Furthermore, a pothole patch that deteriorates as a result of outside forces not associated with normal roadway use does not necessarily prove negligent roadway maintenance.

{¶ 13} To constitute 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. 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. However, proof of notice of a dangerous condition is not necessary when defendant's own agents

or personnel 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. In the instant claim plaintiff has offered sufficient proof to establish the damage to his vehicle was proximately caused by the acts of defendant's personnel in conducting snow removal operations. See *McFadden v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-02881-AD, 2004-Ohio-3756; also *Ruminski v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-05213-AD, 2005-Ohio-4223.

{¶ 14} "If any injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 15} In the instant action the trier of fact finds in the statements offered by both DOT and Beaver employees that the pothole was caused by DOT snow removal operations. Sufficient evidence has been presented to establish defendant breached its duty of care to protect motorists from hazards arising out of DOT maintenance activities. Plaintiff has proven his property damage was caused by the acts of DOT personnel. See *Vitek v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2004-09258-AD, jud, 2005-Ohio-1071; *Zhang v. Ohio Dept. of Transp.*, Ct. Of Cl. No. 2008-07811-AD, 2008-Ohio-7077; *Barnett v. Ohio Dept. of Transp.* (2009), 2008-08809-AD. Consequently, defendant is liable to plaintiff for the damages claimed, $250.00, 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 $275.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
6/10
Filed 6/24/09

Sent to S.C. reporter 10/29/09