[Cite as *Evanoski v. Dept. of Transp.* , 2009-Ohio-7094.]

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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NATHAN EVANOSKI

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-04998-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On April 5, 2009, at approximately 9:30 p.m., plaintiff, Nathan Evanoski, was traveling on the southbound entrance ramp to Interstate 71 in a construction area in Medina County, when the 2003 Pontiac Grand AM he was driving struck a large pothole causing substantial damage to the vehicle. Plaintiff described the damage-causing pothole as a "large square hole cut in (the) road." Plaintiff implied the damage to the 2003 Pontiac Grand AM was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in maintaining a hazardous condition within a construction zone on Interstate 71. Consequently, plaintiff filed this complaint seeking to recover damages in the amount of $1,001.93, an amount representing the insurance coverage deductible for automotive repair, plus car rental expenses. 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 damage event 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, paving 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 DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant contended Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Ruhlin 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 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 DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction.

{¶ 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 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. 00AP-1119.

{¶ 4} Defendant acknowledged receiving two prior complaints about the particular potholes on the Interstate 71 entrance ramp. The complaints, both received on March 9, 2009, were handled by DOT Project Engineer, Luke Wysocki, who contacted Ruhlin and Ruhlin personnel in turn patched all potholes throughout the construction project. Since pothole formation appeared to present a problem in the

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project area it was agreed both Ruhlin and DOT project personnel would monitor the roadway pavement for pothole formation. Apparently no potholes were patched within the project limits during the period from March 9, 2009 to April 5, 2009. Defendant contended that neither DOT nor Ruhlin were aware of the particular damage-causing pothole until after plaintiff's incident occurred. Defendant stated "that I-71 was in good condition at the time and in the general vicinity of the plaintiff's incident." Defendant asserted plaintiff did not produce evidence to prove the damage claimed was attributable to any conduct on the part of Ruhlin or DOT. Defendant denied breaching any duty of care owed to plaintiff in regard to roadway maintenance.

{¶ 5} A distinct and separate claim, Case No. 2009-01727-AD, was filed in this court that involved the same pothole plaintiff's car struck. The plaintiff in Case No. 2009-01727-AD struck the pothole on Interstate 71 on January 2, 2009. Evidence submitted in Case No. 2009-01727-AD established that both DOT and Ruhlin had actual notice of the pothole on December 29, 2008 and the particular defect was described as a recurring pothole.

{¶ 6} Plaintiff filed a response noting the pothole "was a lage square cut into the roadway (and) was not a typical wear and tear pothole." Additionally, plaintiff noted the damage-causing pothole "was a man made hole purposely cut into the roadway." Plaintiff suggested Ruhlin personnel had purposely cut the hole in the road. Plaintiff believed the defect his vehicle struck was not a "preexiting repaired pothole."

{¶ 7} 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.

{¶ 8} 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. 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.

{¶ 9} 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. Evidence is inconclusive to prove that Ruhlin personnel actively caused the roadway defect during working operations in early April 2009.

{¶ 10} 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

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highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Defendant acknowledged the damage-causing pothole the 2003 Pontiac Grand AM 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 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, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173; *Lutz v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-06873-AD, 2008-Ohio-7029. However, considering the particular pothole was classified as a recurring pothole that both defendant and Ruhlin knew about constitutes evidence of constructive notice and negligent maintenance considering that prior patches were prone to deterioration. *Denis*, 75-0287-AD. Furthermore, the fact the pothole needed repair on prior occasions in a brief time frame is conclusive evidence of negligent maintenance. *Carter v. Highway Department Transportation O.D.O.T.* (1997), 97-03280-AD; *Reese v. Ohio Dept. of Transportation* (1999), 99-05697-AD; *Schrock v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2005-02460-AD, 2005-Ohio-2479. Defendant is liable to plaintiff for the damages claimed, $1,001.93, 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 $1,026.93, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT

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January 19, 2010

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RDK/laa
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