[Cite as *Obracay v. Ohio Dept. of Transp., D-12*, 2009-Ohio-7095.]

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
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DANIEL OBRACAY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, D-12

Defendant

Case No. 2009-05081-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On April 30, 2009, at approximately 4:50 p.m., plaintiff, Daniel Obracay, was traveling north on Interstate 271 through a construction zone near milemarker 35, when his 2006 BMW 525XI struck a pothole causing tire damage to the vehicle. Plaintiff pointed out the particular roadway pavement where the pothole was located "had been roughed up" (milled) in preparation for repaving. Plaintiff implied the damage to his car 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 area in Cuyahoga County. Plaintiff filed this complaint seeking to recover damages in the amount of $494.84, his cost of replacement parts and related repair expenses. The filing fee was paid.

{¶ 2} Defendant acknowledged the roadway area where plaintiff's property damage incident occurred was located within the limits of a working construction project under the control of DOT contractor, Karvo Paving Company (Karvo). Defendant explained the construction project "dealt with grading, draining, planning, pavement repair and resurfacing with asphalt concrete on I-271" between mileposts 31.50 and

35.80 in Cuyahoga County. Defendant asserted this particular construction project was under the control of Karvo and consequently, DOT had no responsibility for any damage or mishap on the roadway within the construction project limits. Defendant argued Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT reasoned Karvo is 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 takes control over a particular section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by DOT or its contractors. All construction work was to be performed in accordance with DOT requirements and specifications and subject to DOT approval. Also, DOT personnel maintained an onsite inspection presence throughout the construction project limits.

{¶ 3} 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.

{¶ 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 DOT to maintain the roadway in a safe drivable condition is not delegable to 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. Evidence is inconclusive to establish the specific hazardous condition was attributable to any conduct on the part of either DOT or Karvo.

{¶ 5} Defendant denied that neither DOT nor Karvo had any knowledge of the particular damage-causing roadway defect prior to 4:50 p.m. on April 30, 2009. Defendant stated "I-271 was in good condition at the time and in the general vicinity of plaintiff's incident." Defendant denied receiving any calls or complaints about the specific pothole at milemarker 35 on Interstate 271. DOT records (copies submitted) indicate potholes on Interstate 271 north were reported on April 13, 2009 and April 30, 2009. However, the location of the reported potholes did not coincide with the location of the pothole plaintiff's vehicle struck.

{¶ 6} Defendant submitted a letter from Karvo representative, Michael A. Totaro, who explained Karvo personnel were not working during the day of April 30, 2009 due to the fact "Karvo performs night operations only on this particular project." Totaro reiterated the DOT position that neither DOT nor Karvo had any knowledge of the pothole at milemarker 35.0 prior to plaintiff's incident. Totaro noted:

{¶ 7} "All zones and roadway are driven and inspected by Karvo and ODOT concurrently with all operations of work. The Traffic Control Supervisor, in addition to ODOT personnel, travels the length of the project searching for any potential traffic hazards. If the Traffic Control Supervisor or ODOT observes any issues with-in the zone, the Supervisor will correct the situation immediately and prior to dismantling and opening the roadway to traffic."

{¶ 8} Apparently no potholes were located at milemarker 35.0 on Interstate 271 during the frequent inspections by both DOT and Karvo that were described by Totaro. Submitted Karvo records show milling operations on Interstate 271 north on April 29,

2009 and discovered potholes were repaired with cold patch material on April 30, 2009. Totaro denied the pothole plaintiff's car struck was caused by any direct act of Karvo personnel.

{¶ 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 under both 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 462.465.

{¶ 10} 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 notice 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. Insufficient evidence has been submitted to prove defendant's agents actively created the roadway defect plaintiff's car struck.

{¶ 11} In order to recover in any suit involving injury proximately caused by roadway conditions including potholes, plaintiff must prove either: 1) defendant had actual or constructive notice of the pothole 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. Plaintiff has not produced sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the pothole Additionally, 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 pothole appeared on the roadway. *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. Plaintiff failed to prove his damage was proximately caused by any negligent act or omission on the part of DOT or its agents. See *Wachs v. Dept. of Transp., Dist. 12*, Ct. of Cl. No. 2005-09481-AD, 2006-Ohio-7162; *Nicastro v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2007-09323-AD, 2008-Ohio-4190.

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OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

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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
8/26
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