[Cite as *Smola v. Dept. of Transp.*, 2009-Ohio-7118.]

Court of Claims of Ohio

The Ohio Judicial Center
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ROBERT SMOLA

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05196-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On April 30, 2009, at 5:15 p.m., plaintiff, Robert Smola, was traveling north on Interstate 271 "right before the Mayfield Exit" through a construction zone, when his 2008 Chevrolet Cobalt LS struck a "very large pothole" causing tire and rim damage to the vehicle. Plaintiff recalled about 16 other cars hit the same pothole prompting the Mayfield Heights Police to shut down the roadway lane where the pothole was located. 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 in a construction zone on Interstate 271 in Cuyahoga County. Plaintiff filed this complaint seeking to recover $391.71, the cost of replacement parts and related repair expense. The filing fee was paid.

{¶ 2} Defendant acknowledged the section of roadway where plaintiff's damage event occurred was located within construction project limits under the control of DOT contractor, Karvo Paving Company (Karvo). Defendant related the particular construction "project dealt with grading, draining, planning, pavement repair and resurfacing with asphalt concrete" of Interstate 271 in Cuyahoga County between state

mileposts 31.50 to 35.80. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction work zone. Therefore, DOT argued Karvo is the proper party defendant in this action despite the fact all construction work was to be performed in accordance with DOT specifications and approval. The construction area was also subject to DOT inspection. 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 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 the particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119.

{¶ 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. *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.

{¶ 4} 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. Alternatively, defendant denied that neither DOT nor Karvo had notice of the pothole plaintiff's car struck. Evidence has shown Karvo was not working in the area at the time of plaintiff's incident. Defendant asserted plaintiff has failed to produce any evidence to establish either DOT or Karvo created the damage-causing

pothole. Defendant pointed out "that I-271 was in good condition at the time and in the general vicinity of the plaintiff's incident." Defendant contended plaintiff has not offered evidence to prove his damage was attributable to any conduct on either the part of DOT or Karvo.

{¶ 5} Defendant submitted a letter from Karvo representative, Michael A. Totaro, who observed Karvo "[p]erforms night operations only on this particular project and had no active zones or workers present at the time of the incident." Totaro noted "[a]ll zones and roadway are driven and inspected by Karvo and ODOT concurrently with all operations of work." Apparently no potholes were discovered during the last roadway inspection within the project limits prior to April 30, 2009.

{¶ 6} 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. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven.

{¶ 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; *Rhodus*, 62 Ohio App. 3d at 729, 588 N.E. 2d 864; *Feichtner* at 354.

{¶ 8} Generally, 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 any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show 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. 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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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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
9/11
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