[Cite as *Kornokovich v. Ohio Dept. of Transp.*, 2009-Ohio-7123.]

Court of Claims of Ohio

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ANTHONY KORNOKOVICH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05641-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On May 3, 2009, at approximately 7:00 p.m., plaintiff, Anthony Kornokovich, was traveling north in the middle lane of Interstate 271 through a construction zone "near the Mayfield Road exit" when his 2006 BMW 325 I struck a roadway defect causing tire damage to the vehicle. Plaintiff described the damage-causing defect as "a major gap in the roadway." Plaintiff asserted that the damage to his automobile 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 $342.35, his cost of replacement parts and related repair expenses. The filing fee was paid.

{¶ 2} Defendant acknowledged that 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 that 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 that 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 that Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction zone. Therefore, DOT reasoned that Karvo is the proper party defendant in this action. Defendant implied that 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 that 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 that 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 plaintiff's car struck, which according to DOT records, was located at milepost 35.00 on Interstate 271, within the limits of the construction zone. Defendant essentially contended that plaintiff failed to produce evidence establishing the length of time that the defect existed at milepost 35.00 prior to 7:00 p.m. on May 3, 2009.

{¶ 6} Defendant stated that "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 defect at milemarker 35.00 on Interstate 271. DOT records (copies submitted) indicate that 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. The April 13, 2009 report noted potholes between milemarkers 38.6 to 38.8. The April 30, 2009 report recorded a "large pothole I 271 Right Lane Northbound Local Lanes just before Ridgebury overpass."

{¶ 7} Defendant submitted a letter from Karvo representative, Michael A. Totaro, who explained that Karvo personnel do not work during weekends (May 3, 2009 was a Sunday) and that "Karvo performs night operations only on this particular project." Totaro reiterated the DOT position that neither DOT nor Karvo had any knowledge of a gap or pothole at milemarker 35.0 prior to plaintiff's incident. Totaro noted:

{¶ 8} "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."

{¶ 9} Apparently no potholes or other defects 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 May 1, 2009 in the left lane of travel along with ramps. Evidence submitted in another claim, 2009-05081-AD, has shown that Karvo personnel milled mainline Interstate 271 north and ramps on April 29, 2009. On both April 29, 2009 and again on April 30, 2009, Karvo patched roadway defects with cold patch material from the "beginning to (the) end of the job." In claim 2009-05081-AD the plaintiff's vehicle struck a pothole at milemarker 35.00 on Interstate 271 north at approximately 4:50 p.m. on April 30, 2009. In the instant claim, Totaro denied that the defect plaintiff's car struck was caused by any direct act of Karvo personnel.

{¶ 10} Despite filing a response plaintiff did not produce any evidence to establish the length of time that the defect was present at milepost 35.00 on Interstate 271 prior to 7:00 p.m. on May 3, 2009. Evidence from claim 2009-05081-AD suggests that the defect plaintiff's car struck was present on the roadway before 4:50 p.m. on April 30, 2009. Additionally, evidence available suggests that the damage-causing defect in the present claim was previously patched on April 29, 2009 or April 30, 2009 and that the patching material had deteriorated by May 3, 2009. Plaintiff pointed out no records were submitted to indicate roadway inspections were conducted by either DOT or Karvo.

{¶ 11} 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, 465.

{¶ 12} 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 that defendant's agents actively created the roadway defect plaintiff's car struck.

{¶ 13} 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.

{¶ 14} Generally, in order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove that 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. There is no evidence that defendant had actual notice of the deteriorated roadway condition. Therefore, in order to recover plaintiff must produce evidence to prove constructive notice of the defect or negligent maintenance.

{¶ 15} "[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 1 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.

{¶ 16} Plaintiff has proven that defendant had constructive notice of the damage-causing defect at milemarker 35.00 on Interstate 271. Evidence has shown that the defect was present on the roadway more than three days before plaintiff's incident. The trier of fact finds that sufficient time elapsed from the time the condition first appeared until plaintiff's damage event to establish constructive notice.

{¶ 17} Additionally, evidence has been produced to infer that the roadway was negligently maintained. *Denis*. The damage-causing defect in the instant action appears to have been formed when an existing patch from either April 29 or April 30, 2009 deteriorated. A 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. No evidence has been produced to indicate when the pothole at milepost 35.00 on I-271 was first patched. The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court does not find defendant's assertions persuasive that routine patrols were conducted or that the roadway was adequately maintained. Conversely, the trier of fact finds plaintiff's assertions persuasive in regard to the contentions that the roadway was not routinely inspected all along the project site by both Karvo and DOT personnel. Based on the rationale of *Denis*, the court concludes that defendant is liable to plaintiff for all damages claimed, $342.35, plus the $25.00 filing fee costs. *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 $367.35, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY

Clerk

Entry cc:

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RDK/laa
9/16
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