[Cite as *Novak v. Ohio Dept. of Transp.*, 2009-Ohio-6733.]

Court of Claims of Ohio

The Ohio Judicial Center
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FRANK J. NOVAK

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03291-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 1, 2009, at approximately 10:30 p.m., plaintiff, Frank J. Novak, was traveling south on Interstate 271 in Summit County through a construction area, when his 1995 Ford Escort LX/Sport struck a large pothole causing substantial damage to the vehicle. Plaintiff specifically located the pothole "south I271 just past the mile 18 marker." Plaintiff explained both left tires on the car were damaged as a result of striking the pothole and the left rear strut protruded through the vehicle's floor. Furthermore, plaintiff recalled the impact of striking the pothole caused the "back side of the car (to come) down on the rear tire severing the brake line."

{¶ 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 requested damages in the amount of $2,199.46, for the total value of his automobile towing costs, and repair expenses he incurred prior to the February 1, 2009 damage incident. Plaintiff advised he was informed his 1995 Ford

Escort was a total loss as a result of the damage done by the pothole on Interstate 271. Plaintiff observed his car had a value of $1,355.00 at the time of the damage occurrence. Under these circumstances, plaintiff's damage claim is limited to $88.00 for towing costs and $1,355.00, the stated value of the vehicle. The filing fee was paid.

{¶ 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 "discussion with project personnel, review of (plaintiff's) claim, review of all project related documentation, as well as other miscellaneous resources." Sterling noted Beaver was first notified about the pothole at

milepost 17.93 by DOT "during the night of February 1st." and Beaver was "immediately mobilized and filled the pothole." A document produced by Beaver was submitted and indicated "ODOT Dispatch called 7:30 p.m." on February 1, 2009 to give notice of the pothole at milepost 17.93 on State Route 8. According to the written information on the document, defendant received first notice of the pothole from the Macedonia Police, apparently at some time before 7:30 p.m. Beaver personnel responded to the pothole notification at 12:00 midnight.

{¶ 6} 6) Evidence provided by defendant in another claim filed in this court (2009-02449-AD) regarding damage from this same pothole at milepost 17.93 indicates DOT was aware of problems with spalling and ravelling on this particular section of roadway with potholes in the area being patched on December 27, 2008, January 20, 2009, and February 1, 2009. Further evidence submitted in claim number 2009-02449-AD established DOT conducted snow removal on State Route 8 during the day of February 1, 2009, due to fifteen inches of snow on the ground with high velocity winds causing blowing and drifting. Other evidence submitted in claim number 2009-02449-AD shows Matt Sterling believed DOT's earlier snow removal operations caused the removal of an existing pothole patch at milepost 17.93 and consequently created the pothole in question. Defendant did not provide the above mentioned evidence in the present claim.

CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 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.

{¶ 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 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.

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} 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 finds both DOT and Beaver had actual notice of the damage-causing pothole at least three hours prior to plaintiff's 10:30 p.m. incident. Additionally, no physical response to this notice was made until four and a half hours after actual notice was received. This fact in and of itself would constitute sufficient actual notice of a roadway defect to invoke liability for any damage caused by that defect. Regardless of any notice time frame involved, 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.

{¶ 13} "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.

{¶ 14} 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.*, Ct. of Cl. No. 2008-08809-AD, 2009-Ohio-1589. Consequently, defendant is liable to plaintiff for the damages claimed, $1,443.00, 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 $1,468.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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