[Cite as *Voorhees v. Ohio Dept. of Transp., Dist. 12*, 2009-Ohio-7117.]

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
www.cco.state.oh.us

DONALD G. VOORHEES

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2009-05161-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On May 4, 2009, at approximately 9:15 a.m., plaintiff, Donald G. Voorhees, was traveling north on Interstate 271 "between Mayfield Rd. & Gates Mills" through a construction area, when his automobile struck a pothole causing tire damage to the vehicle. Plaintiff pointed out the roadway section where the damage-causing pothole was located was in an area where the existing pavement had been 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 zone in Cuyahoga County. Plaintiff filed this complaint seeking to recover $1,073.11, the cost of replacement parts and related repair expenses. The filing fee was paid.

{¶ 2} Defendant acknowledged the roadway area where plaintiff's incident occurred was 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 to 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 contended 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 evidence has been submitted to establish DOT personnel were present on site conducting inspection activities.

{¶ 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. No evidence other than plaintiff's own assertion has been produced to show a hazardous condition was maintained by either DOT or Karvo.

{¶ 4} Defendant denied that neither DOT nor Karvo had any notice of the particular damage-causing roadway defect prior to 9:15 a.m. on May 4, 2009. Defendant reported DOT records "indicate that there were several complaints for

potholes on I-271 but not in the area of plaintiff's incident." One submitted record shows a complaint was received on April 30, 2009 regarding a pothole on Interstate 271 in the "right lane northbound local lane just befor(e) Ridgebury overpass." This pothole was located in the general vicinity of plaintiff's incident according to defendant's submitted documentation referencing location of the pothole plaintiff's car struck. However, evidence is inconclusive for a determination that the reported pothole was the same pothole that caused plaintiff's damage. Furthermore, defendant did not submit a record of an approximate time the April 30, 2009 pothole complaint was received. Defendant asserted plaintiff failed to produce any evidence to prove his property damage was attributable to any conduct on either the part of DOT or Karvo. Defendant advised that Interstate 271 "was in good condition at the time and in the general vicinity of the plaintiff's incident."

{¶ 5} Defendant submitted a letter from Karvo representative, Michael A. Totaro, who related that "Karvo performs night operations only on this particular project and had no active zones or workers present at the time of (plaintiff's) incident." Plaintiff's incident occurred on a Monday and there is no record that Karvo performed any pavement milling operations from Sunday evening, May 3, 2009 to the early morning hours of Monday, May 4, 2009. There is no record of what specific date the particular section of Interstate 271 was milled prior to Monday, May 4, 2009. Totaro reported the construction project limits were frequently inspected and provided the following descriptive narrative:

{¶ 6} "All zones and roadway are driven and inspected by Karvo and ODOT concurrently with all operations of work. The Traffic Control Supervisor, in additional 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."

{¶ 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 under both normal traffic and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1950), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462.

{¶ 8} Ordinarily 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. *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. Evidence is inconclusive whether or not the damage-causing pothole was formed by any activity involving roadway pavement milling.

{¶ 9} 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.

_____

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Donald G. Voorhees
13510 Butternut Road
Burton, Ohio 44021

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
9/11
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