[Cite as *Everett v. Ohio Dept. of Transp.*, 2009-Ohio-6734.]

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

ADAM EVERETT

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2009-03657-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On January 1, 2009, at approximately 3:20 p.m., plaintiff, Adam Everett, was traveling "on the ramp connecting I-76 WB to I-71 SB located in Medina County" through a construction area when his Pontiac Grand Am struck a pothole causing wheel damage to the vehicle.

{¶ 2} 2) Plaintiff implied that his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway within a construction zone on Interstate 71 near Medina County. Consequently, plaintiff filed this complaint seeking to recover damages in the amount of $156.65, the total cost of replacement parts and related repair expense resulting from the January 1, 2009 incident. The $25.00 filing fee was paid.

{¶ 3} 3) Defendant observed that the area where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, The Ruhlin Company (Ruhlin). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Ruhlin had any prior knowledge of the roadway defect

plaintiff's car struck. Defendant contended that no calls or complaints were received regarding this particular pothole prior to plaintiff's incident. Defendant explained that the construction project involved roadway improvements between mileposts 208.06 to 213.77 on Interstate 71 in Medina County. Defendant located plaintiff's incident within the limits of the construction project.

{¶ 4} 4) Defendant asserted that Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Ruhlin 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. All construction was to be performed to DOT requirements and specifications and subject to DOT approval.

{¶ 5} 5) Defendant submitted a written transcript of an interview a Ruhlin agent had with plaintiff on February 24, 2009. During the course of the interview, plaintiff acknowledged that he saw the damage-causing pothole on December 30, 2008 while traveling on Interstate 71, but managed to avoid striking the defect.

{¶ 6} 6) Defendant submitted a written statement from Ruhlin Project Engineer, Thomas E. Hill, regarding the Ruhlin work schedule to repair the particular pothole plaintiff's car struck. Hill acknowledged that Ruhlin and DOT were both aware of the damage-causing pothole on December 29, 2008, four days prior to plaintiff's incident. Hill described the particular damage-causing pothole as a recurring pothole. Hill, in his statement, included a time line for Ruhlin's actions to repair the pothole. Hill noted that:

{¶ 7} "12/29/08 - ODOT emailed a maintenance of traffic repair list. On it was the need to repair this pothole

{¶ 8} "12/30/08 - Ruhlin was able to organize a crew in the afternoon, for repairs to be made on 12/31/08.

{¶ 9} "12/31/08 - The crew came to the job to attend to the necessary repairs. Poor snowy weather conditions kept the crew from repairing pot-holes. Items that could be repaired were repaired. ODOT was aware of Ruhlin's efforts.

{¶ 10} "1/5/09 - Ruhlin Crew returned to the job and made repairs to the trouble pot-hole and others."

{¶ 11} 7) Plaintiff filed a response pointing out that defendant submitted evidence establishing that both DOT and Ruhlin had actual knowledge of the damage-causing pothole prior to his January 1, 2009 incident. Plaintiff contended that defendant should have been able to repair the pothole on January 1, 2009 since on that day weather conditions were clear and therefore repairs could have been completed. Plaintiff asserted that defendant should bear responsibility for his damage due to the fact that DOT had actual notice of the defect by December 29, 2008 and repairs were not initiated until seven days later.

CONCLUSIONS OF LAW

{¶ 12} "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.

{¶ 13} "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.

{¶ 14} "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.

{¶ 15} "To prove a breach of the duty by defendant to maintain the highways, plaintiff must establish, by a preponderance of the evidence, that DOT 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. Evidence has shown that both defendant and DOT's agents had actual notice of the defective condition (pothole) and failed to correct the condition in a timely manner. Furthermore, despite the fact that plaintiff had notice of the defect on December 30, 2008, he had a reasonable expectation the pothole would have been patched by the afternoon of January 1, 2009 when his incident occurred. Consequently, plaintiff's prior knowledge of the condition has no bearing on defendant's liability. Defendant is liable to plaintiff for the damage claimed $156.65, plus the $25.00 filing fee which may be awarded as compensable damages pursuant to R.C. 2335.19. *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 $181.65, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
7/30
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