[Cite as *Littleton v. Ohio Dept. of Transp.*, 2007-Ohio-6389.]

Court of Claims of Ohio

The Ohio Judicial Center
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JUSTIN LITTLETON

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-03366-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Justin Littleton, stated that he was traveling east on Interstate 80 on the Meander Reservoir Bridge, on January 15, 2007, at approximately 8:00 p.m., when his automobile struck two large deep potholes in the roadway causing substantial damage to the vehicle. The described incident occurred within a construction zone scheduled for roadway repaving.

{¶2} 2) Plaintiff filed this complaint seeking to recover $1,299.48, the total cost of replacement parts and automotive repair resulting from the January 15, 2007, property damage occurrence. Plaintiff has implied that defendant, Department of Transportation (DOT), should be responsible for the damages he suffered. The $25.00 filing fee was paid and plaintiff requested reimbursement of that amount along with his damage claim.

{¶3} 3) Defendant explained that the area where plaintiff's damage occurred was located within a construction zone under the control of DOT contractors, Anthony Allega Cement Contractor/Great Lakes Construction (Allega/Great Lakes). Defendant located the potholes plaintiff's vehicle struck within the construction zone on Interstate 80 in Mahoning County. Defendant acknowledged that Great Lakes was responsible for work on the Meander Reservoir Bridge on Interstate 80. However, no construction work

had been performed on the Meander Reservoir Bridge at the time of plaintiff's incident. Defendant denied liability in this matter based on the contention that neither DOT nor Great Lakes had any prior knowledge of the roadway defects plaintiff's automobile struck. Defendant related that Allega personnel patched potholes on the Meander Reservoir Bridge on January 16, 2007, the day after plaintiff's property damage event. Defendant asserted that plaintiff has not produced any evidence to establish either DOT or DOT's contractors had any knowledge of the potholes before the incident forming the basis of this claim. No road maintenance was performed on January 15, 2007, because it was a holiday.

{¶4} 4) Defendant related that Allega/Great Lakes are, "contractually responsible for any occurrences or mishaps in the area in which they are working." Therefore, DOT argued that the DOT contractors are the proper party defendants 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.

{¶5} 5) Despite filing a response, plaintiff did not produce any evidence to establish the length of time that the potholes existed prior to the January 15, 2007, property damage event. Plaintiff suggested that the damage-causing potholes had been previously patched and the patching material had deteriorated. Plaintiff did not submit any evidence to show that the potholes his vehicle struck were failed repair patches or the result of prior roadway construction.

CONCLUSIONS OF LAW

{¶6} 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 contention 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. No. 00AP-119.

{¶7} 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. No evidence has shown defendant had actual notice of the damage-causing potholes.

{¶8} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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 defective condition developed. *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 potholes. 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. Size of the defects (potholes) are insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 578 N.E. 2d 891. Although plaintiff has suggested his vehicle was damaged by potholes that had been previously patched, this assertion alone, if established, 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 Dept. of Transportation*, Ct. of Cl. No. 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* (2006), Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Plaintiff has failed to prove the potholes that damaged his car had been previously patched with the patching material subject to rapid deterioration.

{¶9} 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, 5 OBR 179472 N.E. 2d 707, 710. 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 damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard*, 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 this matter. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526, paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. However, evidence has not shown defendant's agents created a hazardous condition on the Meander Reservoir Bridge.

{¶10} 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 so as to render the highway free from an unreasonable risk of harm by 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 conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 564 N.E. 2d 462; *Rhodus*, 67 Ohio App. 3d, at 729, 588 N.E. 2d 864; *Feichtner*, at 354. In the instant claim, plaintiff has failed to introduce sufficient evidence to prove defendant or its agents maintained a known hazardous roadway condition. Plaintiff has failed to prove that his property damage was connected to any conduct under the control of defendant, defendant was negligent in maintaining the construction area, or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

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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.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
7/17
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