

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

MARTY FARREN

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 12

Defendant

Case No. 2008-08299-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On June 1, 2008, at approximately 7:15 p.m., plaintiff, Marty Farren, was traveling east on Interstate 480 in Cuyahoga County, through a construction zone, when his Harley Davidson motorcycle struck a hole in the roadway causing substantial damage to the vehicle. Plaintiff described the particular damage-causing roadway defect as “a very deep crevice” measuring an estimated thirty inches in length, seven inches wide and eight inches deep. Plaintiff submitted a photograph depicting the “crevice” his motorcycle struck. The photographs show a deep linear gouge at the surface pavement in the traveled portion of the roadway lane.

{¶ 2} 2) Plaintiff implied the damage to his motorcycle was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway in the particular construction zone free of defective conditions. Plaintiff filed this complaint seeking to recover \$1,310.12, the stated cost of motorcycle repair resulting from the June 1, 2008 incident. The filing fee was paid.

{¶ 3} 3) Defendant explained the area where plaintiff’s property damage

occurred was located within a construction zone under the control of DOT contractor Kenmore Construction Company, Inc. ("Kenmore"). Defendant pointed out the particular construction project "dealt with grading, draining, paving with asphalt concrete and structure repairs between county mileposts 15.81 to 18.39 of I-480 in Cuyahoga County." Defendant located plaintiff's damage occurrence near milepost 15.94 within the limits of the construction project. Defendant asserted the construction area of Interstate 480 was under the control of Kenmore and consequently DOT bore no responsibility for any damage or mishaps on the roadway within the construction project limits. Defendant related Kenmore, by contractual agreement, was the responsible party for maintaining the roadway within the construction zone. Therefore, DOT argued Kenmore 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. All work performed by Kenmore was to be done in accordance with DOT requirements and specifications. DOT maintained a presence on the job site. Defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created either by DOT or its contractor.

{¶ 4} 4) Alternatively, defendant denied that neither DOT nor Kenmore had any notice of "the crevice or pothole" on the traveled portion of the roadway prior to plaintiff's property damage occurrence. Defendant observed that potholes and other defects "can materialize quickly in a construction zone." Defendant submitted a statement from a Kenmore representative, Jerry Stanoch, who reported no Kenmore crews were working on Interstate 480 on the date of plaintiff's incident, Sunday, June 1, 2008. Stanoch did acknowledge "Kenmore had one operator stockpiling materials" on the Interstate 480 construction project on Saturday morning, May 31, 2008. Stanoch noted Kenmore crews worked in the vicinity of plaintiff's damage occurrence on Friday, May 30, 2008. According to Stanoch, the personnel working on May 30, 2008 were behind a barrier wall separated from the open-to-traffic roadway lanes of Interstate 480. Defendant related no prior calls or complaints were received regarding a pothole or other roadway defect at or near milepost 15.94 on Interstate 480. Plaintiff reported the damage-causing road condition to the Brooklyn Heights Police Department of June 3,

2008, two days after the incident.

CONCLUSIONS OF LAW

{¶ 5} 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. *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 the 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-1119.

{¶ 6} 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. 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. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. 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. There is no evidence either defendant or its agents created the roadway condition that damaged plaintiff's motorcycle.

{¶ 7} 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.

{¶ 8} 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 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*, 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 failed to prove his property damage was connected to any conduct under the control of defendant, that 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Marty Farren
12 East Schaaf Road
Brooklyn Hts., Ohio 44131

James G. Beasley, Director
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RDK/laa
11/24

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