

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

NEIL V. ROMANINI

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2005-09553

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiff brought this action alleging a claim of negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} This case arises as a result of an accident that occurred when plaintiff and a group of friends were traveling to Lodi, Ohio to race their motorcycles. The group was traveling southbound on Interstate 71 (I-71) near the city of Strongsville when the accident occurred. That portion of the roadway was undergoing construction; two of the four southbound lanes were closed off by a concrete barrier for resurfacing work and two lanes were left open for travel. Plaintiff testified that he was riding near the rear of the group, traveling at approximately 55 to 60 mph, when his vehicle suddenly struck a defect in the roadway. He alleges that the defect ran parallel to his direction of travel, that it was approximately seven feet long, four to five inches wide, and three inches deep. According to plaintiff, when the front tire of his motorcycle struck the defect and dropped into the depression, the handlebars began to swing rapidly back and forth and

struck the gas tank, causing him to lose control of the vehicle and be thrown onto the roadway. Plaintiff contends that defendant, the Ohio Department of Transportation (ODOT), was negligent in its maintenance and repair of the roadway.

{¶ 3} In order to prevail upon a claim of negligence, plaintiff must prove by a preponderance of the evidence that defendant owed him a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Although the state is not an insurer of the safety of its highways, it has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335, 339; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723.

{¶ 4} Michael Morveck, Vice President of Kenmore Construction, testified regarding the I-71 project where the accident occurred. Morveck testified that his company was a subcontractor on the project, that it was responsible for the milling and paving work, but that it had no duty to inspect the traveled portion of the roadway. He and his employees did not observe the defect that caused plaintiff's accident. However, based upon the photographic evidence that plaintiff presented (Exhibits 1-8), Morveck opined that a separation of the pavement such as that depicted by the evidence could occur over a period of days, overnight, or in a matter of hours, depending upon a variety of circumstances. Morveck noted that traffic was very heavy at the area where the incident occurred, and that approximately 10,550 vehicles passed through the area per hour. According to Morveck, that volume of traffic would significantly impact road conditions and potential separations of the pavement such as the one encountered by plaintiff. Morveck further testified that if the defect had been patched at some time prior to the accident, the patching material could come loose at any time.

{¶ 5} Plaintiff also presented the testimony of his brother, Tony Romanini, and that of Gary Garbasik, both of whom were traveling in a pickup truck in front of the motorcyclists when the accident occurred. Romanini testified that he observed plaintiff's accident in his side-view mirror. He stated that the front tire of plaintiff's motorcycle "almost disappeared" into the defect and that he inspected the area after the accident.

Romanini agreed that the defect was approximately the size described by plaintiff. Garbasik testified that he was the passenger in the pickup truck and that he was not observing the motorcyclists at the time of the accident. He stated that he stayed with plaintiff after the accident and did not closely observe the defect but that, from his point of view approximately 20 feet away, the defect was “obvious.” Both witnesses stated that there were no signs of broken asphalt or patching material near the area of the accident.

{¶ 6} Defendant presented the testimony of Kirk Gegick, ODOT’s project engineer for the I-71 construction. According to Gegick, Ruhlin Construction Company was the general contractor for the project and was responsible for monitoring and maintenance of the traveled portion of the roadway for the duration of the construction. Gegick testified that the speed limit for the construction zone was lowered from 60 mph to 50 mph for safety purposes. He also testified that the surface being replaced in the area was at least 30 years old and that the construction work extended for six miles in both the north and south directions. Gegick acknowledged that as many as five ODOT employees were at the site from Monday through Friday to monitor the project. He testified that the project-progression records revealed that ODOT had engaged in litter control and patching projects in the area at the time of plaintiff’s accident, but that there was no indication that ODOT or Ruhlin employees observed the specific defect that plaintiff encountered. Gegick further testified that, in his experience, defects such as those evidenced in plaintiff’s exhibits could occur in a matter of hours, including areas where patching had been undertaken to remedy roadway defects.

{¶ 7} Plaintiff cannot prevail on his claim of negligent roadway maintenance absent proof of actual or constructive notice of the condition or defect alleged to have caused the accident. *McClellan v. Ohio Dept. of Transp.* (1986), 34 Ohio App.3d 247. Proof of constructive notice depends upon whether the alleged defect existed for such a length of time as to impute knowledge or notice. *Id.* citing *Bello v. Cleveland* (1922), 106 Ohio St. 94; *McCave v. Canton* (1942), 140 Ohio St. 150. ODOT is liable only for roadway conditions of which it has notice but fails to correct within a reasonable time or manner. *Bussard v. Ohio Dept. of Transp.* (1986), 31 Ohio Misc.2d 1.

{¶ 8} In the present case, there is no evidence that ODOT had actual notice of the defect in question. Thus, the question becomes whether ODOT had constructive notice. The trier of fact is precluded from making an inference of constructive notice unless evidence is presented with respect to the time that the defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc.2d 262. Moreover, the size of a defect is insufficient to show notice or duration of existence. *O'Neil v. Ohio Dept. of Transp.* (1988), 61 Ohio Misc.2d 287.

{¶ 9} Based upon the totality of the evidence presented, the court concludes that plaintiff failed to prove by a preponderance that the defect existed for a sufficient period of time that ODOT knew or should have known of its existence. Thus, plaintiff has failed to demonstrate that ODOT had either actual or constructive notice of the defect that allegedly caused his accident.

{¶ 10} Even assuming, arguendo, that defendant was negligent in its maintenance of the roadway, plaintiff still would not prevail. Ohio's former comparative negligence statute, R.C. 2315.19, bars recovery where a plaintiff's contributory negligence is greater (more than 50 percent) than defendant's. The court finds that plaintiff's failure to take appropriate precautions in a construction zone, where hazardous road conditions should have been obvious and where simple measures such as reducing his speed to the posted limit would have been prudent, outweighs any alleged negligence on the part of ODOT.

{¶ 11} Accordingly, the court concludes that plaintiff failed to prove his claim of negligence and, for the reasons set forth above, judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

cc:

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LH/cmd
Filed July 9, 2009
To S.C. reporter July 20, 2009