

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

ROBIN J. DAUGHERTY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05401-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On April 9, 2008, at approximately 8:30 a.m., plaintiff, Robin J. Daugherty, was traveling south on State Route 83 near the “south corporation limit of the Village of Burbank,” when her 2001 Oldsmobile Aurora struck a large pothole along the right edge line of the roadway causing substantial damage to the vehicle. Plaintiff recalled the damage-causing pothole was “approximately 9” deep.” Plaintiff submitted multiple photographs depicting the pothole, which show a substantial roadway defect located mostly along the roadway berm area. However, the photographs show the pothole also encroached onto the regularly traveled portion of the roadway completely obliterating the white painted edge line and underlying pavement.

{¶ 2} 2) Plaintiff asserted the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover damages in the amount of \$1,859.17, her total cost of automotive repair. Plaintiff submitted the \$25.00 filing fee and requested reimbursement of that cost along

with her damage claim.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage event. Defendant denied receiving any previous reports of a pothole which DOT located at milepost 25.2 on State Route 83 in Warren County. Defendant suggested that, "it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant related the photographs of the damage-causing pothole show the "alleged pothole is past the white line and is not (on) the traveled portion of the road." The trier of fact notes a substantial portion of the pothole is indeed located on the roadway berm area. However, a portion of the pothole that obliterates the painted white edge line and underlying pavement is in fact on the traveled portion of the roadway.

{¶ 5} 5) Defendant submitted a copy of a Traffic Crash Report plaintiff filed with the local Ohio State Highway Patrol ("OSHP") post after the April 9, 2008 incident. Plaintiff filed a written statement with the Traffic Crash Report in which she noted: "a semi (truck) came onto my side of the road forcing me off the road. I hit a pothole. The semi continued northbound on SR 83 without stopping." Defendant disputed plaintiff's contention that she was forced to drive off the roadway by an oncoming semi-truck traveling left of the roadway center line. Defendant based this contention on the observations of investigating OSHP Trooper Abbuhl who did not find any physical evidence at the scene to indicate plaintiff was forced to drive off the roadway by a second vehicle. Defendant asserted DOT can not be held liable for vehicle damage caused by potholes located outside the regularly traveled portion of the roadway.

{¶ 6} 6) Defendant contended plaintiff failed to prove DOT negligently maintained the roadway. Defendant explained that DOT, "Warren County Manager inspects all state roadways within the county on a routine basis, at least one to two times a month." Apparently no potholes were discovered near milepost 25.2 on State Route 83 the last time that specific section of roadway was inspected prior to April 9, 2008. Defendant asserted, "that if ODOT personnel had detected any defects they would have been promptly scheduled for repair."

{¶ 7} 7) Plaintiff filed a response contending that considering the size of the

pothole her vehicle struck the particular defect must have existed for a lengthy period of time. Additionally, plaintiff contended the damage-causing pothole is on the traveled portion of the roadway due to the fact it “extends inside the white line and is within the confines of the normally paved portion of the roadway.” Plaintiff submitted photographs taken on July 22, 2008 which depicted the patched pothole. Plaintiff pointed out the pothole was repaired on April 9, 2008, the day of her damage event and the photographs were taken over three months later. The photographs show some patching material along the roadway berm has deteriorated, but the bulk of the patch has remained in tact.

{¶ 8} 8) Plaintiff stated she spoke with Dan Wiley who resides near State Route 83 in Burbank, Ohio. Plaintiff reported Dan Wiley informed her that the pothole her car struck had existed since November 2007 and that “[t]rucks hitting the pothole would awaken them at night and cause items to fall off their walls.”

CONCLUSIONS OF LAW

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her 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 she 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.

{¶ 12} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition 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. However, the particular standard of proof applies in situations where a motorist suffers damage from a pothole located on the traveled portion of the roadway. Evidence in the instant claim establishes that the pothole plaintiff's car struck was located mostly on the roadway berm although some portion of the defect was located on the traveled roadway area.

{¶ 13} This court has previously held that the Department of Transportation is not to be held liable for damages sustained by individuals who used the berm or shoulder of a highway for travel without adequate reasons. *Colagrossi v. Department of Transportation* (1983), 82-06474-AD. Generally, a plaintiff is barred from recovery for property damage caused by a defect or any condition located off the traveled portion of the roadway.

{¶ 14} The shoulder of a highways is designed to serve a purpose which may include travel under emergency circumstances. It is for the trier of fact to determine whether driving on the shoulder is a foreseeable and reasonable use of the shoulder of the highway. *Dickerhoof v. City of Canton* (1983), 6 Ohio St. 3d 128, 6 OBR 186, 451 N.E. 2d 1193. If a plaintiff sustains damage because of a defect located off the marked, regularly traveled portion of a roadway, a necessity for leaving the roadway must be shown. *Lawson v. Department of Transportation* (1977), 75-0612-AD. Plaintiff, in the present action, related she was forced to drive on the roadway berm due to an oncoming semi-truck traveling left of center on the two lane roadway. Plaintiff

essentially contended she had no choice but to drive on the roadway berm to avoid a collision.

{¶ 15} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court finds plaintiff's statements persuasive in reference to her reasons for driving on the roadway berm. Plaintiff was forced off the roadway by another vehicle. See *Gyonozois v. Dept. of Transp.* (1982), 81-06287-AD.

{¶ 16} This claim shall be determined on the issue of notice of the pothole located on State Route 82. Initially, the trier of fact finds evidence of actual notice of the pothole has not been established. In order for plaintiff to prevail, constructive notice must be proven. 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.

{¶ 17} “[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re Estate of Fahle* (1950), 99 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 49. “A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set time standard for the discovery of certain road hazards.” *Bussard*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. “Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation.” *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. 91AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gelarden v. Ohio Dept. of Transp., Dist. 4, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.*

{¶ 18} Plaintiff has offered evidence that the pothole was present at milepost

25.2 on State Route 83 since November 2007, more than four months before her incident. Evidence of a pothole on the roadway for that length of time is conclusive to resolving the issue of constructive notice. Consequently, defendant is liable to plaintiff for the damages claimed \$1,859.17, plus the \$25.00 filing fee which may be awarded as costs pursuant to R.C. 2335.19. See *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 \$1,884.17, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
9/10
Filed 10/14/08
Sent to S.C. reporter 1/6/09