[Cite as *Wise v. Ohio Dept. of Transp.*, 2007-Ohio-7250.]

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

DONNISE E. WISE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-05709-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Donnise E. White, stated she was traveling south on Montgomery Road (US Route 22) on May 17, 2007, at approximately 8:00 a.m., when her automobile struck a "giant" pothole causing substantial suspension damage to the vehicle. Plaintiff related the damage-causing pothole was located, "just before the Stewart Road Street in front of Esther Price's Candy Store."

{¶2} 2) Plaintiff filed this complaint seeking to recover repair costs related to the May 17, 2007, property damage incident. Plaintiff implied the property damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway in a construction area on US Route 22 in Hamilton County. The filing fee was paid.

{¶3} 3) Defendant explained that the area of US Route 22 or Montgomery Road where plaintiff's damage occurred was located within a construction zone under the control of DOT contractor, Barrett Paving Materials Incorporated ("Barrett"). Defendant further explained the construction zone maintained by Barrett spanned mileposts 10.21 to 11.07 on US Route 22 in Hamilton County which included the section of Montgomery Road in front of the Ester Price Candy Store. Defendant located the damage-causing pothole at, "milepost 10.21 on US 22 in Hamilton County," an area within the limits of the construction project. Defendant denied liability for plaintiff's

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damage based on the contention that neither DOT nor Barrett had any knowledge of the particular pothole plaintiff's car struck. Defendant argued plaintiff failed to produce any evidence to establish the roadway was negligently maintained. Defendant has no record of receiving any calls or complaints regarding a pothole at milepost 10.21 on US Route 22.

{¶4} 4) Defendant submitted photographs and a written statement dated May 23, 2007, from Barrett representative, Dennis Brunton, concerning the pothole in front of the Ester Price Candy Store on Montgomery Road. A submitted photograph of this location was taken and no roadway defects or repaired defects are depicted. Additional submitted photographs depict the roadway outside the construction project limit near the store entrance on Montgomery Road. These photographs do depict a patched pothole. This particular repaired pothole is located within the city of Silverton, Ohio, outside the maintenance jurisdiction of either DOT or Barrett. Brunton denied any potholes or evidence of repaired potholes could be observed at the location given by plaintiff within the limits of the construction project.

{¶5} 5) Defendant asserted that Barrett, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Barrett is the proper party defendant in this action. Defendant implied that

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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.

{¶6} 6) Plaintiff did not submit any evidence to indicate the length of time the pothole existed prior to her property damage event.

CONCLUSIONS OF LAW

{¶7} 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.

{¶8} 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.

{¶9} In order to prove a breach of the duty to maintain the highways, plaintiff

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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 condition 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.

{¶10} Plaintiff has not produced sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of the pothole.

{¶11} Moreover, 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. There is no indication defendant had constructive notice of the pothole. 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 pothole is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 587 N.E. 2d 891. "A

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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. 92AP-1183. No evidence of constructive notice was provided. "[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), 90 Ohio App. 195, 197-198, 105 N.E. 2d 429.

{¶12} Plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show her property damage was connected to any conduct under the control of defendant or any negligence on the part of defendant or DOT's 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. Plaintiff has failed to prove her vehicle struck a roadway defect in an area under the control of either defendant or DOT agents. See *Honsaker v. Ohio Dept. of Transp., District 8* (2007), Ct. of Cl. No. 2007-03307-AD,

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2007-Ohio-6388. 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:

Donnise E. Wise
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RDK/laa
11/27
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