

[Cite as *Pipes v. Ohio Dept. of Transp.*, 2008-Ohio-5605.]

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

JOSEPHINE E. PIPES

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2008-02711-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

[Cite as *Pipes v. Ohio Dept. of Transp.*, 2008-Ohio-5605.]

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Josephine E. Pipes, filed this action against defendant, Department of Transportation (DOT), seeking to recover repair costs for property damage to her automobile from striking a pothole on State Route 61 in Crawford County. Plaintiff stated that, “we were driving on Route 61 south of U.S. 30 Bypass the passenger wheels hit a horrific hole.” Plaintiff additionally stated that, “[t]he hole was not marked and there was no way to avoid hitting it.” The impact of striking the pothole caused tire and rim damage to plaintiff’s vehicle. Plaintiff recalled that the described incident occurred at approximately 6:00 p.m. on February 7, 2008. Plaintiff related that she contacted defendant regarding the damage-causing pothole and the defect was subsequently repaired. Plaintiff submitted photographs depicting the pothole after patching operations had been completed.

{¶ 2} 2) Plaintiff implied that the damage to her vehicle was proximately caused by negligence on the part of defendant in failing to keep the roadway free of defects. Plaintiff seeks damages in the amount of \$372.82 for the cost of tire and rim replacement. Plaintiff paid the \$25.00 filing fee and requests reimbursement of that cost along with her damage claim.

{¶ 3} 3) Defendant stated that, “[t]he Department of Transportation’s investigation reveals that ODOT received a complaint of the pothole on SR 61 prior to Plaintiff’s incident.” Defendant located the damage-causing pothole at milepost 5.40 on State Route 61 in Crawford County. Defendant reported that DOT phone logs (copy submitted) show the DOT Crawford County office received a phone call from Richland County regarding the pothole at 2:45 p.m. on February 8, 2008. Defendant’s records (copy submitted) show that the pothole at milepost 5.40 on State Route 61 was repaired between 3:00 and 4:00 p.m. on February 8, 2008. Defendant asserted that plaintiff did not present any evidence to establish how long the pothole existed at milepost 5.40 on State Route 61 prior to 6:00 p.m. on February 7, 2008. 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 the incident.”

{¶ 4} 4) Defendant pointed out that the DOT Crawford County Manager conducts road inspections of all state roadways within the county at least one to two times a month. Apparently no potholes were discovered at milepost 5.40 on State

Route 61 the last time that section of roadway was inspected before February 7, 2008. DOT records (copy submitted) reveal that potholes were repaired in the vicinity of plaintiff's incident on December 19, 2007. Defendant contended that plaintiff has failed to prove her property damage was caused by any negligence attributable to DOT.

{¶ 5} 5) Plaintiff filed a response noting that defendant did not submit any document to determine the last time the DOT Crawford County Manager inspected State Route 61 prior to February 7, 2008. Plaintiff also noted that defendant acknowledged receiving a complaint of the pothole prior to her incident. Plaintiff received the submitted investigation report where defendant wrote: "[t]he Department of Transportation's investigation reveals that ODOT received a complaint of the pothole on SR 61 prior to Plaintiff's incident" (February 7, 2008). Plaintiff contested that defendant's assertion regarding routine road inspections reasoning that if DOT did indeed conducting routine inspections then some record of these inspections would have been attached to the investigation report. Plaintiff contended that defendant acted negligently in not repairing the pothole until February 8, 2008 when defendant admitted receiving a complaint about the pothole prior to plaintiff's incident. Plaintiff pointed out that "[d]efendant contradicts themselves in their (investigation report) on two occasions." Initially, as has been documented, defendant stated DOT received a complaint of the pothole "prior to Plaintiff's incident." In the same paragraph of the investigation report, defendant recorded that, "[b]ecause ODOT did not receive notice of the subject condition prior to February 8, 2008, Defendant has no way of knowing how long the pothole existed prior to Plaintiff's incident." In between these two contradictory written statements defendant references receiving a phone complaint of the pothole on February 8, 2008 (record submitted) and then dispatching a repair crew to the area within minutes of receiving the phone complaint (record submitted). Taking the investigation report in its entirety the trier of fact finds that defendant did not receive actual notice of the damage-causing pothole until February 8, 2008, after plaintiff's

property damage event. The trier of fact finds that the purported acknowledgment of prior notice appears from the evidence to be a mistake and not an admission of liability. Plaintiff also pointed out that defendant claimed the roadway area around milepost 5.40 on State Route 61 was in good condition on or before February 7, 2008, but then defendant claimed to have no way of knowing how long the pothole existed in that location prior to February 7, 2008. Plaintiff asserted that she has offered sufficient proof to establish liability on the part of DOT.

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.

{¶ 7} In order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove that either: 1) defendant had actual or constructive notice of the pothole 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.

{¶ 8} To prove a breach of 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 that defendant had actual notice of the damage-causing pothole.

{¶ 9} The trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the defective condition (pothole) developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. Size of the defect (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. There is no evidence of constructive notice of the pothole.

{¶ 10} Plaintiff has not produced any evidence to infer that 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶ 11} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her property damage was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing pothole was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant. *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.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

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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:

Josephine E. Pipes
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James G. Beasley, Director
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RDK/laa
6/26
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