[Cite as *Kay v. Dept. of Transp.*, 2008-Ohio-7089.]

Court of Claims of Ohio

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SHELLY KAY

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05567-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On March 19, 2008, at approximately 9:20 a.m., plaintiff, Shelly Kay, was traveling on Interstate 71 in Hamilton County when her 2008 Subaru Legacy struck a large pothole causing substantial damage to the vehicle. Plaintiff noted that the damage-causing pothole was located between exits 3 and 5 on Interstate 71 "right before you see a little green sign that says-Martin Luther Drive (on the right hand side of the road) and before you actually see the exit 5 sign-I believe there is an overpass right above it."

{¶ 2} 2) Plaintiff asserted that her property damage was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover $427.55, the cost of automotive repair. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the damage-causing pothole prior to plaintiff's

property damage event. Defendant denied receiving any prior calls or complaints about the particular pothole which DOT located between mileposts 3.33 and 6.03 on Interstate 71 in Hamilton County. Defendant asserted that plaintiff did not produce any evidence to establish the length of time the pothole existed prior to March 19, 2008.

{¶ 4} 4) Furthermore, defendant contended that plaintiff failed to produce evidence to show that DOT negligently maintained the roadway. Defendant explained that the DOT Hamilton County Manager "conducts roadway inspections on all state roadways within the county on a routine basis, as least one to two times a month." Apparently no potholes were discovered between mileposts 3.33 and 6.03 on Interstate 71 the last time that this section of roadway was inspected before March 19, 2008. Defendant advised that if any DOT personnel would have detected potholes the particular defects would have been "promptly scheduled for repair." DOT records show that potholes were repaired in the general vicinity of plaintiff's incident on December 27, 2007, February 8, 2008, and March 6, 2008.

{¶ 5} 5) Despite filing a response, plaintiff did not provide any evidence to show the length of time that the particular damage-causing pothole existed prior to 9:20 a.m. on March 19, 2008. Plaintiff stated that "for all I know it (pothole) could have been there for 3 weeks or 3 months I have no clue." Plaintiff expressed her incomprehension that she has the burden to prove prior notice in order to prevail in her claim.

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

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.

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MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
9/25
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