

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

JAN VAN MOSSEVELDE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08515-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Jan Van Mossevelde, stated that, “I was driving on I 71 South between Columbus and Cincinnati, Ohio, on the evening of June 20th (2008) at approximately 10 pm” when her 2007 BMW 328XI struck “a deep pothole” causing tire damage to the vehicle. Plaintiff pointed out that the pothole was located within the right roadway lane of Interstate 71 South “about 60 miles before Cincinnati” in an area where “the road was already showing a lot of previous repair spots.”

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$625.77, the cost of replacement tires and associated repair expenses resulting from the June 20, 2008 property damage event. Plaintiff implied that the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in maintaining the roadway. 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 pothole on the roadway prior to plaintiff’s property damage occurrence. Based on the information plaintiff filed with her complaint,

defendant located the damage-causing pothole between mileposts 65.0 to 60.0 on Interstate 71 South between Fayette and Greene Counties. Defendant denied receiving any calls or complaints regarding the particular pothole on Interstate 71 prior to plaintiff's June 20, 2008 damage event. 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." Defendant asserted that plaintiff did not produce any evidence to establish the length of time the pothole was present on the roadway prior to 10:00 p.m. on June 20, 2008. Defendant contended that plaintiff did not offer any evidence to prove the damage-causing pothole formed due to negligent maintenance.

{¶ 4} 4) Plaintiff filed a response explaining that she mislocated the pothole noting "I realize now my estimate (of the location) of about 60 miles was rather 60 Km, or about 35 miles away from Cincinnati on I-71 southbound to be precise." Plaintiff submitted a photograph depicting the pothole at approximately milemarker 35.0. The photograph submitted shows a pothole that had formed as a result of deterioration of patching material. Plaintiff did not provide any evidence to indicate when this pothole first formed.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} 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. No evidence has been shown defendant had actual notice of the damage-causing pothole.

{¶ 7} Therefore, to find liability plaintiff must prove that DOT had constructive

notice of the defect. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication that defendant had constructive notice of the pothole. 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. 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. Although plaintiff has shown some evidence that her car was damaged by a pothole that had been previously patched, this assertion alone, if established, does not provide proof of negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute, in and of itself, conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Plaintiff has failed to prove when the pothole that damaged her car had been previously patched or that the pothole was patched with material subject to rapid deterioration. Furthermore, plaintiff also failed to establish the general time frame when the roadway condition depicted in her photographs initially appeared. Plaintiff, in the instant claim, has not produced sufficient 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. Plaintiff has failed to show that the proximate cause of her damage was connected to any conduct under the control of defendant, or that defendant was negligent in maintaining the roadway area. *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.

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

JAN VAN MOSSEVELDE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08515-AD

Clerk Miles C. Durfey

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.

MILES C. DURFEY

Entry cc:

Jan Van Mossevelde
100 East Central Parkway
Cincinnati, Ohio 45202

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
11/18
Filed 12/16/09
Sent to S.C. reporter 3/6/09

