[Cite as *Ressetar v. Ohio Dept. of Transp.*, 2008-Ohio-5911.]

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

CHERYL ANN RESSETAR

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-03076-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On December 12, 2007, at approximately 7:15 a.m., plaintiff, Cheryl Ann Ressetar, was driving a 2003 Pontiac Grand Am east on Interstate 480 exiting at the Warrensville Road Exit in Cuyahoga County, when the vehicle struck a large pothole resulting in substantial property damage. Plaintiff submitted photographs depicting the pothole after patching repairs had been made to the roadway defect. From a review of these photographs it appears the damage-causing pothole on Interstate 480 (state milepost 25.98) was a previously patched defect and was newly formed when the old patching material deteriorated.

{¶ 2} 2) Plaintiff asserted the damage to the 2003 Pontiac Grand Am 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 expenses she incurred for automotive repair resulting from the December 12, 2007 incident. In her complaint, plaintiff acknowledged she received payment from her insurer for automotive repair costs. Plaintiff also acknowledged her insurance coverage is subject to a $500.00 deductible provision. Pursuant to R.C. 2743.02(D), plaintiff damage claim in this matter is limited to $500.00.[1]. 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 particular pothole before plaintiff's December 12, 2007 property damage event. Defendant explained a complaint was received on November 16, 2007 regarding a pothole on the bridge deck on Warrensville Road over Interstate 480. After receiving the complaint on December 16, 2007, the pothole was patched by DOT personnel on that same day. Apparently the pothole patch made on November 16, 2007 had deteriorated by December 12, 2007 and created the newly formed pothole that plaintiff's vehicle struck. Defendant asserted plaintiff did not produce any evidence to establish the length of time the newly formed

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[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of (B)(2) of that section apply under those circumstances."

pothole existed prior to the December 12, 2007 damage event. Defendant suggested "it is likely the pothole existed for only a short time before the incident."

{¶ 4} 4) Defendant contended plaintiff failed to offer evidence to prove her damage was caused by negligent maintenance. Defendant related the DOT "Cuyahoga County Manager examines all state roadways within the county at least two times a month." Defendant implied the deteriorated condition of the pothole repair was not discovered the last time the bridge deck on Warrensville Road over Interstate 480 was examined between November 16, 2007 and December 12, 2007.

{¶ 5} 5) Despite filing a response, plaintiff did not provide evidence to indicate the length of time the pothole was present on the bridge deck prior to 7:15 a.m. on December 12, 2007.

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 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 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.

{¶ 8} 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. 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. 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 defect (pothole) is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287. 578 N.E. 2d 891.

{¶ 9} 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 79, 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.

{¶ 10} 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. Defendant acknowledged the damage-causing pothole plaintiff's vehicle struck was a defect that had been previously patched and deteriorated. This fact alone 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*, 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* (2006), 2006-01343-AD, jud, 2006-Ohio-7173.

{¶ 11} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff has 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 or its 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.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Cheryl Ann Ressetar
1900 Jacqueline Drive
Parma, Ohio 44134

James G. Beasley, Director
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RDK/laa
8/6
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