[Cite as *Kashner v. Ohio Dept. of Transp., Dist. 8*, 2009-Ohio-7080.]

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
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MYRA KASHNER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2009-05013-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On April 29, 2009, at approximately 8:30 p.m., plaintiff, Myra Kashner, was traveling on US Route 50 in Hamilton County, when her 2005 Nissan Altima struck "an abnormally large pothole" causing strut damage to the vehicle. Plaintiff submitted photographs of the damage-causing pothole. The photographs depict a substantial roadway defect that appears to have been patched but with extensively deteriorated patching material. Plaintiff asserted that the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of defects. Plaintiff filed this complaint seeking to recover $627.60, her total cost of automotive repair. The filing fee was paid.

{¶ 2} 2) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole on the roadway prior to plaintiff incurring property damage to her car. Defendant denied receiving any previous calls or complaints regarding the particular damage-causing pothole, which DOT located at

milepost 3.73 on US Route 50 in Hamilton County. Defendant asserted that plaintiff has failed to produce any evidence to establish the length of time the pothole at milepost 3.73 existed prior to April 29, 2009. Defendant suggested that "it is likely the pothole existed for only a short time before the incident."

{¶ 3} 3) Defendant argued that plaintiff has failed to prove DOT acted negligently in maintaining US Route 50. Defendant related that the DOT "Hamilton County Manager inspects all state roadways in the county at least two times a month." Apparently no potholes were discovered at milepost 3.73 on US Route 50 the last time that particular section of roadway was inspected prior to April 29, 2009. Defendant submitted DOT maintenance records for US Route 50 in Hamilton County for the six-month period from October 29, 2008 to April 29, 2009. The records include such activities as "Cleaning Drainage Structures, Mowing, Care of Shrubs, Plants, Trees, Graffiti Removal, Cleaning Pavement And/Or Berm, Guardrail End Assembly Maintenance, Clean Curbs, Gutters & Along Median, Litter Pickup, Guardrail Repair, Replacement, or Removal, Litter Patrol, Traffic Control, Inspection of Signs, Markings, Etc., Ground-Mounted Flatsheet Sign Maintenance, Unscheduled Traffic Signal Maintenance, and Signal Inspection And Relamping." The maintenance records cover the entire portion of US Route 50 that runs through Hamilton County, from milepost 0.00 to 36.48. The records are devoid of any reference to "Pothole Patching" despite the fact that the pothole which plaintiff's car struck had been previously patched at some time prior to plaintiff's April 29, 2009 incident and perhaps prior to October 29, 2008. Defendant contended that the evidence available "does not support a finding defendant was negligent."

{¶ 4} 5) Plaintiff filed a response asserting defendant should bear liability in this matter based on the doctrine of Res Ipsa Loquitur. Additionally, plaintiff asserted that since the damage-causing pothole was a defect that had been previously patched and subsequently deteriorated, defendant should have been aware of its existence. Plaintiff pointed out that defendant did not submit any inspection log from the Hamilton County Manager in regard to inspections of US Route 50. Plaintiff stated "[g]iven prior repairs and the sheer size of the pothole; regular inspections of the roadway are warranted to ensure that any deterioration to the roadway is repaired expeditiously." Essentially plaintiff asserted that defendant breached its duty of care to the traveling

public in respect to inspection and roadway defect repair.

CONCLUSIONS OF LAW

{¶ 5} 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 179, 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.

{¶ 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} The trier of fact in the instant claim finds that the doctrine of res ipsa loquitur is inapplicable under the facts presented.

{¶ 8} "*Res ipsa loquitur* is an evidentiary, as opposed to substantive, rule of law, which allows the jury to infer negligence in cases where the prerequisites for its application are met." *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App. 3d 220, 230, 648 N.E. 2d 72. Its application "does not change the plaintiff's claim, but merely allows the plaintiff to prove his case through circumstantial evidence." *Gayheart*. According to the Ohio Supreme Court, "'to warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that

the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.'" *Jennings Buick, Inc. v. City of Cincinnati* (1978), 63 Ohio St. 2d 167, 170, 17 O.O. 3d 102, 406 N.E. 2d 1385, quoting from *Hake v. Wiedemann Brewing Co.* (1979), 23 Ohio St. 2d 65, 66-67, 52 O.O. 2d 366, 262 N.E. 2d 703.

{¶ 9} In *Jennings Buick* the court explained that:

{¶ 10} "the second prerequisite * * * that there must be evidence tending to prove that the injury ordinarily would not have occurred if ordinary care had been exercised, serves to establish the logical basis for the inference that the plaintiff's injury was the proximate result of someone's negligence. The first prerequisite, that there must be evidence tending to prove that the instrumentality causing the injury was under the exclusive management and control of the defendant, permits the further inference that it was the defendant who was negligent." 63 Ohio St. 2d at 170-71, 17 O.O. 3d 102, 406 N.E. 2d 1385.

{¶ 11} "'[A] plaintiff seeking to invoke the doctrine of *res ipsa loquitur* in a negligence action need not eliminate all reasonable non-negligent causes of his injury. It is sufficient if there is evidence from which reasonable men can believe that it is more probable than not that the injury was the proximate result of a negligent act or omission.'" *Gayheart*, 98 Ohio App. 3d 220, 232, 648 N.E. 2d 72, quoting from *Jennings Buick*, 63 Ohio St. 2d at 172, 17 O.O. 3d 102, 406 N.E. 2d 1385.

{¶ 12} In regard to claims involving automotive damage from potholes on roadways, the doctrine of res ipsa loquitur is not applicable to find liability on the part of defendant for a negligent act or omission. Potholes can and do form and exist on the roadways despite all diligent efforts by defendant to detect and repair the defects. The mere existence of a pothole does not result in the conclusion that the defective condition is attributable to negligent maintenance on the part of DOT.

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.

Generally, 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 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. There is no evidence that defendant had actual notice of the deteriorated pothole patch. Therefore, in order to recover plaintiff must produce evidence to prove constructive notice of the defect or negligent maintenance.

"[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, 47 O.O. 231, 105 N.E. 2d 429. "A 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 1 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. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD; *Gelarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

Plaintiff has provided evidence for the trier of fact to find constructive notice of the pothole has been proven. The photographic evidence plaintiff supplied establishes that the damage causing defect was massive in size and constituted a recurring problem defendant failed to timely correct. Ordinarily size of a defect (pothole) is insufficient to show notice of duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 587 N.E. 2d 891. However, massive size of a defect coupled with knowledge that the pothole presented a recurring problem is sufficient to prove constructive notice.

Additionally, plaintiff has produced evidence to infer defendant maintains the roadway negligently. *Denis*. The photographic evidence submitted shows the particular

damage-causing pothole was formed when an existing patch deteriorated. This fact alone does not provide conclusive 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*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. No evidence has been produced to indicate when the pothole at milepost 3.73 on US Route 50 was first patched. The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court does not find defendant's assertions persuasive that routine patrols were conducted or that the roadway was adequately maintained. Conversely, the trier of fact finds plaintiff's assertions persuasive in regard to the contentions that the roadway was not routinely inspected for defects or that any discovered defects were promptly repaired. Based on the rationale of *Denis*, the court concludes defendant is liable to plaintiff for all damages claimed, $627.60, plus the $25.00 filing fee cost. *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $652.60, which includes the filing fee. Court costs are assessed against defendant.

_____
MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
7/22
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