

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

BRENDA WHITE

Plaintiff

v.

DEPT. OF TRANSPORTATION

Defendant

Case No. 2009-04971-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 5, 2009, at approximately 8:43 a.m., plaintiff, Brenda White, was traveling on State Route 139 in Jackson County, when her automobile struck a pothole on the right side of the roadway causing tire and rim damage to the vehicle. Plaintiff related she called defendant, Department of Transportation (DOT), after her property damage incident and reported the pothole. Plaintiff recalled DOT personnel took a photograph of the damage-causing pothole and subsequently repaired the roadway defect on or about May 7, 2009.

{¶ 2} 2) Plaintiff asserted her property damage was proximately caused by negligence on the part of defendant in failing to maintain State Route 139 free of hazardous defects such as the pothole her vehicle struck on May 5, 2009. Plaintiff filed this complaint seeking to recover \$383.60, the cost of replacement parts. The filing fee was paid.

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

occurrence. Defendant denied receiving any calls or complaints regarding the particular damage-causing pothole which DOT located at milepost 12.62 on State Route 139 in Jackson County. 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 plaintiff did not produce any evidence to establish the length of time the pothole was present on the roadway prior to 8:43 a.m. on May 5, 2009.

{¶ 4} 4) Furthermore, defendant contended plaintiff did not offer sufficient evidence to prove her damage was caused by negligent roadway maintenance on the part of DOT. Defendant argued plaintiff did not provide evidence to establish her damage was attributable to any conduct on the part of DOT personnel. Defendant related the DOT “Jackson County Manager, travels each state highway twice a month in Jackson County and looks for potholes, low berms, and other safety hazards and records any deficiencies he finds on the Road Inspection Reports.” Defendant submitted copies of the Road Inspection Reports for March, April, and May 2009. According to the reports, low berm areas were discovered on State Route 139 during inspections on March 9 and April 8, 2009. Additionally, low berm areas were discovered during a May 6, 2009 inspection. Potholes were discovered during the March 9, 2009 inspection, but not at the 12.62 milepost area where plaintiff’s incident occurred. Defendant submitted photographs dated May 5, 2009 which purportedly depict a low berm area on State Route 139. Upon a review of the photographs, the trier of fact finds the photographs depict an area of roadway deterioration from the paved berm and well onto the traveled portion of the roadway completely obliterating the white painted edge line.

CONCLUSION OF LAW

{¶ 5} In order to prevail, plaintiff must prove, by a preponderance of the evidence, that defendant owed her a duty, that defendant breached that duty, and that defendant’s 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.

{¶ 6} “Whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact, to be decided . . . by the court . . .” *Pacher v.*

Invisible Fence of Dayton, 154 Ohio App. 3d 744, 2003-Ohio-5333, 798 N.E. 2d 1121, ¶41, citing *Miller v. Paulson* (1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521; *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318, 544 N.E. 2d 265.

{¶ 7} 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.

{¶ 8} Therefore, in order for plaintiff to recover under a negligence theory she must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the pothole and failed to respond in a reasonable time or responded in a negligent manner. *Denis v. Department of Transportation* (1976), 75-0287-AD; *O'Hearn v. Department of Transportation* (1985), 84-03278-AD. A breach of the duty to maintain the highways must be proven, by a preponderance of the evidence, showing 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. A roadway defect that obliterates the white painted edge line is considered to exist on the traveled portion of the roadway. *Young v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-03181-AD, 2008-Ohio-5173. In the instant action, plaintiff has failed to provide any evidence to indicate defendant had actual notice of a pothole at milepost 12.62 on State Route 139 on or before May 5, 2009.

{¶ 9} 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 that the pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. "[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 v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 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; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 10} 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. Therefore, under the evidence presented, plaintiff has failed to show defendant had constructive notice of the pothole.

{¶ 11} Also, 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. Plaintiff has not shown 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.

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Brenda White
4013 Bert Harrold Road
Jackson, Ohio 45640

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
8/10
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