[Cite as *Reed v. Ohio Dept. of Transp.*, 2009-Ohio-7122.]

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

PATRICIA REED

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05510-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 13, 2009, at approximately 5:30 p.m., plaintiff, Patricia Reed, was traveling south on Interstate 271 west of milemarker 28 near the Interstate 480 westbound ramp in Cuyahoga County, when her 2007 Lexus struck a pothole causing tire and rim damage to the vehicle.

{¶ 2} 2) Plaintiff asserted that the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation (ODOT), in failing to maintain the roadway free of defective conditions. Plaintiff filed this complaint seeking to recover damages in the amount of $1,189.00, the cost of replacement parts and automotive repair expense resulting from the May 13, 2009 incident. Plaintiff submitted photographs depicting the damage-causing pothole her vehicle struck. The pothole depicted in the photographs appears to be several feet in length, has the width of an automobile tire, and is perhaps one inch in depth. Furthermore, the pothole shown also appears to have been patched and the patching material has deteriorated. The filing fee was paid.

{¶ 3} 3) Defendant explained that the pothole plaintiff's car struck was located at milepost 27.40 on Interstate 271 and had been previously repaired after receiving a complaint regarding the defect on April 15, 2009. ODOT Records (copies submitted) show that the same pothole was reported on February 12, 2009 and presumedly was patched at some time after this complaint was received. Defendant's maintenance records (copies submitted) show that ODOT crews repaired potholes in the vicinity of plaintiff's damage occurrence on December 18, 2008, December 30, 2008, January 5, 2009, February 9, 2009, and March 6, 2009. Defendant contended that plaintiff failed to prove ODOT "in a general sense maintains its highways negligently." Additionally, defendant asserted that plaintiff did not produce evidence to establish that her property damage was attributable to conduct on the part of ODOT. Defendant pointed out that the ODOT "Cuyahoga County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently no potholes were discovered at milepost 27.40 on Interstate 271 the last time that section of roadway was inspected prior to May 13, 2009. Defendant did not provide any inspection records. Defendant stated that "[a] review of the six-month maintenance history for the area in question reveals that five (5) pothole patching operations were conducted in the southbound direction and the last repair was on March 6, 2009." The submitted maintenance history is devoid of any repair record for the pothole at milepost 27.40 made incident to the complaints of February 12, 2009 and April 15, 2009. Defendant contended that "if ODOT personnel had detected any defects they would have been promptly scheduled for repair."

CONCLUSIONS OF LAW

{¶ 4} 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.

{¶ 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.

{¶ 7} Generally, in order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove either: 1) that 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. 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.

{¶ 8} "[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, 48 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. 2007-02521-AD, 2007-Ohio-3047.

{¶ 9} Plaintiff has provided sufficient evidence for the trier of fact to find that defendant had constructive notice of the pothole. The photographic evidence plaintiff supplied establishes that the damage-causing defect was large and constituted a recurring problem defendant failed to timely correct. Ordinarily size of a 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. However, size of a defect coupled with knowledge that the pothole presented a recurring problem is sufficient to prove constructive notice.

{¶ 10} Additionally, plaintiff has produced evidence to infer defendant maintains the roadway negligently. *Denis*. The photographic evidence submitted shows that 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 27.40 on Interstate 271 was first patched, although evidence has shown that the pothole was patched at sometime after February 12, 2009 and again at sometime after April 15, 2009. The fact that the particular damage-causing pothole presented a recurring condition constitutes proof of negligent maintenance under the rationale of *Denis*. Therefore, the court concludes that defendant is liable to plaintiff for all damages claimed, $1,189.00, 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.

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

PATRICIA REED

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05510-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 plaintiff in the amount of $1,214.00, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY
Clerk

Entry cc:

Patricia Reed
17815 Susan Avenue
Cleveland, Ohio 44111

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
9/17
Filed 10/2/09
Sent to S.C. reporter 1/29/10