[Cite as *Wenz v. Ohio Dept. of Transp.*, 2014-Ohio-5898.]

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

CYNTHIA WENZ

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00109-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Cynthia Wenz, filed a complaint against defendant, Ohio Department of Transportation ("ODOT"), in which she contended her vehicle "sustained tire damage (a permanent low and irreparable leak) due to pothole(s) located on Interstate 75 in the construction zone between Piqua and Sydney." Plaintiff asserted the incident occurred on January 13, 2014 at approximately 10:00 a.m. Plaintiff contended defendant "had clear actual and constructive notice of the existence of multiple potholes and the potential for auto damage." She based this contention on the fact that this area was under construction at the time of incident. She also asserted tire repair associates from two different service providers "confirmed that the tire was damaged due to pothole strike(s) and that the damage was irreparable requiring a new tire."

{¶2} Plaintiff seeks damages in the amount of $825.39, the cost to replace four tires. Plaintiff explained, while only one tire was damaged, technicians required that matching tires be installed for safe performance of the vehicle. Plaintiff submitted the $25.00 filing fee and seeks reimbursement for that amount as well.

{¶3} Defendant filed an investigation report in which it requested the court reduce plaintiff's prayer amount to $231.35 (the cost to replace one tire, plus reimbursement of the filing fee). Defendant stated: "only one tire was damaged by the incident in question. She made the conscience [sic] choice to replace all four (4) tires, instead of just the one (1) damaged tire attributed to the pothole incident filed with the Court."

{¶4} Defendant denied liability based on the contention that no ODOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's incident. After contacting the plaintiff for a more specific location of the incident, defendant's investigation revealed plaintiff's incident "was at milepost 93.0 on IR 75 in Shelby County." This section of roadway has an average daily traffic count between 29,870 and 43,750 vehicles. Defendant asserted plaintiff did not provide any evidence to establish the length of time that the pothole existed at this location prior to plaintiff's incident. Defendant suggested, since it is not aware of any other incidents near this location, "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."

{¶5} Defendant asserted on the day in question, this section of IR 75 was "reduced to a single lane through the work zone and traffic was backed up for several miles. Because one lane of interstate was closed, traffic was moving between five (5) and twenty (20) mph. . . At 10:00 a.m. when the Plaintiff traveled though the work zone, the traffic was moving at an average speed of seventeen (17) mph." Defendant contended, based on the quantity of traffic that passed through the work zone at this time, "if there was a problem with potholes in this location more complaints and incidents would have occurred."

{¶6} Additionally, defendant contended, plaintiff did not offer any evidence to prove that the roadway was negligently maintained. Defendant advised, the ODOT "Shelby County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times per month." There were also thirty-three

(33) pothole patching operations performed on this roadway in the six months prior to this incident. "Defendant maintains that if ODOT personnel had detected any defects they would have been promptly scheduled for repair."

{¶7} Plaintiff filed a response to defendant's investigation report in which she asserted "defendant's motion to dismiss should be disregarded." She contended, she "provided sufficient proof in the original complaint for relief to be granted." She argued that "Defendant's reliance on damage occurring specifically at mile marker 93 is without basis," as "[i]t is very likely that the damage could have occurred at any single or number of points in the construction zone." She disclaimed any personal liability, as "it was impossible for plaintiff to have avoided all potholes or other failing parts of the road." Plaintiff contended the fact that this section of IR 75 was under construction is evidence of "constructive, if not actual, notice of the dilapidated road condition that could cause damage to tires." She cited several news articles which purportedly demonstrate defendant had notice of the road condition prior to her incident. She asserted defendant was negligently maintaining this section of roadway, as "[n]o objective person would consider this stretch of roadway to be in reasonable condition at the time of this event." In regards to the discrepancy in the amount of damages, plaintiff asserted, while she "seeks at a minimum damages for the replacement of one tire. . . it is not unreasonable to expect that, for safety purposes, all tires be replaced on the vehicle to ensure safety." "Finally, Plaintiff entered the ODOT construction zone with four operable tires in good working condition. They left the construction zone with tire damage. The construction zone was under the control of the defendant. Given the extensive nature of the damage to the entire stretch of roadway it is not unreasonable to expect plaintiff to be reimbursed for damage that clearly took place in the construction zone."

CONCLUSIONS OF LAW

{¶8} 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 Company, Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). 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.*, 145 Ohio St. 198, 61 N.E. 2d 198 (1945), approved and followed.

{¶9} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App. 2d 335, 361 N.E.2d 486 (10th Dist. 1976). However, defendant is not an insurer of the safety of its highways. *Kniskern v. Township of Somerford*, 112 Ohio App. 3d 189, 678 N.E. 2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Trans.*, 67 Ohio App. 3d 723, 588 N.E. 2d 864 (10th Dist. 1990).

{¶10} In order to prove a breach of the duty to maintain highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E. 2d 179 (Ct. of Cl. 1986). Considering plaintiff is unable to provide a specific location for the damage-causing pothole, there is no evidence that the defendant had actual notice of this pothole on IR 75 prior to January 13, 2013.

{¶11} In the absence of actual notice, plaintiff may prove that ODOT 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 that the defective condition developed. *Spires v. Ohio Highway Department*, 61 Ohio Misc. 2d 262, 577 N.E. 2d 458 (Ct. of Cl. 1988).

{¶12} In order for there to be constructive notice, plaintiff must show 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*, 78-026-AD (1978). "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,* at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.*, 10th Dist. No. 92AP-1183 (Feb. 4, 1993). Plaintiff has provided evidence in the form of local news stories related to the condition of this section of IR 75, dating as far back as March 8, 2014. While this alone is insufficient for a finding of constructive notice. The court finds that this evidence coupled with three complaints received by defendant regarding potholes in the same, general vicinity of plaintiff's incident to be sufficient for a finding of constructive notice. The first complaint received on January 7, 2014 (incident occurred on January 6, 2014), indicated there was "huge pieces of asphalt missing" near milepost 89 on IR 75 N/S. The second incident occurred on January 12, 2014 and was reported on January 13, 2014 regarding damage caused by a pothole on northbound I-75 "by the Fair Exit." Finally, the third incident (the only one highlighted by defendant), referred to damage caused by a pothole on January 12, 2014 on IR 75 N "between mm 99 and 85." While this final complaint was not received until after plaintiff's incident, these three complaints regarding incidents that occurred on this section of IR 75 N prior to plaintiff's incident are sufficient for a finding of constructive notice.

{¶13} The standard measure of damages for personal property loss is market value. *McDonald v. Ohio State Univ. Veterinary Hosp*., 67 Ohio Misc. 2d 40, 644 N.E. 2d 750 (Ct. of Cl. 1994).

{¶14} As trier of fact, this court has the power to award reasonable damages based on evidence presented. *Sims v. Southern Ohio Correctional Facility*, 61 Ohio Misc. 2d 239,

577 N.E. 2d 160 (Ct. of Cl. 1988).

{¶15} Damage assessment is a matter within the function of the trier of fact. *Litchfield v. Morris*, 25 Ohio App. 3d 42, 495 N.E. 2d 462 (10th Dist. 1985). Reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits. *Bemmes v. Pub. Emp. Retirement Sys. Of Ohio*, 102 Ohio App. 3d 782, 658 N.E. 2d 31 (12th Dist. 1995). Plaintiff contended the replacement of all four tires was necessary for safety purposes, and the invoice she provided included the following statement from the technician: "[t]he driver rear tire has an impact break on the inside edge of the tire. The car is all wheel drive, the tread on the other tires would cause all wheel drive issues to the diameter difference, needed all four tires." However, plaintiff provided no explanation for why she or the repair shop could not obtain a replacement tire with similar dimensions. Plaintiff had a duty to mitigate damages, and has not provided sufficient evidence from which the court can infer that she was unable to mitigate her damages, and had no choice but to purchase four tires as opposed to one. Based on the evidence presented, plaintiff has suffered damages in the amount of $206.35 plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. 1990).

CYNTHIA WENZ

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00109-AD

Deputy Clerk Daniel R. Borchert

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 $231.35, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Cynthia Wenz
75 Pembrook Court
Springboro, Ohio 45066

Jerry Wray, Director
Department of Transportation
1980 West Broad Street

Mail Stop 1500
Columbus, Ohio 43223

DJM/laa
Filed 7/11/14
Sent to S.C. Reporter 9/14/15