[Cite as *Fite v. Ohio Dept. of Transp.*, 2009-Ohio-7124.]

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

CARL W. FITE, JR.

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2009-05757-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

{¶ 1} On April 4, 2009, at approximately 5:00 p.m., plaintiff, Carl W. Fite, Jr., was traveling north on State Route 132 (Batavia/Owensville) "at approximate address of 4981 St. Rt. 132," when his 2006 Mini Cooper struck a "giant pothole, measure 24 inches long, 18 inches wide and nearly 4 inches deep." The impact of striking the pothole caused tire and rim damage to plaintiff's vehicle. Plaintiff submitted multiple photographs depicting the damage-causing pothole. Upon reviewing the photographs, it appears that the pothole had been previously patched at some undetermined time and the patching material had completely deteriorated forming a massive roadway defect. The roadway area around the pothole shows signs of pavement deterioration along with other repaired areas.

{¶ 2} Plaintiff asserted that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to adequately maintain the roadway free of defects. Plaintiff filed this complaint seeking to recover $500.00, his insurance coverage deductible for automotive repair costs he incurred resulting from the April 4, 2009 incident. The filing fee was paid.

{¶ 3} Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to the April 4, 2009 incident. Defendant noted that DOT records show no prior calls or complaints were received about the pothole, which defendant located "at milepost 15.13 on SR 132 in Clermont County." Defendant asserted that plaintiff did not produce any evidence to establish the length of time the pothole at milepost 15.13 existed before April 4, 2009 and suggested that "it is likely the pothole existed for only a short time before the incident." Defendant explained that the DOT "Clermont County Manager inspects all state roadways within the county at least two times a month." Apparently, no potholes were discovered at milepost 15.13 on State Route 132 the last time that section of roadway was inspected prior to April 4, 2009. Defendant did not provide any inspection records. Defendant's maintenance records for State Route 132 (copy submitted) show that DOT crews patched potholes in the vicinity of plaintiff's incident on December 23, 2008 and February 20, 2009. No patching operations were conducted from February 21, 2009 to April 4, 2009, the date of plaintiff's damage occurrence. The records show that DOT crews made partial depth repairs in the vicinity of plaintiff's incident on February 26, 2009 and again on February 27, 2009. Records also show that DOT personnel performed various maintenance activities on State Route 132 during the week prior to April 4, 2009. With the exception of a general inspection of "signs, markings, etc." on April 3, 2009, none of these maintenance activities performed on State Route 132 were conducted in the general vicinity of plaintiff's damage occurrence.

{¶ 4} Plaintiff filed a response contending that the fact DOT conducted maintenance on State Route 132 many times prior to April 4, 2009 is sufficient proof to constitutes notice of the pothole at milepost 15.13. Plaintiff observed that "[p]otholes this large do not form overnight." Plaintiff related that defendant had many opportunities to discover the pothole at milepost 15.13 before April 4, 2009 and failed to notice a defect massive in size. Plaintiff disputed defendant's contention that no DOT personnel had any knowledge of a "giant 2+ foot 18 inch wide by 4 inch deep pothole."

{¶ 5} For plaintiff to prevail on a claim of negligence he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his 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 he 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} 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.

{¶ 8} 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 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. Evidence tends to indicate that defendant had actual notice of the pothole considering DOT personnel inspected State Route 132 the day before plaintiff's incident and the pothole was in all probability present on the roadway at that time.

{¶ 9} Despite the fact proof of actual notice may be not entirely conclusive, the trier of fact finds defendant had constructive notice of the pothole at milepost 15.13 on

State Route 132. "[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 2. 3d 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; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 10} 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 or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287, 587 N.E. 2d 891. However, the massive size of a defect coupled with knowledge that the pothole presented a recurring problem is sufficient to prove constructive notice.

{¶ 11} 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 15.13 on State Route 132 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 properly 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 adequately 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, $500.00, plus the $25.00 filing fee costs. *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 $525.00, which includes the filing fee. Court costs are assessed against defendant.

MILES C. DURFEY
Clerk

Entry cc:

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RDK/laa
9/14
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