[Cite as *Lorber v. Ohio Dept. of Transp., Dist. #12*, 2009-Ohio-2768.]

Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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HALLIE LORBER

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DISTRICT #12

Defendant

Case No. 2008-10544-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On October 21, 2008, at approximately 1:30 p.m., plaintiff, Hallie Lorber, was traveling south on Interstate 271 less than ½ mile from the Cedar/Brainard Road entrance ramp when her 2007 Mazda struck a "road hazard" causing tire damage to the vehicle.

{¶ 2} 2) Plaintiff asserted 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 hazardous conditions. Plaintiff filed this complaint seeking to recover $236.99, the cost of replacement tires and related towing expense. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the "road hazard" or damage-causing pothole prior to plaintiff's described occurrence. Defendant denied receiving any previous reports of the particular roadway defect or pothole which DOT located at milepost 33.08 on Interstate 271 in Cuyahoga County. Defendant suggested, "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.

{¶ 4} 4) Furthermore, defendant asserted plaintiff has not produced evidence to show DOT negligently maintained the roadway. Defendant explained that the DOT 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 or defects were discovered at milepost 33.08 on Interstate 271 the last time this roadway was inspected prior to October 21, 2008. Defendant's records show pothole patching operations were conducted in the vicinity of milepost 33.08 on Interstate 271 South on April 29, 2008. Pothole patching operations in the northbound lane of Interstate 271 were conducted on June 16, 2008, October 8, 2008, and October 16, 2008. Litter pickup crews worked in the vicinity on October 10, 2008 and October 21, 2008, the day of plaintiff's incident.

{¶ 5} 5) Plaintiff filed a response stating the roadway defect that damaged her car may have been a pothole but her recollection was that the damage-causing condition was "an object on the road (road hazard)." Plaintiff did not offer any evidence to indicate the length of time the damage-causing defect, whether it was a pothole or "road hazard," existed on the roadway prior to 1:30 p.m on October 21, 2008.

CONCLUSIONS OF LAW

{¶ 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 recover in a suit involving damage proximately caused by roadway conditions including potholes and road hazards, plaintiff must prove that either: 1) defendant had actual or constructive notice of the pothole or road hazard 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.

{¶ 8} To prove a breach of duty by defendant to maintain the highways plaintiff

must establish, by a preponderance of the evidence, that DOT 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. No evidence has shown that defendant had actual notice of the damage-causing defective condition.

{¶ 9} 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* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. Size of the defect 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. There is no evidence of constructive notice of the pothole or road hazard.

{¶ 10} 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole or road hazard.

{¶ 11} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her property damage was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing defective condition was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant. *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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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