[Cite as *Mitchell v. Dept. of Transp.*, 2007-Ohio-5821.]

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 L. MITCHELL

Plaintiff

v.

DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-02572-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) Plaintiff, Patricia L. Mitchell, stated she was traveling, "from Georgetown on 68 N-(towards Ripley)," on February 19, 2007, about 4:45 p.m. when a passing motorist in the left roadway lane hit a pothole and propelled a piece of pavement material into the path of her vehicle moving in the left lane of US Route 68. Plaintiff related the flying pavement material struck the hood and windshield of her automobile causing substantial damage.

{¶2} 2) Plaintiff filed this complaint seeking to recover damages in the amount of $722.45, the cost of automotive repair resulting from the described February 19, 2007, incident. Plaintiff asserted she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost.

{¶3} 3) Defendant denied any liability for plaintiff's damage. Defendant denied any DOT personnel had any knowledge of the roadway condition prior to plaintiff's property damage occurrence. Defendant asserted DOT records show no calls or complaints were received regarding potholes or roadway debris located at milepost 11.943 on US Route 68 in Brown County before 4:45 p.m. on February 19, 2007. Based on information gathered, defendant suggested the roadway pavement condition which caused plaintiff's property damage, "existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant noted a DOT employee conducted an inspection of the particular area of US Route 68 on February 12, 2007, and did not discover, "any problems with potholes or debris lying in the area." Defendant related if any problems had been discovered regarding pavement conditions on US Route 68 these problems would have been promptly corrected. Defendant contended plaintiff failed to produce sufficient evidence to establish her property damage was proximately caused by any negligent act or omission on the part of DOT concerning roadway maintenance.

{¶4} 4) Defendant submitted a photograph of the pavement condition at milepost 11.943 on US Route 68 in Brown County. The photograph was taken subsequent to plaintiff's incident, presumedly on or about March 16, 2007. The photograph depicts a minor pavement defect that appears to be a pavement patch deterioration. Defendant did not produce any record showing when pavement patching repairs were last completed at

milepost 11.943 on US Route 68, prior to February 19, 2007.

CONCLUSIONS OF LAW

{¶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, 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} To prove a breach of duty by defendant 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, 507 N.E. 2d 1179. No evidence has shown defendant had actual notice of the damage causing deteriorated pavement condition.

{¶7} Plaintiff has not produced any evidence to indicate the length of time the pavement condition was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the condition. 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 the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the pavement condition.

{¶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 Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio*

Welding Products, Inc. (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. 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, 61 N.E. 2d 198, approved and followed.

{¶9} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition 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.

{¶10} This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 471 N.E. 2d 477. Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show that the proximate cause of her property damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the roadway area or that there was any negligence on the part of defendant connected to her damage. *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:

Patricia L. Mitchell
3013 Woodland Ridge
Maysville, Kentucky 41056

James Beasley, Director
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1980 West Broad Street
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RDK/laa
6/25
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