Court of Claims of Ohio

JENNIFER J. F. BEISEL

    Plaintiff

    v.

OHIO DEPARTMENT OF TRANSPORTATION

    Defendant

    Case No. 2009-03401-AD

Deputy Clerk Daniel R. Borchert

<u>MEMORANDUM DECISION</u>

FINDINGS OF FACT

{¶ 1} 1) On February 18, 2009, at approximately 3:03 p.m., plaintiff, Jennifer J. F. Beisel, was traveling north on Interstate 75 "veering right to 74 West" in Hamilton County, when her vehicle struck a large pothole causing substantial property damage.

{¶ 2} 2) Plaintiff implied 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 hazards such as potholes. Plaintiff filed this complaint seeking to recover unspecified damages for work loss, loss of use, the cost of replacement parts, and related repair expenses she incurred resulting from the February 18, 2009 incident.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's February 18, 2009 property damage occurrence. Defendant denied receiving prior notice about the pothole plaintiff's car struck, which DOT located at approximately milemarker 4.40 on Interstate 75 in Hamilton County. Defendant asserted plaintiff did

not produce any evidence to indicate the length of time the damage-causing pothole existed prior to February 18, 2009. 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) Defendant asserted plaintiff failed to offer evidence to establish DOT negligently maintained the roadway in question. Defendant's records show pothole patching operations were conducted in the vicinity of milepost 4.40 on Interstate 75 on January 22, 2009, February 8, 2009, February 9, 2009, and February 18, 2009. Defendant related that if the particular damage-causing pothole had been detected by DOT the particular defect "would have been promptly scheduled for repair."

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, 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 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.

{¶ 7} 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. Evidence is inconclusive to show that defendant had actual notice of the damage-causing pothole, considering DOT was conducting pothole repair operations in the vicinity of plaintiff's damage occurrence on February 18, 2008, the same day the incident forming the basis of this claim occurred.

{¶ 8}   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 (pothole) developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.   There is inconclusive evidence DOT had constructive notice of the pothole despite the fact DOT patching crews were in the area on the day of the incident.

{¶ 9}   Plaintiff has not produce 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.

{¶ 10} 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 pothole 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.

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

JENNIFER J. F. BEISEL

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

　Case No. 2009-03401-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 defendant. Court costs are assessed against plaintiff.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jennifer J. F. Beisel   Jolene M. Molitoris, Director
10767 Stone Ridge Way   Department of Transportation
Harrison, Ohio 45030   1980 West Broad Street
                                                            Columbus, Ohio 43223

RDK/laa
7/9
Filed 7/16/09
Sent to S.C. reporter 11/10/09