[Cite as *Olson v. Ohio Dept. of Transp.*, 2007-Ohio-3752.]

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

JO ANN OLSON

Plaintiff

v.

DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-01649-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Jo Ann Olson, stated she was traveling north on State Route 7 on January 4, 2007, at approximately 10:30 a.m., when her car, "hit something on the passenger side causing a blow-out of [the left] rear tire." Plaintiff related she reported this incident to defendant, Department of Transportation ("DOT"), and DOT dispatched an employee to the scene. According to plaintiff, DOT personnel, "checked Rt 7-1/4 [mile south] of McClurg Rd. and found the recessed man hole cover which cut my tire and rim beyond repair."

{¶ 2} 2) Plaintiff asserted her property damage to her automobile was caused by negligence on the part of DOT in maintaining a hazardous condition on State Route 7. Consequently, plaintiff filed this complaint seeking to recover $890.49, the cost of replacement parts and automotive repair expenses associated with the January 4, 2007, property damage incident. The filing fee was paid.

{¶ 3} 3) Defendant denied having any knowledge of any particular roadway defect including a recessed manhole cover on State Route 7. From plaintiff's description defendant approximated the location of plaintiff's incident at milepost 6.50 on State Route 7 in Mahoning County. Defendant explained a DOT work crew was dispatched on January 5, 2007, after plaintiff reported a roadway defect on State Route 7 on January 4, 2007. Defendant asserted the DOT work crew could not find any defects on the roadway.

Defendant did acknowledge, "there is a manhole cover to the right of the lane on SR 7 before approaching McClurg Road." However, defendant doubts this manhole damaged plaintiff's vehicle since she claimed damaged to the left passenger tire of her car while traveling north and the manhole is located on the right side of the north bound lane of State Route 7. Defendant contended plaintiff failed to prove a roadway defect damaged her car. Alternatively, defendant contended plaintiff failed to produce sufficient evidence regarding the length of time any damage-causing defect existed prior to her January 4, 2007, incident. Defendant maintained DOT employees conduct, "roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no defects were discovered on the roadway during previous inspections.

CONCLUSIONS OF LAW

{¶ 4} 1) 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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 5} 2) 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. 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.

{¶ 6} 3) Plaintiff has not produced any evidence to indicate the length of time any defective manhole condition or other condition was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual notice of a defective 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 defective condition appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the open manhole. Plaintiff has not produced any evidence to infer 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.

{¶ 7} 4) 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 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. 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, approved and followed. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. Defendant professed liability cannot be established when requisite notice of the damage-causing conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard*, supra. However, proof of a dangerous condition is not necessary when defendant's own agents actively cause such condition, as it appears to be the situation in the instant matter. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861. Plaintiff has failed to produce sufficient evidence to prove her property damage was caused by a defective condition created by DOT.

{¶ 8} 5) Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing condition was connected to any conduct under the control of defendant, or 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. Plaintiff has failed to provide sufficient evidence to prove defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to her vehicle. *Hall v. Ohio Department of Transportation* (2000), 99-12863-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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jo Ann Olson
141 Lakeshore Drive
Columbiana, Ohio 44408

James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
5/16
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