IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SUSAN PRESTON,	:	NO. 09 – 02,785
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
CITY OF WILLIAMSPORT,	:	
Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the Court is Defendant's Motion for Summary Judgment, filed April 12, 2011. Argument on the motion was heard May 23, 2011.

In her Complaint, Plaintiff alleges that on April 1, 2009, she was walking to her car after work and tripped in a pothole in the crosswalk at the intersection of East Third and Mulberry Streets in Williamsport, suffering injury to her left hand and arm as a result. Plaintiff contends the City's negligence in failing to fix the pothole or warn pedestrians of its existence caused her injuries. In their motion for summary judgment, the City argues Plaintiff has failed to offer sufficient proof that the City knew of the pothole, a required element under the Political Subdivision Tort Claims Act.

The court may grant summary judgment if an adverse party who will bear the burden of proof at trial has failed to produce sufficient evidence of facts essential to the cause of action, which in a jury trial would require the issue be submitted to a jury. Pa.R.C.P. 1035.2(2). Counsel agree that Plaintiff's burden in this case is defined by the Political Subdivision Tort Claims Act, as follows:

> (6) Streets.- A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa.C.S. Section 8542(b)(6).

Plaintiff contends she has offered the following evidence, based on which the City could reasonably be charged with notice ("constructive notice") of the pothole:[1] the pothole was in the middle of the street, the street is busy, in downtown Williamsport, and employees of the city would travel through the intersection daily.[2] There is absolutely no evidence, however, of how long the pothole had been there and, to the contrary, the evidence offered by the City is that April 1 is near the beginning of the freeze-thaw cycle when potholes form very rapidly, and the evidence offered by Plaintiff herself is that she walked that intersection very frequently and had not seen the pothole prior to her fall.

Plaintiff argues nevertheless that since city employees travelled the area of the pothole, a jury could find constructive notice, citing Franc v. Pennsylvania Railroad, 225 A.2d 528 (Pa. 1967). There, the injured plaintiff had fallen through a hole in a railroad bridge also used by pedestrians, which hole was caused by a missing board. The Court said, "since railroad employees walked across the bridge, it was for the jury to determine whether the railroad company … had constructive notice of the hiatus in the walking surface of the span." Id. at 529. Plaintiff's reliance on Franc is misplaced, however, as in Franc there was also evidence that the board had been missing for three weeks. The Tort Claims Act requires not just notice but notice "at a sufficient time prior to the event". While the Court agrees with Plaintiff that a plaintiff need not "produce positive testimony as to how long [a] defect existed", Stais v. Sears-Roebuck & Co., 102 A.2d 204 (Pa. Super. 1954), there must be at least circumstantial evidence that the defect existed long enough to be noticed and remedied. Here, the circumstantial evidence points the other way, to a period of time so short that reasonable minds could not differ in finding the City did not have constructive notice of the pothole.

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[1] The evidence does not support a finding, and Plaintiff does not contend, that the City had actual notice.

[2] Plaintiff also argues in her brief that since the City's Streets and Parks Director said the hole was caused by a snowplow, and since the snowplow would have been driven by a city employee, the City would have had notice of the defect. The Director did not say the pothole was caused by a snowplow, however, but, rather, by freeze-thaw. Notes of Deposition Testimony of William Wright, December 2, 2010, at p. 44.

Accordingly, the Court will enter the following :

ORDER

AND NOW, this 24th day of May 2011, for the foregoing reasons, the motion for summary judgment is hereby GRANTED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Michael Dinges, Esquire
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Gary Weber, Esq.
Hon. Dudley Anderson