

[Cite as *Stinson v. Ohio Dept. of Transp.*, 2003-Ohio-597.]

IN THE COURT OF CLAIMS OF OHIO

BRYAN M. STINSON	:	
6273 N. Philomath Road	:	
Brownsville, Indiana 47325	:	Case No. 2002-06677-AD
Plaintiff	:	MEMORANDUM DECISION
v.	:	
OHIO DEPARTMENT OF	:	
TRANSPORTATION	:	
Defendant	:	

: : : : : : : : : : : : : : : :

For Defendant: Gordon Proctor, Director
 Department of Transportation
 1980 West Broad Street
 Columbus, Ohio 43223

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FINDINGS OF FACT

{¶1} On May 18, 2002, at approximately 6:00 p.m., plaintiff, Bryan M. Stinson, was traveling west on State Route 122 between Concord/Fairhaven Road and Walverton Road in Preble County when his automobile struck a pothole causing tire damage to the vehicle. Plaintiff submitted photographic evidence depicting the pothole his car struck. The pothole appeared to be a deteriorated patch around a metal monument box. The sharp corner of the monument box was exposed when the pavement patching material deteriorated. As a result of striking the pothole plaintiff incurred automotive repair costs. Consequently, plaintiff filed this claim seeking to recover \$140.00 for two replacement tires, \$12.00 for wheel balancing, \$4.00 for tire disposal, \$40.00 for a front end alignment and \$25.00 for filing fee reimbursement. Plaintiff has asserted he

sustained these damages as a proximate cause of negligence on the part of defendant, Department of Transportation, in maintaining the roadway.

{¶2} On or about June 2, 2002, plaintiff first contacted defendant about the damage-causing pothole. Plaintiff sent written electronic correspondence to defendant describing the damage he suffered from striking the pothole on May 18, 2002. Plaintiff also inquired about filing a claim to pay for his automotive damage. On June 4, 2002, defendant's Highway Management Administrator, Dave Irwin, responded to plaintiff's inquiries. Irwin referred plaintiff to defendant's Preble County Manager, Bill Rigsby regarding the pothole on State Route 122. Additionally, plaintiff was told he could contact defendant's District Office in Lebanon, Ohio, concerning any damage claim he may have wanted to pursue. On June 6, 2002, plaintiff had two tires replaced on his automobile and had the car's front end aligned. Plaintiff paid for these vehicle repairs on the day the repairs were made.

{¶3} On June 6, 2002, defendant's employee, Bill Rigsby sent plaintiff a communication about the pothole on State Route 122. In this communication, Rigsby noted, "the pothole in question was due to surveyors working in preparation for a major resurfacing job which will include widening the road by two feet on either side which is expected to take place later this summer." Rigsby also presciently indicated the pothole on State Route 122, "was repaired on Monday morning June 12, 2002." The court takes note June 12, 2002 fell on a Wednesday and occurred after June 5, 2002.

{¶4} Defendant denied any liability in this matter based on the assertion it did not have notice of the pothole on State Route 122 prior to plaintiff's May 18, 2002 incident. Defendant acknowledged it first received notice of the pothole when a representative of Wikel Surveying contacted defendant's employee, Bill Rigsby. According to defendant, Wikel Surveying was performing surveying work under the direction of the Preble County

Highway Department and employees of Wikel Surveying had "dug up a survey monument on State Route 122." Defendant denied having any knowledge regarding how long the pothole was present on State Route 122 prior to plaintiff's property damage event.

{¶5} Additionally, defendant contended plaintiff has failed to provide sufficient evidence to establish negligent maintenance of the roadway. Defendant's records revealed seven pothole patching operations were performed in the highway vicinity during the five-month period preceding plaintiff's incident. The last pothole patching before plaintiff's damage incident occurred on April 8, 2002. Defendant conducted a roadway patrol activity on State Route 122 on May 9, 2002. No potholes or other defects were discovered at that time.

{¶6} Plaintiff filed a response addressing defendant's contentions. Plaintiff asserted no employee of Wikel Surveying conducted any surveying operation in the area of State Route 122 where his property damage occurred. Plaintiff therefore disputed defendant's assertions that agents of Wikel Surveying had created the pothole which resulted in the May 18, 2002 property damage event. Plaintiff reasoned the pothole either happened naturally or was created by defendant's personnel in connection with the summer 2002 roadway project under defendant's control. Plaintiff pointed out that defendant, from April 9, 2002 through May 2002, did not repair potholes in the vicinity where his incident occurred. Plaintiff has argued this fact of no repair activity constitutes negligent maintenance. The trier of fact disagrees. Plaintiff believes the pothole his automobile struck was present for at least a week before he encountered it on May 18, 2002. However, plaintiff did not offer any evidence to support this belief.

CONCLUSIONS OF LAW

{¶7} Defendant has the duty to maintain its highway 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.

{¶8} 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, 517 N.E. 2d 1388. Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Ohio Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. There is no evidence defendant had notice of the pothole on State Route 122. Plaintiff has failed to prove defendant had actual notice of the pothole. Constructive notice of a hazardous condition or defect on a state highway occurs where the defect or notice existed for such a length of time to impute knowledge or notice. *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526. The trier of fact is precluded from making an inference of constructive notice, unless evidence is presented in respect to the time the defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. 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.

{¶9} There is no indication defendant had constructive notice of the pothole. Finally, 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶10} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶11} IT IS ORDERED THAT:

{¶12} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶13} 2) The court shall absorb the court costs of this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

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