

[Cite as *Tomic v. Ohio Dept. of Transp.*, 2005-Ohio-4609.]

IN THE COURT OF CLAIMS OF OHIO

ANDY TOMIC	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02613-AD
OHIO DEPT. OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	

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FINDINGS OF FACT

{¶ 1} 1) On January 5, 2005, at approximately 7:30 a.m., plaintiff, Andy Tomic, was traveling north on Interstate 77 near mile marker 137.7 in Summit County, when his truck hit a series of potholes causing damage to the vehicle.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$633.04, for truck repair, a cost plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. The filing fee was paid.

{¶ 3} 3) Plaintiff has not submitted any evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim. Defendant contended plaintiff failed to establish his property damage was caused by any negligent act or omission on the part of DOT.

{¶ 4} 4) Defendant's maintenance records show potholes were patched in the general vicinity of plaintiff's incident on January 3, 2005, two days prior to plaintiff's damage occurrence.

{¶ 5} 5) On June 23, 2005, this court granted plaintiff's motion

for extension of time to submit a response to defendant's investigation report. However, plaintiff failed to timely submit a response.

CONCLUSIONS OF LAW

{¶ 6} 1) Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 7} 2) 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.

{¶ 8} 3) In order to prove a breach of 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. 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 developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶ 9} 4) In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after the dangerous condition

appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD. Size of the defect is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set-time standard for the discovery of certain road hazards." *Bussard*, supra at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. No. 92AP-1183.

{¶ 10} 5) Plaintiff has not produced any evidence to indicate the length of time the potholes were 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 potholes. 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 potholes appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the pothole. 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 conditions. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

IN THE COURT OF CLAIMS OF OHIO

ANDY TOMIC	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02613-AD
OHIO DEPT. OF TRANSPORTATION	:	<u>ENTRY OF ADMINISTRATIVE</u>
Defendant	:	<u>DETERMINATION</u>

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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:

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Plaintiff, Pro se

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For Defendant

DRB/RDK/laa
7/28
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