

[Cite as *Deimling v. Ohio Dept. of Transp., Dist. 12, 2005-Ohio-843.*]

IN THE COURT OF CLAIMS OF OHIO

PAUL FRANCIS DEIMLING :
 :
 Plaintiff :
 :
 v. : CASE NO. 2004-10426-AD
 :
 OHIO DEPT. OF TRANSPORTATION, : MEMORANDUM DECISION
 DIST. 12 :
 :
 Defendant :

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FINDINGS OF FACT

{¶ 1} 1) On April 3, 2004, at approximately 1:00 a.m., plaintiff, Paul F. Deimling, was traveling west on Mayfield Road (US Route 322) in Cuyahoga County when his automobile struck a large pothole causing tire and rim damage to the vehicle. Plaintiff related he could not avoid the pothole due to its overwhelming size.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$442.49, the cost of replacement parts and related expenses incurred resulting from striking the large pothole in the traveled portion of the roadway. Plaintiff paid the \$25.00 filing fee. Plaintiff asserted he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in failing to properly maintain the roadway.

{¶ 3} 3) Defendant denied liability based on the contention no DOT personnel had any knowledge of the damage-causing pothole prior to plaintiff's property damage occurrence. Defendant stated DOT's records indicate no calls or complaints were received concerning the particular pothole that damaged plaintiff's automobile.

Defendant's submitted phone logs show no one called to report a pothole on Mayfield Road prior to April 3, 2004. Defendant explained plaintiff called to report the pothole on April 6, 2004, and the pothole was promptly patched. Defendant denied having any type of notice regarding the damage-causing pothole. Defendant suggested it is likely the pothole had been formed for a short period of time prior to plaintiff's April 3, 2004, property damage event. Defendant professed plaintiff did not present any evidence to establish the length of time the pothole existed prior to his property damage event.

{¶ 4} 4) Defendant argued plaintiff did not produce evidence to establish DOT negligently maintained US Route 322. Defendant rated US Route 322 as being in good condition prior to April 3, 2004. Furthermore, defendant noted DOT employees conduct roadway inspections on a routine basis and do not neglect repairing noticed roadway defects. Defendant's records show DOT personnel patched a pothole in the vicinity of plaintiff's incident on April 2, 2004.

{¶ 5} 5) In his response to the investigation report, plaintiff disputed the accuracy of defendant's submitted phone log. Plaintiff pointed out the phone log does not show a record of his April 6, 2004, telephone complaint to DOT. Plaintiff stated "I do not feel this log is an accurate representation of complaints made regarding the stretch of road which the defendant claims it does."

{¶ 6} 6) Plaintiff alleged the damage-causing pothole had been previously repaired and the repair patch had rapidly deteriorated. Plaintiff did not offer evidence to support this allegation. Plaintiff did not present any evidence to establish the length of time the pothole his automobile struck existed prior to the incident forming the basis of this claim.

CONCLUSIONS OF LAW

{¶ 7} 1) 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} 2) In order to recover in any suit involving injury proximately caused by roadway conditions plaintiff must prove 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.

{¶ 9} 3) 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.

{¶ 10} 4) Size of the defect (pothole) is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297.

{¶ 11} 5) Plaintiff has not produced any evidence to indicate the length of time the pothole was 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 pothole. 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 pothole 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.

DRB/RDK/1aa

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