

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

TOM SHANE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-01525-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On January 3, 2007, at approximately 9:00 p.m., plaintiff, Tom Shane, was traveling on the, “Indianapolis exit (ramp) off I75 North” in Cincinnati, when his 2004 Buick Lesabre struck a “huge” pothole causing tire and rim damage to the vehicle.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$680.94, the cost of replacement parts and automotive repair. Plaintiff implied that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. Plaintiff seeks reimbursement of the \$25.00 filing fee in addition to his damages claim of \$705.94.

{¶3} 3) Defendant denies liability for the reason that no DOT personnel had any knowledge of the pothole prior to plaintiff’s property damage occurrence. Defendant’s investigation concluded that the pothole was located between mileposts 4.23 to 4.40 on Interstate 75 in Hamilton County. Alternatively, defendant stated that, “[t]he ramp for westbound I-74 from I-75 is between mileposts 19.02 to 19.47.” Defendant also asserts that plaintiff failed to produce any evidence showing how long the pothole existed prior to the incident forming the basis of this claim.

{¶4} 4) Defendant denied receiving any calls or complaints regarding the particular pothole before plaintiff’s incident. Defendant explained that DOT employees conduct roadway inspections, “at least two times a month.” Apparently no potholes were discovered during previous roadway inspections. Defendant concluded that, “. . . it is likely the pothole existed for only a short time before the incident.” Defendant denied that DOT employees were negligent in regard to roadway maintenance.

{¶5} 5) Plaintiff did not produce any evidence establishing the length of time that the pothole existed prior to his property damage occurrence at 9:00 p.m. on January 3, 2007.

CONCLUSIONS OF LAW

{¶6} 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.

{¶7} To prove a breach of the duty by defendant to maintain the highways plaintiff

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must establish, by a preponderance of the evidence, that DOT 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.

{¶8} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. Additionally, size of a pothole is insufficient to prove notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287.

{¶9} In order for there to be constructive notice, plaintiff must show that sufficient time has elapsed after the dangerous condition appears, so that under the circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation* (1978), 78-0126-AD. "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. 92AP-1183, 1993 Ohio App. LEXIS 636.

{¶10} There is evidence that the pothole on Interstate 75 was present for at least four hours and twenty minutes prior to plaintiff's property damage event. The issue presented is whether this evidence constitutes a finding of constructive notice of the defect. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198. Constructive notice of roadway potholes has been determined in multiple claims involving less than a twenty-four hour time frame. See *McGuire v. Ohio*

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Department of Transportation (2002), 2001-08722-AD; *Piscioneri v. Ohio Dept. of Transportation, District 12*; 2002-10836-AD, 2003-Ohio-2173, jud; *Kill v. Ohio Department of Transportation*, 2003-01512-AD, 2003-Ohio-2620, jud; *Grothouse v. Ohio Department of Transportation, District 1*, 2003-01521-AD, 2003-Ohio-2621, jud; *Zeigler v. Department of Transportation*, 2003-01652-AD, 2003-Ohio-2625; *Sheaks v. Ohio Department of Transportation*, 2003-02179-AD, 2003-Ohio-2176, jud.

{¶11} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, 2005-02117-AD, jud; 2005-Ohio-3976, in a Motion for Court Review, the court concluded in reversing a determination by the Clerk that thirteen hours constructive notice of a defect is insufficient notice to invoke liability on DOT. In reversing the finding of constructive notice, the Court quoted and adopted DOT's argument: "It is inappropriate that ODOT be held negligent for not patrolling every square mile or roadway every twelve hours. Such a ruling is against all case law created outside the limited arena of these administrative determination." (Defendant's motion for court review, page 7.) In its reversal order the court also recognized a constructive notice standard involving signage. The court noted in finding, ". . . that evidence of a stop sign being down for less than 24 hours was not enough time to impute constructive notice of its condition to ODOT." See *Cushman v. Ohio Dept. of Transp.* (1995), 91-11591; affirmed (March 14, 1996), Franklin App. No. 95AP107-844, 1996 Ohio App. LEXIS 990. The court is required to follow existing precedent. Consequently, plaintiff has failed to prove that defendant had sufficient constructive notice of the damage-causing pothole to invoke liability.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant

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.

MILES C. DURFEY
Clerk

Entry cc:

Tom Shane
27054 St. Rd. 46 W.
Batesville, Indiana 47006

James Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
4/4
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