

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

THOMAS BURKE

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 3

Defendant

Case No. 2007-02181-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 4, 2007, at approximately 11:30 p.m., plaintiff, Thomas Burke, was traveling east on Interstate 90, “in the area of the bridge for Rte. 83,” when his automobile struck a pothole causing wheel damage to the vehicle.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$197.70, the total cost of replacement parts and automotive repair costs resulting from the February 4, 2007, incident. Plaintiff also seeks reimbursement of the \$25.00 filing fee. Plaintiff contended his property damage was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the fact it professed to have no knowledge of the damage-causing pothole prior to plaintiff’s incident. Defendant denied receiving any prior complaints about the pothole on Interstate 90 which DOT located, “at approximate state milemarker 153.10 . . . in Lorain County.” Defendant explained, “it is more likely than not the pothole existed in that location for only a relatively short amount of time before plaintiff’s incident.” Defendant asserted DOT employees conduct roadway inspections on a routine basis and apparently had not discovered any potholes on Interstate 90 during these routine inspections.

[Cite as *Burke v. Ohio Dept. of Transp., Dist. 3, 2007-Ohio-3754.*]

{¶ 4} 4) Defendant provided documentation showing potholes were previously repaired in the vicinity of plaintiff's incident on November 30, December 11, December 12, 2006, and February 1, 2007. Defendant contended plaintiff failed to produce evidence showing how long the particular pothole existed prior to the incident forming the basis of this claim.

{¶ 5} 5) Despite filing a response, plaintiff did not submit any evidence to establish the length of time the defect was on the roadway prior to his property damage incident.

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} 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. 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} Plaintiff has not produced sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown 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. Ohio 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

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{¶ 9} 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. 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 287. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.



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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Thomas Burke
21966 Cromwell Avenue
Fairview Park, Ohio 44126

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

RDK/laa
5/8
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