

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

JEFFREY SCOTT CUNNINGHAM

Case No. 2007-04681-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 8

Defendant

FINDINGS OF FACT

{¶1} 1) On March 28, 2007, at approximately 6:30 a.m., plaintiff, Jeffrey S. Cunningham, was traveling on State Route 73 in Warren County, when his automobile struck a large pothole causing tire and rim damage to the vehicle. Plaintiff submitted photographs depicting the pothole his vehicle struck. The pothole appears from the photographs to be a roadway defect that had previously been patched and the patching material had subsequently failed creating a new hazard.

{¶2} 2) Plaintiff asserted his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway. Consequently, plaintiff filed this complaint seeking to recover \$396.41, the cost of replacement parts and associated automotive repair expenses. The filing fee was paid.

{¶3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage event. Defendant denied receiving any previous calls or complaints regarding a pothole which DOT located at milepost 11.19 on State Route 73 in Warren County. Defendant suggested, "it is likely the pothole existed for only a short time before the incident."

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{¶4} 4) Defendant contended plaintiff failed to produce evidence establishing the length of time the pothole existed prior to March 28, 2007. Defendant also contended plaintiff failed to establish the roadway was negligently maintained. Defendant noted DOT Warren County Manager inspects all state roadways in Warren County, “at least two times a month.” Apparently, no potholes were discovered near milepost 11.19 on State Route 73 during the last inspection before March 28, 2007. Defendant patched potholes in the area of plaintiff’s damage occurrence on February 6, and February 27, 2007.

{¶5} 5) Despite filing a response, plaintiff did not produce evidence showing the length of time the pothole existed prior to March 28, 2007. Plaintiff referred to the photographs he submitted specifically pointing out the roadway area evidencing multiple prior repairs. Plaintiff also pointed out the photographs depict a, “road bed (that) appears to be sliding down the hill immediately next to the road creating substantial cracks and potholes.” Plaintiff insisted defendant had to be aware of this condition of the roadway. Plaintiff asserted the deteriorated repairs shown in the photographs constitute evidence of negligent maintenance.

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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶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, 517 N.E. 2d 1388. Defendant is only liable for roadway condition of which it has notice but fails to

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reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179. No evidence has shown defendant had actual notice of the damage-causing pothole.

{¶18} 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, 577 N.E. 2d 458. 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 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, 587 N.E. 2d 891. Although plaintiff has shown his vehicle was damaged by a pothole that had been previously patched, this assertion alone, if established, does not provide proof of negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute in and of itself conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Plaintiff has failed to prove the pothole that damaged his car had been previously patched with the patching material subject to rapid deterioration since the last previous pothole repair made by DOT was on February 27, 2007, or February 6, 2007. Furthermore, plaintiff also failed to establish the general time frame when the roadway condition depicted in his photographs initially appeared. Plaintiff, in the instant claim, has not produced sufficient evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy*



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MEMORANDUM DECISION

v. Ohio Department of Transportation (1999), 99-07011-AD. Plaintiff failed to show that the proximate cause of his damage was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the roadway area or that there was any negligence on the part of defendant connected to his damage. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Jeffrey Scott Cunningham
120 Deeter Drive
Clayton, Ohio 45315

James G. Beasley, Director
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1980 West Broad Street
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RDK/laa
8/17
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