[Cite as *Frye v. Ohio Dept. of Transp.*, 2007-Ohio-7240.]

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 K. FRYE, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-05741-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On March 8, 2007, at approximately 12:45 p.m., plaintiff, Nora H. Frye, was driving her 2003 Mazda Protege west on Interstate 275 exiting onto State Route 4, when the vehicle struck a pothole in the traveled portion of the roadway. Plaintiff, Thomas K. Frye, the co-owner of the Mazda Protege and the spouse of Nora H. Frye, claimed the impact of striking the pothole caused damage to the rack and pinion steering mechanism on the vehicle. Plaintiffs submitted photographs depicting the damage-causing roadway defect. These photographs show a defective condition that spans the entire length of the roadway lane with pavement heaves, surface cracks, and missing portions of pavement surface displayed.

{¶2} 2) Plaintiffs asserted their property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. Consequently, plaintiffs filed this complaint seeking to recover $1,232.65, the complete cost of automotive repair incurred. The filing fee was paid.

{¶3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole plaintiffs' car struck, which defendant located at milepost 41.00 on Interstate 275 in Hamilton County. Defendant denied receiving any calls or complaints about defective roadway conditions at milepost 41.00

on Interstate 275 prior to the incident forming the basis of this claim. Defendant suggested, "it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant noted that DOT, "Hamilton County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no defective conditions were discovered at milepost 41.00 on Interstate 275 during the last roadway inspection prior to March 8, 2007. Defendant denied DOT employees were negligent in regard to roadway maintenance.

{¶4} 4) Plaintiffs filed a response. Plaintiffs asserted DOT personnel should have known about the damage-causing pothole, if the roadway had been properly inspected. Plaintiffs contended defendant is speculating concerning the length of time the roadway condition existed prior to March 8, 2007. Plaintiffs did not present any evidence to establish how long the roadway condition at milepost 41.00 on Interstate 275 existed prior to March 8, 2007. Plaintiffs submitted additional photographs of the damage-causing roadway pavement taken August 4, 2007. These photographs depict a pavement condition virtually identical to the condition shown in the photographs submitted with plaintiffs' complaint (filed June 18, 2007). Plaintiffs contend the fact the pavement condition at milepost 41.00 on Intestate 275 had not been ameliorated as of August 4, 2007, constitutes proof of negligent maintenance and resulting liability.

CONCLUSIONS OF LAW

{¶5} 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.

{¶6} In order to prove a breach of the duty to maintain the highways, plaintiffs

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 conditions of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 31 OBR 64, 507 N.E. 2d 1179.

{¶7} Plaintiffs have not produced sufficient evidence to indicate the length of time the particular pothole or defective conditions were present on the roadway prior to the incident forming the basis of this claim. Plaintiffs have not shown defendant had actual notice of the pothole or defective conditions. 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 or conditions appeared on the roadway. *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 or hazardous pavement conditions. Plaintiffs have not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition or conditions. *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. Therefore, defendant is not liable for any damage plaintiffs may have suffered from the pothole or defective condition.

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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:

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RDK/laa
11/7
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