[Cite as *Matzdorff v. Ohio Dept. of Transp.*, 2008-Ohio-4194.]

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 O. MATZDORFF

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-01481-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) At approximately 9:00 a.m. on December 18, 2007, plaintiff, Thomas O. Matzdorff, was traveling north on Interstate 75 near milemarker 199 in Wood County, when his automobile struck a pothole causing rim damage to the vehicle.

{¶ 2} 2) Plaintiff implied that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to adequately maintain the roadway in regard to pothole repair. Consequently, plaintiff filed this complaint seeking to recover $119.17, the complete cost of automotive repair expense resulting from the December 18, 2007 damage occurrence. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the damage-causing pothole prior to plaintiff's incident. Defendant's records show no previous reports about the particular pothole which DOT located at state milepost 199.0 on Interstate 75 in Wood County. Defendant suggested, "it is likely the pothole existed for only a short time before the incident." Defendant's records establish potholes were patched in the vicinity of plaintiff's incident on October 3, 2007, October 4, 2007, December 4, 2007, and December 11, 2007. It appears the pothole repairs made on December 4, 2007 included patching the pothole plaintiff's vehicle struck on December 18, 2007.

{¶ 4} 4) Defendant asserted plaintiff failed to produce evidence to establish DOT negligently maintained the roadway. Defendant explained that the DOT Wood County Manager, "inspects all state roadways in the county at least two times a month,"

including Interstate 75. Defendant observed a DOT employee, Rick Riebesel, traveled Interstate 75 in Wood County on February 5, 2008, seven weeks after plaintiff's damage event. Riebesel noted he found one roadway defect in the middle lane of Interstate 75 near milemarker 198.2. A photograph taken on February 5, 2008 depicting this defect was submitted. The small hole depicted appears to be a minor deterioration of a layer of pothole patch that according to defendant's records, was last patched on December 6, 2007. Defendant's submitted maintenance history records of "pothole patching" cover the period of July 1, 2007 to December 18, 2007. No records concerning "pothole patching" from the subsequent period of December 19, 2007 to February 5, 2008 were provided. Defendant argued plaintiff failed to produce any evidence to indicate the length of time the particular damage-causing pothole existed prior to 9:00 .a.m. on December 18, 2007.

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, 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 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} 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, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the pothole.

{¶ 8} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, 788 N.E. 2d 1088, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidenced so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶ 9} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highway negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Defendant acknowledged the damage-causing pothole plaintiff's vehicle struck was a defect that had been previously patched and deteriorated. This fact alone 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.

{¶ 10} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff has failed to show that the damage-causing pothole was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant or its agents. *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:

Thomas O. Matzdorff
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RDK/laa
5/7
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