[Cite as *Harris v. Dept. of Transp.*, 2008-Ohio-5608.]

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

ANTHONY HARRIS

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-02975-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

[Cite as *Harris v. Dept. of Transp.*, 2008-Ohio-5608.]

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Anthony Harris, suffered damage to his car on February 9, 2008, while traveling west on Interstate 90 in Cleveland, when the vehicle struck a pothole in the roadway. Plaintiff stated, "I hit a chuck hole when trying to exit on E260th St. Exit 184 off the freeway." Plaintiff related the impact of striking the pothole caused a tire to blow out and damage to the vehicle's coil spring, right spring strut, and shock absorber assembly.

{¶ 2} 2) Plaintiff asserted the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover $534.98, the total cost of automotive repair incurred resulting from the February 9, 2008 incident. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention no DOT personnel had any knowledge of the pothole on Interstate 90 prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints about the particular damage-causing pothole which DOT located at state milepost 185 on Interstate 90 in Cuyahoga County. Plaintiff submitted photographs depicting DOT roadway exit signs for State Route 175 "E. 260th St, Babbit Rd, Exit 184." Defendant acknowledged the submitted photographic evidence shows the E. 260th Street exit as milepost 184. However, according to defendant, "ODOT's records show the exit for E. 260th Street or SR 185 at milepost 185." Defendant submitted a copy of the record with an attached map. Defendant contended plaintiff failed to produce any evidence to establish the length of time the damage-causing pothole was present on the roadway prior to February 9, 2008. Defendant suggested "it is likely the pothole existed for only a short time before the incident." Defendant asserted plaintiff did not prove DOT personnel knew about the pothole or should have known about the pothole.

{¶ 4} 4) Furthermore, defendant asserted plaintiff failed to prove DOT negligently maintained the roadway. Defendant explained the DOT Cuyahoga County Manager "inspects all state roadways within the county at least two times a month." Defendant's records show DOT patched potholes in the vicinity of plaintiff's incident on December 21, 2007, December 28, 2007, December 31, 2007, January 7, 2008, and January 8, 2008. Apparently the pothole plaintiff's vehicle struck was not discovered

during roadway inspections of Interstate 90 from the period of January 9, 2008 to February 8, 2008.

{¶ 5} 5) Plaintiff, in attempting to accurately pinpoint the location of the pothole, wrote in a response, "I was not exiting on E 260 Street Exit I hit the pothole about a half a mile before the E 260 Exit I was coming south to west across the I-90 bridge." Plaintiff noted the pothole his vehicle struck "is still (there) as (shown) in my picture." Plaintiff did submit three photographs all depicting a massive pothole in the traveled portion of the roadway; the date the photographs were taken was not provided. Plaintiff asked, "if the defendant maintains an active inspection program for their roadways then why is the pothole still (there)?" Plaintiff asserted defendant should bear the liability for his property damage.

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 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.

{¶ 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 that 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.

{¶ 9} "[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, 47 O.O. 231, 105 N.E. 2d 429. "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*, 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. 91AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, 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; *Gelarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047. There is no indication that defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer that 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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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:

Anthony Harris
21551 Crystal Avenue
Euclid, Ohio 44123

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
7/7
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