

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

BRUCE ROBERTS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05036-AD

Miles C. Durfey, Clerk

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} Plaintiff, Bruce Roberts, related that he was traveling “on State Rt 78 in Hocking County toward Nelsonville,” when his Ford 500 struck two potholes in the roadway causing tire damage to the vehicle. Plaintiff recalled that the property damage incident occurred on March 25, 2008. Plaintiff submitted a photograph (taken March 30, 2008) depicting the potholes his automobile struck. The potholes depicted are located near the painted roadway edge line and appear to have been previously patched areas that have re-formed into potholes due to deterioration of the patching material. Patching material is present along the roadway berm area depicted. On March 30, 2008 plaintiff reported the incident regarding the pothole on State Route 78 to local Ohio State Highway Patrol (“OSHP”). Plaintiff filed a “Crash Report” #05-0376-05 with OSHP and submitted a copy of the first page of that report. The OSHP Crash Report page submitted reflects the reported incident occurred on March 25, 2008 on State Route 78 at milepost 1.0.

{¶ 2} Plaintiff asserted 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 free of defects. Plaintiff file this complaint seeking to recover \$167.44, the cost of a replacement tire and related repair expense. The filing fee was paid.

{¶ 3} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the damage-causing potholes prior to plaintiff’s incident. Defendant related that records show no calls or complaints were received regarding the particular potholes which DOT located between mileposts 0.00 and 3.32 on State Route 78 in Hocking County. Evidence submitted by plaintiff (cover page of OSHP Crash Report) more precisely locates the potholes at milepost 1.00 on State Route 78. Defendant asserted that plaintiff did not produce any evidence to establish the length of time the potholes existed prior to his property damage event, which apparently occurred on March 25, 2008 (OSHP Crash Report). Defendant suggested that the damage-causing potholes likely appeared “for only a relatively short amount of time before plaintiff’s incident.” DOT employee, Ron Neuhauser, inspected State Route 78 on March 20, 2008 and did not discover any potholes in the approximate area of milepost 1.00. Neuhauser noted, “I found no big holes to report for repair.” Neuhauser also reported that he inspected State Route 78 on April 23, 2008 and again on April 24, 2008 and did not discover any potholes. Defendant did not provide any record of DOT maintenance activity history for State Route 78 in Hocking County.

{¶ 4} Plaintiff filed a response verifying the fact that he reported the potholes to the local Ohio State Highway Patrol and filed a crash report with OSHP. Plaintiff did not submit an entire copy of the OSHP crash report. Plaintiff seemingly questioned the validity of the purported inspection of State Route 78 on March 20, 2008. Plaintiff stated that “[i]f the highway was checked about the 20th (March 2008), these holes didn’t get that huge in 5 days.” Plaintiff explained he telephoned the DOT Logan garage and was told by DOT personnel that the potholes at milepost 1.00 on State Route 78 had been patched twice since his property damage event. Plaintiff did not offer any evidence to show the length of time the damage-causing potholes existed before March 25, 2008.

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 potholes 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 potholes. 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.

{¶ 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, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 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 she 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 evidence 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 highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Evidence from a photograph has shown the damage-causing potholes plaintiff’s vehicle struck were defects 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*, 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* (2006), 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 potholes were 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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Clerk Miles C. Durfey

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.

MILES C. DURFEY
Clerk

Entry cc:

Bruce Roberts
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James G. Beasley, Director
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RDK/laa
8/20
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