

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

DAVE BYERS

Plaintiff

v.

DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-05991-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 16, 2008, at approximately 8:45 p.m., plaintiff, Dave Byers, was traveling south on State Route 7 about two miles south of Columbiana, Ohio, when his 2002 Mitsubishi Eclipse struck potholes causing tire and rim damage to the vehicle.

{¶ 2} 2) Plaintiff asserted the damage to his 2002 Mitsubishi Eclipse was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway free of hazardous conditions. Plaintiff filed this complaint seeking to recover \$262.15, the total cost of replacement parts and repair expense. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing potholes prior to plaintiff’s February 16, 2008 property damage occurrence. Defendant denied receiving prior calls or complaints about potholes plaintiff’s car struck, which DOT located at approximately milemarker 24.66 on State Route 7 in Columbiana County. Defendant

asserted plaintiff did not produce any evidence to indicate the length of time the damage-causing potholes existed prior to February 16, 2008. Defendant suggested “it is likely the pothole existed for only a short time before the incident.” Defendant stated the DOT “Columbiana County Manager inspects all state roadways within the county at least two times a month.” Apparently, no potholes were discovered at milemarker 24.66 on State Route 7 the last time that section of roadway was inspected prior to February 16, 2008. Defendant’s maintenance records show pothole patching was performed in the vicinity of plaintiff’s incident on January 29, 2008.

{¶ 4} 4) Plaintiff filed a response insisting the potholes his car struck “had been there all winter long.” Plaintiff recorded, “I can call in so many witnesses that will testify that this area has had these terrible pot holes.” Plaintiff did not submit any witness statements. Plaintiff disputed defendant’s credibility in regard to assertions made concerning lack of DOT notice of particular potholes at milepost 24.66 on State Route 7. Plaintiff maintained the damage-causing potholes were quite large and had been present on the roadway for “in excess of two months” prior to February 16, 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. No evidence has been shown defendant had actual notice of the damage-causing potholes.

{¶ 7} 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 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. "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*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "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. 92AP-1183. No evidence of constructive notice was provided. "[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.

{¶ 8} Plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show his property damage was connected to any conduct under the control of defendant or any negligence on the part of defendant or DOT's 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:

Dave Byers
13603 Old Fredericktown Road
East Liverpool, Ohio 43920

James G. Beasley, Director
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1980 West Broad Street
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RDK/laa
9/10
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