

[Cite as *Zussman v. Ohio Dept. of Transp.*, 2008-Ohio-5917.]

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

DAVID H. ZUSSMAN

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-04226-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, David H. Zussman, related he sustained property damage to his 2008 Volkswagen GTI R32 when the vehicle struck a pothole while traveling on the “Interstate 75 South connector to Fort Washington Way.” Plaintiff recalled the property damage incident occurred at approximately 7:50 p.m. on March 22, 2008.

{¶ 2} 2) Plaintiff asserted the damage to his vehicle 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 \$406.00, the cost of automotive repair. 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 pothole prior to plaintiff’s March 22, 2008 property damage occurrence. Defendant denied receiving prior calls or complaints about the pothole plaintiff’s car struck, which DOT located at approximately milemarker 0.71 on Interstate 75 in Hamilton County. Defendant asserted plaintiff did not produce any evidence to indicate the length of time the damage-causing pothole existed prior to March 22, 2008. Defendant suggested “it is likely the pothole existed for only a short time before the incident.” Defendant stated the DOT “Hamilton County Manager inspects all state roadways within the county at least two times a month.” Apparently, no potholes were discovered at milemarker 0.71 on Interstate 75 the last time that section of roadway was inspected prior to March 22, 2008. Defendant’s maintenance records show pothole patching was performed in the vicinity of plaintiff’s incident on October 5, 2007 and January 11, 2008. Defendant asserted plaintiff did not provide any evidence to prove his negligent maintenance claim.

CONCLUSIONS OF LAW

{¶ 4} 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.

{¶ 5} 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 condition 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 pothole.

{¶ 6} 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 pothole. 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.

{¶ 7} Plaintiff, in the instant claim, has not produced sufficient 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. Plaintiff has failed to show the proximate cause of his damage was connected to any conduct under the control of defendant, or that defendant was negligent in maintaining the roadway area. *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

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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:

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RDK/laa
7/15
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