[Cite as *Keim v. Dept. of Transp.*, 2009-Ohio-6893.]

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

RODNEY J. KEIM

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-04611-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On February 7, 2009, at approximately 10:00 p.m., plaintiff, Rodney J. Keim, was traveling east on US Route 250 "in the [v]illage of Apple Creek" in Wayne County, when his 2008 Chevrolet Cobalt struck a large pothole causing tire and rim damage to the vehicle.

{¶ 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. Consequently, plaintiff filed this complaint seeking to recover $350.68, the cost of replacement parts and related repair expenses. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage occurrence. Defendant denied receiving any previous calls or complaints regarding the particular damage-causing pothole which DOT located between mileposts 18.18 and 19.65 on US Route 250 in Wayne County. Defendant asserted plaintiff failed to provide

evidence to establish the length of time the pothole existed prior to 10:00 p.m. on February 7, 2009. Defendant suggested "it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant contended plaintiff failed to produce any evidence to show his damage was proximately caused by negligent roadway maintenance on the part of DOT. Defendant related the DOT "Wayne County Manager conducts roadway inspections of all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no potholes were discovered between mileposts 18.18 and 19.65 on US Route 250 the last time that particular section of roadway was inspected before February 7, 2009. DOT records show potholes were patched in the vicinity of plaintiff's damage occurrence on November 24, 2008, December 1, 2008, December 30, 2008, and January 27, 2009. Additionally, DOT crews conducted snow removal operations in the vicinity of plaintiff's damage-occurrence on January 23, 2009. Defendant asserted plaintiff failed to prove his damage was attributable to any conduct on the part of DOT. Defendant stated "that if ODOT personnel had detected any defects they would have been promptly scheduled for repair."

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

that 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 that 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 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 that plaintiff may have suffered from the pothole.

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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:

Rodney J. Keim
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RDK/laa
8/10
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