[Cite as *Fox v. Ohio Dept. of Transp.*, 2009-Ohio-7076.]

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

EDWARD J. FOX

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03479-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Edward J. Fox, related he sustained suspension damage to his 2002 Oldsmobile Alero when the vehicle struck a pothole on State Route 96 in Richland County. Plaintiff described the damage incident noting: "[o]n Friday 13, 2009 (February 13, 2009) at about 7:00 p.m I was leaving Shelly Oh. going west on Rt. 96. Just before I got to the Rt 39 branch off, I hit a chuck hole with the right front wheel of my 2002 Oldsmobile Alero." Plaintiff pointed out the pothole his car struck "had been patched many times" and apparently the last patching effort made before February 13, 2009 had deteriorated.

{¶ 2} 2) Plaintiff implied the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT")in failing to maintain the roadway free of defective conditions. Plaintiff filed this complaint seeking to recover $921.53 in damages for the cost of automotive repair (repair bill dated March 2, 2009 submitted) resulting from the February 13, 2009 incident. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with his

damage claim.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's property damage occurrence. Defendant denied receiving any prior complaints regarding the pothole which DOT located near milepost 3.71 on State Route 96 in Richland County. Defendant noted that plaintiff did not produce any evidence to establish the length of time the pothole was present on the roadway before 7:00 p.m. on February 13, 2009. Defendant suggested that, "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) Furthermore, defendant argued that plaintiff failed to produce evidence to show the roadway was negligently maintained. Defendant explained that the DOT "Richland County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently no potholes were discovered at milepost 3.71 on State Route 96 the last time that specific section of roadway was inspected prior to February 13, 2009. Defendant observed that if any DOT employees had found "any defects during these inspections they would have been promptly scheduled for repair." DOT records show that potholes were patched in the vicinity of plaintiff's property damage incident on December 16, 2008 and December 30, 2008. Defendant argued "[p]laintiff has failed to introduce evidence which affords a reasonable basis for the conclusion that is more likely than not the conduct of the ODOT was the cause" of the property damage claimed.

{¶ 5} 5) Plaintiff filed a response asserting that he telephoned DOT employee Mark Mayer in Ashland and was informed by Mayer that DOT had received "a lot of complaints filed for that chuck hole." Plaintiff pointed out defendant did not submit any telephone complaint logs for the month of February 2009. Plaintiff also pointed out DOT crews were conducting sign maintenance on State Route 96 on February 13, 2009. The crews were working more than ten miles from the location of the damage-causing pothole. Plaintiff did not submit evidence to establish the length of time the pothole at milepost 3.71 on State Route 96 existed prior to 7:00 p.m. on February 13, 2009.

{¶ 6} 6) Defendant filed a reply to plaintiff's response.

CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} 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 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 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.

{¶ 10} 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 he 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.

{¶ 11} 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. Defendant acknowledged the damage-causing pothole plaintiff's vehicle struck was a defect 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*, Ct. of Cl. No. 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*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173.

{¶ 12} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him, or that his injury was proximately caused by defendant's negligence. Plaintiff has failed to show that the damage-causing pothole was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant. *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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Edward J. Fox
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RDK/laa
7/28
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