

## IN THE COURT OF CLAIMS OF OHIO

GARY TERBORG

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00482-AD

Clerk Mark H. Reed

### MEMORANDUM DECISION

{¶1} Plaintiff Gary Terborg filed this claim on May 19, 2014, to recover damages which occurred when his 2009 Honda Accord struck a pothole while traveling on State Route 557 on April 17, 2014 in Holmes County, Ohio. This road is a public road maintained by the Ohio Department of Transportation. Plaintiff's vehicle sustained damages in the amount of \$166.95. Plaintiff maintains a collision insurance deductible of \$100.

{¶2} In order to recover on a claim for roadway damages against the Ohio Department of Transportation, Ohio law requires that a motorist/plaintiff prove all of the following:

- i. That the plaintiff's motor vehicle received damages as a result of coming into contact with a dangerous condition on a road maintained by the defendant.
- ii. That the defendant knew or should have known about the dangerous road condition.
- iii. That the defendant, armed with this knowledge, failed to repair or remedy the dangerous condition in a reasonable time.

{¶3} In this claim, the court finds that the plaintiff did prove that his vehicle received

damages and that those damages occurred as a result of the plaintiff's vehicle coming into contact with a dangerous condition on a road maintained by the defendant.

{¶4} The next element that a plaintiff must prove to succeed on a claim such as this is to show that the defendant knew or should have known about this dangerous condition.

{¶5} Based on the evidence presented, the court is unable to find that the defendant had actual knowledge of the dangerous condition. However, the evidence presented persuades the court to find that the defendant should have known about this dangerous condition and thus would have had constructive notice about the highway danger. Constructive notice is defined as "(n)otice arising from the presumption of law from the existence of facts and circumstances that a party has a duty to take notice of...Notice presumed by law to have been acquired by a person and thus imputed to that person." (Black's Law Dictionary at 1090 8<sup>th</sup> Ed. 2004.)

{¶6} In order for there to be constructive notice, a plaintiff must prove that sufficient time has passed after the dangerous condition first appears, so that under the circumstances the defendant should have gained knowledge of its existence.

{¶7} In this case, the plaintiff submitted a Google earth photograph taken August, 2013 that clearly shows the pothole that plaintiff's vehicle struck. This photograph is persuasive to the court that the defendant should have had knowledge that this dangerous highway condition existed on May 14, 2014, the date of the accident in question.

{¶8} Therefore, the court finds that the agency was negligent in failing to repair this pothole and therefore the court will find in favor of the plaintiff.

{¶9} Plaintiff's repair costs were \$166.95 and his insurance deductible is \$100.00. Ohio law requires recoveries against the state to be reduced by any available insurance. As plaintiff's recovery is therefore limited to his out of pocket

deductible losses of \$100.00 plus the \$25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. 1990).

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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 plaintiff in the amount of \$125.00, which includes the filing fee. Court costs are assessed against defendant.

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MARK H. REED  
Clerk

Entry cc:

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MHR/pjr  
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