

[Cite as *Gray v. Ohio Dept. of Transp.*, 2005-Ohio-6283.]

IN THE COURT OF CLAIMS OF OHIO

THOMAS J. GRAY, et al. :
Plaintiffs :
v. : CASE NO. 2005-08581-AD
DEPARTMENT OF TRANSPORTATION : MEMORANDUM DECISION
Defendant :

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FINDINGS OF FACT

{¶ 1} 1) On May 14, 2005, at approximately 11:00 p.m., plaintiffs, Thomas J. and Grettel L. Gray, were traveling east on Interstate 70 approaching the Zanesville exit at about milepost 152 when their automobile struck "a huge, deep, pothole" causing rim and tire damage to the vehicle.

{¶ 2} 2) Plaintiffs filed this complaint seeking to recover \$362.71, the cost of automotive repair, which plaintiffs contend they incurred as a result of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. The \$25.00 filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the fact it had no knowledge of the pothole prior to plaintiffs' property damage occurrence.

{¶ 4} 4) Plaintiffs have not submitted any evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim.

{¶ 5} 5) Defendant has asserted records indicate no calls or complaints were received about the damage-causing pothole prior to

May 14, 2005. Defendant related DOT employees conduct regular inspections of the roadways and did not discover any potholes. at milemarker 152 on Interstate 70 in Muskingum County. Plaintiffs explained pothole repairs were made at that approximate location on April 1, 2005. Another repair was conducted at the location on May 16, 2005, two days after plaintiffs' incident. Defendant suggested "the pothole existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant contended, plaintiffs did not produce sufficient evidence to prove DOT breached any duty of care owed to the traveling public in respect to roadway maintenance.

{¶ 6} 6) Despite filing a response, plaintiffs did not produce evidence to establish requisite prior notice of the damage-causing on the part of DOT personnel.

CONCLUSIONS OF LAW

{¶ 7} 1) 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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 8} 2) In order to prove a breach of duty to maintain highways, plaintiffs 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. 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.

{¶ 9} 3) In order for there to be constructive notice, plaintiffs must show sufficient time has elapsed after the

dangerous condition appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD. Size of defect is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297. "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*, supra at 4. Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation. *Danko v. Ohio Dept. of Transp.* Court of Claims No. 90-05881, 1992-Ohio-264 affirmed (Feb. 4, 1993), Franklin App. No. 92AP-1183.

{¶ 10} 4) Plaintiffs have not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show 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. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the pothole. Plaintiffs have 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. Therefore, defendant is not liable for any damage plaintiffs may have suffered from the pothole.

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Plaintiffs	:	
v.	:	CASE NO. 2005-08581-AD
DEPARTMENT OF TRANSPORTATION	:	<u>ENTRY OF ADMINISTRATIVE</u>
Defendant	:	<u>DETERMINATION</u>

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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 plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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For Defendant

RDK/laa
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