

[Cite as *Peltz v. Ohio Dept. of Transp.*, 2005-Ohio-2477.]

IN THE COURT OF CLAIMS OF OHIO

EDWARD F. PELTZ	:	
Plaintiff	:	
v.	:	CASE NO. 2005-01854-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 3	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
.....	:	

FINDINGS OF FACT

{¶ 1} 1) On January 4, 2005, at approximately 7:30 a.m., plaintiff, Edward F. Peltz, was traveling east on Interstate 76, “just east of the Rt. 251 (Wadsworth) on Ramp,” when his automobile struck a large pothole causing rim damage to the vehicle. Plaintiff noted that immediately after he struck the pothole he saw many disabled vehicles parked along the roadway berm. These parked vehicles had apparently sustained tire damage from striking the same pothole plaintiff’s car hit.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$181.00, the cost of automotive repair which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. Plaintiff paid the \$25.00 filing fee and also seeks recovery of that amount as damages.

{¶ 3} 3) Defendant denied any liability in this matter based on the allegation DOT did not have any notice of the pothole prior to plaintiff’s property damage occurrence. Defendant located the damage-causing pothole at about milepost 11.71 on Interstate 76 in Medina County. Defendant asserted no DOT personnel received any calls or complaints about a pothole on Interstate 76 prior to 7:30 a.m. on January 4, 2005. Defendant suggested the pothole appeared on the roadway, “a relatively short amount of time before plaintiff’s incident.”

{¶ 4} 4) Plaintiff submitted a copy of an incident report from the Norton Police

Department regarding the pothole plaintiff's car hit.¹ This incident report involved another motorist who struck the pothole a short time prior to plaintiff's property damage event. This incident report noted the Norton Police Department was contacted about the pothole at approximately 7:12 a.m. on January 4, 2005. The investigating officer, identified as Steven Davis, reported he notified DOT of the pothole at about 7:19 a.m. on January 4, 2005. By that time three or four vehicles had already been disabled from striking the pothole.

{¶ 5} 5) Defendant explained DOT employees periodically inspect the roadway for defects on a routine basis at least one or two times a month. Seemingly, the last time DOT personnel inspected Interstate 76 prior to January 4, 2005, no defects were discovered. Defendant contended the particular portion of Interstate 76 was in good condition. DOT maintenance records show five pothole patching operations were needed in the general vicinity of plaintiff's incident during the five-month period preceding the January 4, 2005 property damage event.

CONCLUSIONS OF LAW

{¶ 6} 1) Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 7} 2) 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} 3) In order to prove a breach of 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 incident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247. Defendant is only liable for roadway conditions of which it has notice, but fails to

¹ Plaintiff filed a response on March 24, 2005.

reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. Evidence in the instant claim has established DOT received actual notice of the damage-causing pothole at 7:19 a.m. on January 4, 2005, about eleven minutes prior to plaintiff's damage occurrence. The time frame involved here is insufficient to find liability based on an actual notice rationale. Defendant did not have actual notice of the pothole for an adequate period of time to invoke liability.

{¶ 9} 4) Additionally, plaintiff has failed to produce evidence proving defendant had constructive notice of the particular pothole. In order for there to be constructive notice, plaintiff 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 the 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.* (Feb. 4, 1993), Franklin App. NO. 92AP-1183. 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. Highway Department* (1988), 61 Ohio Misc. 2d 262. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

EDWARD F. PELTZ :

Plaintiff :

v. :

CASE NO. 2005-01854-AD

OHIO DEPARTMENT OF :
TRANSPORTATION, DISTRICT 3 :

ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant :

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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. 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
3/30
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