[Cite as *Leverette v. Ohio Dept. of Transp.*, 2007-Ohio-5283.]

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

BRIAN LEVERETTE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-03617-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On February 24, 2007, at approximately 6:00 p.m., plaintiff, Brian Leverette, was traveling on the entrance ramp of Interstate 77 South, "towards Akron at the Broadway Ave. (and) Canalway Ohio Scenic Byway Junction," when his automobile struck a large pothole causing substantial damage to the vehicle. Plaintiff noted the property damage incident occurred when he saw a pothole on the left side of the roadway and, attempting to avoid that pothole, swerved to the right where his car struck another pothole on the right side of the roadway.

{¶2} 2) Plaintiff filed this complaint seeking to recover $942.87, the cost of replacement parts and automotive repair resulting from the February 24, 2007, incident. Plaintiff implies his property damage was proximately caused by negligence on the part of defendant Department of Transportation (DOT) in maintaining the roadway. The filing fee was paid.

{¶3} 3) Plaintiff submitted photographs of the damage-causing pothole. The photographs depict a massive pavement defect in the traveled portion of the roadway.

{¶4} 4) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole on the roadway entrance ramp prior to plaintiff's property damage event. Defendant located the pothole at state milepost 162.30 on Interstate 77 in Cuyahoga County. 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."

{¶5} 5) Defendant asserted that plaintiff failed to produce sufficient evidence to prove DOT negligently maintained the roadway. Defendant explained that DOT's County Manager conducts roadway inspections on state roadways within the county on a routine basis, "at least one to two times a month." Apparently the particular pothole was not discovered during the last inspection prior to plaintiff's February 24, 2007, property damage event. Defendant related that if any DOT personnel had detected any defects on the roadway, these defects would have been repaired. Potholes were patched in the area of plaintiff's damage occurrence on February 21 and February 22, 2007.

{¶6} 6) Despite filing a response, plaintiff did not produce any evidence to establish how long that the pothole existed prior to his February 24, 2007, property damage incident. Plaintiff also requested that his claim be heard by a judge. If plaintiff disagrees

with this memorandum decision, he may file a motion for court review; a judge of the Court of Claims will then review the decision.

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, 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} To prove a breach of duty by defendant 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, 507 N.E. 2d 1179. No evidence has been shown that defendant had notice of the damage-causing, deteriorated pavement condition.

{¶9} Plaintiff has not produced any evidence to indicate the length of time that the pavement condition was present on the roadway prior to the subject incident. 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.

{¶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, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707,

710. 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, 61 N.E. 2d 198, approved and followed.

{¶11} Ordinarily in a claim involving roadway defects, plaintiff must prove either: 1) that 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.

{¶12} This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 471 N.E. 2d 477. Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's damage was proximately caused by defendant's negligence. Plaintiff has failed to show that the proximate cause of his property damage was connected to any conduct under the control of defendant, or that defendant was negligent in maintaining the roadway area or that there was any negligence on the part of defendant connected to his damage. *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.

_____
MILES C. DURFEY
Clerk

Entry cc:

Brian Leverette
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Bedford, Ohio 44146

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RDK/laa
7/20
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