[Cite as *Pierson v. Ohio Dept. of Transp., Dist. #8* , 2009-Ohio-2763.]

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

CHARLES PIERSON

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT #8

Defendant

Case No. 2008-10048-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On May 23, 2008, at approximately 11:45 p.m., plaintiff, Charles Pierson, was traveling on State Route 128 in Hamilton County, when his automobile struck a large pothole causing tire and rim damage to the vehicle. Plaintiff asserted the damage-causing pothole "measured 8 ½ feet long 46" wide and 10" deep."

{¶ 2} 2) Plaintiff contended his property damage was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazardous conditions such as potholes. Plaintiff filed this complaint seeking to recover $498.14, the total cost of replacement parts. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the assertion that no DOT personnel had any knowledge of the damage-causing pothole prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints about the particular pothole which DOT located at "milepost 5.67 on SR 128 in Hamilton County." Defendant argued no evidence has been offered to establish the length of time the

pothole existed at milepost 5.67 on State Route 128 prior to 11:45 p.m. on May 23, 2008. Defendant suggested, "it is likely the pothole existed for only a short time before the incident."

{¶ 4} 4) Furthermore, defendant contended that plaintiff failed to produce evidence to prove DOT negligently maintained the roadway. Defendant explained the DOT "Hamilton County Manager inspects all state roadways within the county at least two times a month." Apparently, no potholes were discovered at milepost 5.67 on State Route 128 the last time that section of roadway was inspected prior to May 23, 2008. Defendant submitted maintenance records that show no pothole repair operations were conducted in the vicinity of plaintiff's damage incident in the six-month period preceding May 23, 2008. Evidence in another claim file in this court establishes that a pothole existed at milepost 5.67 on State Route 128 at least since 8:20 p.m. on May 17, 2008. See *O'Brien v. Department of Transportation* (2009), 2008-09040-AD. The pothole plaintiff's car struck was present on the roadway for over six days prior to the incident forming the basis of the present claim.

CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} In order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove that either: 1) defendant had actual or constructive notice of the pothole 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.

{¶ 7} 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.

{¶ 8} To prove a breach of duty by defendant to maintain the highways plaintiff must establish, by a preponderance of the evidence, that DOT 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. No evidence has shown that defendant had actual notice of the damage-causing pothole.

{¶ 9} Therefore, in order to prevail plaintiff must prove defendant had constructive notice of the pothole at milepost 5.67 on State Route 128. The trier of fact is precluded from making an inference regarding defendant's constructive notice, unless evidence is presented in respect to the time the defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 10} Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *In re Fahle's Estate* (1950), 90 Ohio App. 195, 197, 47 O.O. 231, 105 N.E. 2d 429. To find 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. Dept. of Transportation* (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 287, 587 N.E. 2d 891. "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*, 31 Ohio Misc. 2d at 431, 6 OBR 507 N.E. 2d 1179. "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. In the instant action, available evidence has shown the particular damage-causing pothole was present on the roadway for over six days prior to plaintiff's damage occurrence. The court concludes the time frame cited constitutes sufficient evidence of defendant's constructive notice of the pothole and resulting liability. Evidence has shown the pothole existed for a sufficient length of time for defendant to have become aware of the defect and take measures to initiate repairs. Since constructive notice has been shown, defendant is liable to plaintiff for damages in the amount of $498.14, plus the $25.00 filing fee, which may be reimbursed as compensable costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of $523.14, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Charles Pierson
600 Meadow Brook Court
Trenton, Ohio 45067

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
2/6
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