[Cite as *Hogue v. Ohio Dept. of Transp.*, 2009-Ohio-3775.]

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

RAY HOGUE

Plaintiff

v.

STATE-OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-10293-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Ray Hogue, asserted he suffered property damage to his 1997 Honda Accord while traveling on State Route 313 in Muskingum County on August 21, 2008 at approximately 10:30 a.m. Plaintiff recalled the specific incident noting as he entered State Route 313 he saw a "Men Working" sign and then traveled about two miles "just past the Rex Mills sign" when his automobile struck a large pothole in the roadway. The impact of striking the pothole caused tire and wheel damage to plaintiff's vehicle, but he continued traveling on State Route 313 for approximately one mile when he discovered a road work crew patching potholes. Plaintiff related he stopped his car and summoned one of the road workers over and "asked him why there was no signs or warnings of the potholes" on State Route 313, particularly the pothole his car had just hit. Plaintiff further related he then continued on his way to his brother's residence and subsequently discovered "that my vehicle had a 'vibration' while driving it." Plaintiff stated he took his car to a local tire shop on August 22, 2008 where he was informed he "needed 4 new wheels."

{¶ 2} 2) Plaintiff contended the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain State Route 313 free of defective conditions, such as potholes. Plaintiff filed this complaint seeking to recover $1,081.50, the total cost of automotive repair and replacement parts needed that resulted from the August 21, 2008 property damage incident. In his complaint, plaintiff acknowledged he carriers insurance coverage for automotive damage with a $200.00 deductible amount. Plaintiff acknowledged he received payment in the amount of $916.60 from his insurance carrier. Based on the provisions of R.C. 2743.02(D)[1], plaintiff's damage claim is limited to $164.90. The $25.00 filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage occurrence. Defendant denied receiving any calls or complaints about the particular pothole which DOT located at milemarker 5.54 on State Route 313 in Muskingum 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." Defendant contended that plaintiff did not produce any evidence to establish the length of time the pothole existed prior to the August 21, 2008 property damage occurrence.

{¶ 4} 4) Defendant denied that the roadway was negligently maintained. Defendant explained that DOT Muskingum County Manager, "conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no potholes were discovered at milemarker 5.54 on State Route 313 the last time that section of roadway was inspected prior to August 21, 2008. Defendant's records show that pothole patching operations were conducted by DOT crews in the vicinity of plaintiff's incident on March 11, 2008, April 21, 2008, and August 5, 2008. Defendant denied any DOT employees were conducting pothole patching operations on State Route 313 on August 21, 2008. Submitted records indicate no DOT employees were conducting any roadway maintenance activity on

[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section

State Route 313 on August 21, 2008.

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 prove a breach of the 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 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.

{¶ 7} Plaintiff has not produced sufficient evidence to indicate the length of time that the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown that 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 that 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 that defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer that 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. Size of the defect (pothole) 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. Therefore, defendant is not liable for any damage that plaintiff may have suffered from the pothole.

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apply under those circumstances."

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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.

____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Ray Hogue
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RDK/laa
3/25
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