

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

CARL VASILIOU

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03142-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Carl Vasiliu, asserted that he sustained rim damage to his 2006 Mercedes SL55/SL65 from striking a pothole while traveling on Interstate 71 in Hamilton County on February 13, 2009, at approximately 12:00 noon. Plaintiff stated that, "I was driving on I-71 between the 1.3 & 1.4 mile markers in the far left lane," when his vehicle struck a large pothole in the roadway. Plaintiff explained that he did not see the pothole quickly enough to avoid striking it due to lighting conditions in the Lytle Tunnel on Interstate 71 where the pothole was located.

{¶ 2} 2) Plaintiff contended that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of hazardous defects such as the damage causing pothole. Plaintiff filed this complaint seeking to recover \$614.86, the total cost of automotive repair he incurred. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole on Interstate 71 prior to plaintiff's February

13, 2009 property damage occurrence. Defendant denied receiving any calls or complaints about the particular pothole at Lytle Tunnel. Defendant asserted that plaintiff failed to produce any evidence to establish the length of time that the pothole existed on the roadway prior to February 13, 2009.

{¶ 4} 4) Furthermore, defendant argued that plaintiff has not offered any evidence to prove the roadway was negligently maintained. Defendant stated that “[p]laintiff has failed to introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the ODOT was the cause” of plaintiff’s property damage. Defendant observed that the DOT “Hamilton 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 between milemarkers 1.3 and 1.4 in the Lytle Tunnel on Interstate 71 the last time that section of roadway was inspected prior to February 13, 2009. Defendant explained that DOT records indicate no potholes were patched in the vicinity of plaintiff’s incident during the six-month period preceding February 13, 2009. Defendant related “that if ODOT personnel had detected any potholes they would have been reported and promptly scheduled for repair.”

{¶ 5} 5) Plaintiff filed a response pointing out that the pothole his vehicle struck had not been patched as of May 20, 2008. Plaintiff also pointed out that he noticed additional potholes had formed on the roadway in the Lytle Tunnel. Plaintiff stated that “[i]f the ODOT inspector cannot find the pothole in question my only recommendation and the only way I could obtain photographic proof of the pothole would be for ODOT to shut down the tunnel at a reasonable time to allow me access to the roadway inside the tunnel.” Plaintiff did not produce any evidence to establish the length of time that the damage-causing pothole existed prior to February 13, 2009.

CONCLUSIONS OF LAW

{¶ 6} Defendant has the duty to maintain its highways in a reasonable 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff has failed to show that the damage-causing pothole was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant. *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.

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

CARL VASILIOU

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-03142-AD

Clerk Miles C. Durfey

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:

Carl Vasiliou
3712 Homelawn Avenue
Cincinnati, Ohio 45211

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

RDK/laa
6/9
Filed 7/23/09
Sent to S.C. reporter 12/4/09