

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

GEORGE R. WINSOR

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DISTRICT 8

Defendant

Case No. 2009-03720-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} “1) On February 17, 2009, at approximately 6:15 a.m., plaintiff, George R. Winsor, was traveling north on U.S. Route 68 in Greene County, when his 2002 Ford Taurus “hit a pothole where the road had collapsed” causing tire and wheel damage to the vehicle. Plaintiff specifically located his property damage incident “on a stretch of highway north of Spring Valley and south of Waynesville-Jamestown Roads, between Wilmington (and) Xenia, about 8 miles south of Xenia.”

{¶ 2} “2) Plaintiff asserted 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 defective conditions. Plaintiff pointed out he telephoned the DOT Greene County Garage regarding the “collapsing road” on U.S. Route 68 and repairs were made “the next day.” Plaintiff filed this complaint seeking to recover \$541.29, the cost of replacement parts and related repair expenses he incurred resulting from the February 17, 2008 damage event. The filing fee was paid.

{¶ 3} “3) Defendant denied liability based on the contention that no DOT

personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's February 17, 2008 property damage occurrence. Defendant denied receiving prior calls or complaints about the pothole plaintiff's car struck, which DOT located between milemarkers 1.57 and 4.23 on US Route 68 in Greene County. Defendant asserted plaintiff did not produce any evidence to indicate the length of time the damage-causing pothole existed prior to February 17, 2009. Defendant suggested "it is likely the pothole existed for only a short time before the incident." Defendant stated the DOT "Greene County Manager inspects all state roadways within the county at least two times a month." Apparently no potholes were discovered between milemarkers 1.57 and 4.23 on US Route 68 the last time that section of roadway was inspected prior to February 17, 2009. Defendant's records show DOT crews patched potholes in the vicinity of plaintiff's incident on December 30, 2008 and January 21, 2009.

{¶ 4} "4) Despite filing a response, plaintiff did not produce any evidence to indicate the length of time the pothole existed prior to 6:15 a.m. on February 17, 2009. Plaintiff stated "[c]onstructive notice is implied" due to the fact the "road bed deterioration (on US Route 68) is egregious that (defendant) should have noted it." Plaintiff asserted potholes are present at multiple locations on US Route 68 in Greene County and defendant has been lax in responding to the situation.

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 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 the pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 8} “[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429. “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 standards for the discovery of certain road hazards.” *Bussard*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 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. 91AP-1183. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, that 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 ; *Gelarden v. Ohio Dept. of Transp., Dist. 4, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047*. 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. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

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

{¶ 11} Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him, or that his 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; *Herman v. Ohio Dept. of Transp.* (2006), 2006-05730-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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

George R. Winsor
305 Dana Avenue
Wilmington, Ohio 45177

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
6/18
Filed 7/20/09
Sent to S.C. reporter 11/25/09