[Cite as *Boyers v. Ohio Dept. of Transp.*, 2009-Ohio-7112.]

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

DAVID R. BOYERS

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05684-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} "1) On May 12, 2009, at approximately 12:48 a.m., plaintiff, David R. Boyers, was traveling east on State Route 39 in Columbiana County "approximately 1/4 mile from the Pennsylvania state line" when his 2005 Cadillac Deville struck a pothole causing substantial damage to the vehicle. Plaintiff described the defect as "a very large pothole" and noted "[t]here was no illumination or warning of the pothole's existance [sic], and it is inconceivable that a crevice of this magnitude, located in the immediate path of on-going traffic, was not filled before this incident occurred." Plaintiff expressed the opinion that "judging by the size of the pothole, it had to have been a problem for over a month" prior to May 12, 2009. Plaintiff recalled he again traveled on State Route 39 in Columbiana County on May 31, 2009 and noticed the particular damage-causing pothole had still not been patched.

{¶ 2} "2) Plaintiff asserted the damage to his car was caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway free of hazards. Plaintiff filed this complaint seeking to recover damages in the

amount of $530.24 for automotive repair. The filing fee was paid.

{¶ 3} "3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of a pothole on the roadway prior to plaintiff's May 12, 2009 property damage occurrence. Defendant related that DOT records indicate that no previous calls or complaints were received from any entity regarding the particular pothole which DOT located at milepost 22.95 on State Route 39 in Columbiana County. Defendant contended plaintiff failed to produce any evidence to show how long the pothole existed on the roadway prior to 12:48 a.m. on May 12, 2009. Defendant suggested "it is likely the pothole existed for only a short time before the incident."

{¶ 4} "4) Defendant asserted plaintiff failed to prove State Route 39 was negligently maintained. Defendant observed the DOT "Columbiana County Manager inspects all state roadways within the county at least two times a month." Apparently no pothole was discovered at milepost 22.95 on State Route 39 the last time that section of roadway was inspected prior to May 12, 2009. The file is devoid of any copies of roadway inspection records. Defendant did submit a DOT "Maintenance History" record reflecting pothole repairs made by DOT crews on State Route 39 between November 12, 2008 and May 12, 2009. No repairs were made in the vicinity of milepost 22.95 during the recorded time frame.

{¶ 5} "5) Plaintiff filed a response insisting defendant failed to offer any evidence that State Route 39 at milepost 22.95 was properly maintained. Plaintiff again asserted he observed on May 31, 2009 the pothole his vehicle struck had not been patched; nineteen days after the incident forming the basis of this claim. Plaintiff related defendant did not supply any evidence to establish the pothole at milepost 22.95 on State Route 39 had ever been repaired by DOT personnel. Plaintiff did not provide evidence to establish the length of time the particular damage-causing pothole existed on State Route 39 prior to 12:48 a.m. on May 12, 2009.

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 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. There is no evidence defendant had actual notice of the pothole on State Route 39 prior to 12:48 a.m. on May 12, 2009.

{¶ 8} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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 defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 9} In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after the dangerous conditions 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 4, 31 OBR 64, 567 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. 92AP-1183. No evidence has shown DOT had constructive notice of the pothole.

{¶ 10} Generally, 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 potholes 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. The fact defendant had not repaired the specific damage-causing pothole nineteen days after plaintiff's incident does not constitute conclusive evidence of negligent maintenance. Additionally, the fact defendant's "Maintenance History" reflects no pothole repairs were made in the vicinity of milepost 22.95 on State Route 39 between November 12, 2008 to May 12, 2009 does not prove negligent maintenance of the roadway area on the part of DOT. Plaintiff has not produced sufficient evidence to infer 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. Plaintiff has failed to introduce sufficient evidence to prove defendant maintained a known hazardous roadway condition. Plaintiff has failed to prove that his property damage was connected to any conduct under the control of defendant, defendant was negligent in maintaining the roadway area, 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.

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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:

David R. Boyers
628 Farm Lane
Rochester, Pennsylvania 15074

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

RDK/laa
8/12
Filed 9/29/09
Sent to S.C. reporter 1/22/10