

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

THOMAS FINCH

Case No. 2007-01631-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 8
OFFICE

Defendant

FINDINGS OF FACT

{¶1} 1) On January 3, 2007, at approximately 4:40 p.m., plaintiff, Thomas Finch, was traveling, “on the I-74 exit ramp from Northbound I-75 in Hamilton County,” when his automobile, a 2005 Ford Five Hundred, struck “an extremely large pothole,” located on the roadway exit ramp. The impact of striking the pothole damaged the tire, wheel, and windshield of plaintiff’s vehicle. Plaintiff related, “[a] witness has recounted to me that this pothole was in the roadway as early as the morning of January 2, 2007.” Plaintiff did not submit any statements from the witness.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$1,000.00, his cost of replacement parts and automotive repair necessitated by the property damage event. Plaintiff implied the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. 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 on the roadway prior to plaintiff’s property damage occurrence. Defendant located the damage-causing pothole between milepost 4.23 to 4.40 on Interstate 75 in Hamilton County. Alternatively, defendant located the pothole on the westbound ramp of Interstate 74 from Interstate 75 between mileposts

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19.02 to 19.47.

{¶14} Defendant asserted plaintiff failed to produce any evidence showing how long the pothole existed prior to the incident forming the basis of this claim.

{¶15} 4) Defendant denied receiving any calls or complaints regarding the particular pothole before plaintiff's incident. Defendant explained DOT employees conduct roadway inspections, "at least two times a month." Apparently, no potholes were discovered during previous roadway inspections. Defendant suggested the pothole likely, "existed for only a short time before the incident," forming the basis of this claim. Defendant denied DOT employees were negligent in regard to roadway maintenance.

{¶16} 5) Despite filing a response, plaintiff did not submit sufficient evidence to establish the length of time the pothole existed prior to 4:40 p.m. on January 3, 2007

CONCLUSIONS OF LAW

{¶17} 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. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶18} 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. 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.

{¶19} 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 defendant had actual notice of the pothole for a sufficient length of time to invoke liability. Additionally, the trier of fact is precluded from making an

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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. There is no indication defendant had constructive notice of the pothole. Plaintiff has not produced any 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. In order for there to be 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. "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*, supra, at 4. "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, 1993 Ohio App. LEXIS 636.

{¶10} Assuming plaintiff has shown the damage-causing pothole was present on the roadway on January 2, 2007, constructive notice of the condition would still not be established under current law, the issue presented is whether presence of a roadway defect for more than twenty-four hours constitutes a finding of constructive notice of the defective condition. "[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. Constructive notice of roadway potholes has been determined in multiple claims involving less than a twenty-four hour time frame. See *McGuire v. Ohio Department of Transportation* (2002), 2001-08722-AD; *Piscioneri v. Ohio Dept. of Transportation, District 12*; 2002-10836-AD, 2003-Ohio-2173, jud; *Kill v. Ohio Department of Transportation*, 2003-01512-AD, 2003-Ohio-2620, jud; *Grothouse v. Ohio*

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Department of Transportation, District 1, 2003-01521-AD, 2003-Ohio-2621, jud; Zeigler v. Department of Transportation, 2003-01652-AD, 2003-Ohio-2625; Sheaks v. Ohio Department of Transportation, 2003-02179-AD, 2003-Ohio-2176, jud.

{¶11} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, 2005-02117-AD, jud; 2005-Ohio-3976, in a Motion for Court Review, the court concluded in reversing a determination by the Clerk that thirteen hours constructive notice of a defect is insufficient notice to invoke liability on DOT. The court in reversing the finding of constructive notice quoted and adopted DOT's argument: "It is inappropriate that ODOT be held negligent for not patrolling every square mile or roadway every twelve hours. Such a ruling is against all case law created outside the limited arena of these administrative determination." (Defendant's motion for court review, page 7.) In its reversal order the court also recognized a constructive notice standard involving down signage. The court noted in finding, "that evidence of a stop sign being down for less than 24 hours was not enough time to impute constructive notice of its condition to ODOT." See *Cushman v. Ohio Dept. of Transp.* (1995), 91-11591; affirmed (March 14, 1996), Franklin App. No. 95AP107-844, 1996 Ohio App. LEXIS 990. The court, in the instant claim, finds insufficient evidence of any notice has been presented and consequently, plaintiff's claim is denied. Plaintiff has not shown defendant had notice of the defect and has not produced evidence to prove his property damage was proximately caused by negligent maintenance on the part of DOT.

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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Thomas Finch
25083 Apple Blossom Drive
West Harrison, Indiana 47060

James Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
4/4
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