

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

MICHAEL R.W. IMLER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-04912-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On May 5, 2009, at approximately 10:30 p.m., plaintiff, Michael R.W. Imler, was traveling on US Route 50 (Western Avenue) in Ross County, when he decided to turn his motorcycle into a Shell Station located adjacent to the roadway. As plaintiff turned his motorcycle from the traveled portion of US Route 50 onto the paved entrance to the Shell Station, the vehicle struck a pothole estimated to be three feet long, two feet wide, and four and one half inches deep. Plaintiff stated “[t]he hole turned my front wheel and my bike went down on its left side” causing substantial damage to the vehicle. Plaintiff implied his property damage was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of hazardous conditions such as the large pothole located at the entrance to the Shell Station on Western Avenue. Plaintiff filed this complaint seeking to recover \$2,500.00 in damages for motorcycle repair. The filing fee was paid.

{¶ 2} Defendant initially denied liability in this matter based on the contention that no DOT personnel had any knowledge of a pothole on Western Avenue at the entrance to a Shell Station. Defendant related DOT records indicate no prior calls or

complaints were received regarding the particular damage-causing pothole which DOT located at milepost 20.35 on US Route 50 or Western Avenue in Ross County. Defendant observed it has no way of knowing how long the pothole existed in that location prior to May 5, 2009 and plaintiff has not produced any evidence to establish the length of time the pothole was present prior to 10:30 p.m. on May 5, 2009. Defendant suggested “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.”

{¶ 3} Defendant submitted photographs of the Western Avenue Roadway at the entrance to the Shell Station. Defendant related the photographs depict a repaired deteriorated condition located at “the Shell Station’s entry apron.” Defendant further related, referencing the photographs, that “[t]his deterioration is also past the white (edge) line of US 50 which is not the traveled portion of the roadway.” Defendant asserted the area where the pothole was located was outside the maintenance responsibility of DOT. Defendant explained the deterioration has been patched with cold mix material, but did not identify the entity who repaired the deterioration. The trier of fact, after reviewing the photographs, finds the area where the damage-causing pothole was located was clearly outside the traveled portion of US Route 50 and off the roadway berm.

{¶ 4} Defendant contended plaintiff failed to produce any evidence to establish DOT negligently maintained US Route 50. Defendant further contended plaintiff did not offer evidence to prove that any conduct attributable to DOT caused his property damage. Defendant noted the DOT Ross County Manager inspects all state roadways within the county two times a month and “looks for potholes, low berms, and other safety hazards and records any deficiencies he finds in the Road Inspection Reports.” Defendant submitted copies of the Road Inspection Reports for March, April, and May 2009. There are no recorded entries on these reports for potholes at or near milepost 20.35 on US Route 50.

{¶ 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, plaintiff has not offered any evidence to prove defendant had constructive notice of the pothole. 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 defect appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. 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.

{¶ 8} 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. In fact, the evidence presented seems to establish that the maintenance responsibility for the area where plaintiff's damage event occurred did not fall on DOT. Consequently, plaintiff's claim is denied.

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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:

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RDK/laa
8/11
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