

# 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](http://www.cco.state.oh.us)

---

WILLIAM E. NEWBERRY

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION,  
DISTRICT 4

Defendant

Case No. 2007-01380-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

---

## FINDINGS OF FACT

{¶ 1} Plaintiff, William E. Newberry, related he was traveling east on State Route 18, “approximately 1/8 mile before Hometown Rd.,” in Summit County, when his automobile struck a large pothole in the roadway causing wheel damage to the vehicle. Plaintiff recalled the property damage incident occurred around 6:30 p.m. on December 26, 2006. According to plaintiff, the damage-causing pothole measured twelve to eighteen inches in diameter and was six to eight inches in depth. Plaintiff stated, “the hole in which I hit had been there for at least 1 month, but had not been that severe before; the road was coming apart in that spot for at least 2 months prior to said incident.”

{¶ 2} Plaintiff filed this complaint seeking to recover \$472.64, his total cost of automotive repair which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. The \$25.00 filing fee was paid.

{¶ 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 December 26, 2006, property damage occurrence. Defendant asserted plaintiff failed to produce any evidence showing how long the pothole existed prior to 6:30 p.m. on December 26, 2006.

[Cite as *Newberry v. Ohio Dept. of Transp., Dist. 4, 2007-Ohio-1999.*]

{¶ 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 a previous roadway inspection. Defendant suggested the pothole likely, "existed for only a short time before the incident." Defendant located the pothole plaintiff's vehicle struck, "close to milepost 0.87 on SR 18 in Summit County." Defendant explained DOT received one prior complaint made on November 17, 2006, about a pothole on State Route 18. This pothole was promptly repaired after the complaint was received.

{¶ 5} Plaintiff filed a response suggesting the damage-causing pothole his vehicle struck was the same pothole defendant repaired on November 17, 2006. Plaintiff implied the repair patch had failed due to cold wet weather conditions and high traffic volume. Plaintiff noted he traveled State Route 18 five days a week and had multiple opportunities to observe the roadway deteriorate. Plaintiff stated State Route 18 was well traveled by DOT personnel and suggested at least one DOT employee must have noticed the damage-causing pothole prior to December 26, 2006. Plaintiff argued the pothole his car struck must have been negligently repaired on November 17, 2006, since the patching material had deteriorated thirty-nine days later creating a new massive pothole. Furthermore, plaintiff disputed defendant's assertion that no DOT personnel were aware of the pothole on State Route 18 prior to December 26, 2006.

#### 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. 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.

[Cite as *Newberry v. Ohio Dept. of Transp., Dist. 4, 2007-Ohio-1999.*]

{¶ 7} 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, 81, 2003-Ohio-2573, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. 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. 1981, approved and followed.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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

[Cite as *Newberry v. Ohio Dept. of Transp., Dist. 4, 2007-Ohio-1999.*]

{¶ 11} length of time to invoke liability. 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. 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. 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. Although plaintiff has suggested his vehicle was damaged by a pothole that had been previously patched, this assertion alone, if established, does not provide proof of negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute in and of itself conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation, District 8* (2006), 2006-01343-AD, jud, 2006-Ohio-7173.

{¶ 12} 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 or its agents. *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](http://www.cco.state.oh.us)

---

WILLIAM E. NEWBERRY

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2007-01380-AD

Deputy Clerk Daniel R. Borchert

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:

William E. Newberry  
1010 Indian Trail  
Akron, Ohio 44314

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

RDK/laa  
3/21  
Filed 4/3/07  
Sent to S.C. reporter 4/25/07