

# 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)

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JOSHUA D. SCHIRMER

Plaintiff

v.

OHIO DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2007-02840-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

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### FINDINGS OF FACT

{¶1} 1) On February 20, 2007, at approximately 8:15 p.m., plaintiff, Joshua D. Schirmer, was traveling east on State Route 125 in Withamsville, Ohio, when his van struck a pothole causing tire and rim damage to the vehicle. Plaintiff related, “potholes where [sic] located near Banks Rd and the Fire station.”

{¶2} 2) Plaintiff filed this complaint seeking to recover \$214.58, for replacement parts and automotive repair resulting from the February 20, 2007, property damage event. Plaintiff implied the damage to his vehicle was caused by negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that amount in his complaint.

{¶3} 3) Defendant denied liability based on the contention no DOT personnel had any knowledge of the pothole on the roadway prior to plaintiff’s damage occurrence. Defendant located the damage-causing pothole, “approximately at milepost 2.13 on SR 125 in Clermont County.” Defendant asserted plaintiff failed to produce any evidence showing how long the pothole existed prior to the incident forming the basis of this claim. Defendant suggested, “it is likely the pothole existed for only a short time before the incident.”

{¶4} 4) Defendant denied receiving any calls or complaints regarding the

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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 denied DOT employees were negligent in regard to roadway maintenance. Defendant's records show potholes patching operations were conducted on State Route 125 on February 20, 2007, between mileposts 1.00 and 7.00. Presumably the pothole plaintiff's vehicle struck was not discovered by defendant's crews.

{¶15} 5) Plaintiff has not submitted evidence to establish the length of time the pothole existed prior to his property damage event.

#### CONCLUSIONS OF LAW

{¶16} 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.

{¶17} 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.

{¶18} 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. 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

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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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

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ENTRY OF ADMINISTRATIVE  
DETERMINATION

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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.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/laa  
6/25  
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