

[Cite as *Berg v. Ohio Dept. of Transp.*, 2008-Ohio-5615.]

# 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)

JULIE ANN BERG

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-03190-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

[Cite as *Berg v. Ohio Dept. of Transp.*, 2008-Ohio-5615.]

## FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Julie Ann Berg, stated, “I was driving on Rt 261, outside the city limits of Wadsworth, heading west right before the Speedway Gas station when I hit a pothole.” The impact of striking the pothole caused tire damage to plaintiff’s car, a 2006 Mercedes C230. Plaintiff recalled the property damage event occurred on March 4, 2008 at approximately 10:30 a.m.

{¶ 2} 2) Plaintiff implied the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway. Consequently, plaintiff filed this complaint seeking to recover \$166.61, the total cost of a replacement tire. Plaintiff submitted the filing fee.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff’s March 4, 2008 property damage occurrence. Defendant denied receiving any prior calls or complaints about the pothole plaintiff’s car struck, which DOT located at approximately milemarker 1.97 on State Route 261 in Medina County. Defendant suggested, “it is more likely than not that the pothole existed in that location for only a relatively short amount of time before the time of the incident.” Defendant asserted plaintiff did not produce any evidence to establish the length of time the pothole existed before 10:30 a.m. on March 4, 2008.

{¶ 4} 4) Furthermore, defendant explained the DOT “Medina County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month.” Apparently, no potholes were discovered at milemarker 1.97 on State Route 261 the last time that section of roadway was inspected prior to March 4, 2008. Defendant’s maintenance records show no pothole patching operations were conducted in the general vicinity of plaintiff’s incident during the six-month period preceding March 4, 2008. Defendant insisted if any DOT personnel had found any roadway defects “they would have been reported and promptly scheduled for repair.” Defendant denied DOT personnel acted negligently in regard to roadway maintenance.

## CONCLUSIONS OF LAW

{¶ 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 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 pothole 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.

{¶ 7} To prove a breach of duty by defendant to maintain the highways plaintiff must establish, by a preponderance of the evidence, that DOT 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. No evidence has shown that defendant had actual notice of the damage-causing pothole.

{¶ 8} The trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the defective condition (pothole) developed. *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. There is no evidence of constructive notice of the pothole.

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

{¶ 10} Plaintiff has not shown by a preponderance of the evidence, that defendant failed to discharge a duty owed to her or that her property damage was proximately caused by defendant's negligence. Plaintiff 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. *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.

[Cite as *Berg v. Ohio Dept. of Transp.*, 2008-Ohio-5615.]



[Cite as *Berg v. Ohio Dept. of Transp.*, 2008-Ohio-5615.]

# 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)

JULIE ANN BERG

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2008-03190-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE  
DETERMINATION



[Cite as *Berg v. Ohio Dept. of Transp.*, 2008-Ohio-5615.]

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:

Julie Ann Berg  
673 Sally Circle  
Wadsworth, Ohio 44281

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

RDK/laa  
7/7  
Filed 7/31/08  
Sent to S.C. reporter 10/28/08