[Cite as *Clancy v. Ohio Dept. of Transp.*, 2009-Ohio-3034.]

# 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

HARRY M. CLANCY, JR.

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-01069-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

**{¶ 1}** "1) On December 6, 2008, at approximately 6:05 p.m., plaintiff, Harry M. Clancy, Jr., was traveling east on Interstate 480 "between the 130th and 150th Exit and the Tiedeman Exit" in Cleveland, when his automobile hit a large pothole "approximately 300 ft. past the 130th/150th St. Exit." The impact with the pothole caused rim and tire damage to plaintiff's vehicle.

**{¶ 2}** "2) Plaintiff filed this complaint seeking to recover $232.63, the cost of replacement parts and automotive repair necessitated by the property damage event. Plaintiff implied that the damage to the 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 at milepost 12.57 on Interstate 480 in Cuyahoga County. Defendant asserted that plaintiff failed to

produce any evidence showing how long the pothole existed prior to the incident forming the basis of this claim. Defendant pointed out "that ODOT had two complaints on file on June 23, 2008 and August 25, 2008, for a pothole at the same location as plaintiff's." The potholes were patched either on the same day the complaint was received or on the following day. The last time a pothole was patched at milepost 12.57 was over three months prior to plaintiff's December 6, 2008 property damage event.

**{¶ 4}** "4) Defendant denied receiving any calls or complaints after August 25, 2008 and December 6, 2008 regarding the particular pothole plaintiff's car struck. Defendant explained that DOT employees conduct roadway inspections, "at least two times a month." Apparently, no potholes were discovered during previous roadway inspections. Defendant suggested that the pothole likely, "existed for only a short time before the incident," forming the basis of this claim. Defendant denied that DOT employees were negligent in regard to roadway maintenance.

**{¶ 5}** "5) Plaintiff filed a response contending thatdefendant negligently maintained the roadway considering the pothole his vehicle hit had been previously patched two times during the summer of 2008. Plaintiff asserted that defendant should have known a pothole patch was subject to rapid deterioration during the winter season when his incident occurred.

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, 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.

**{¶ 7}** 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.

**{¶ 8}** 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, 577 N.E. 2d 458. 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, 587 N.E. 2d 891.

**{¶ 9}** 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, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. 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. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

**{¶ 10}** 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 a manner, or 2) that defendant in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Defendant acknowledged the damage-causing pothole plaintiff's vehicle struck was a defect that had been previously patched and deteriorated. This fact alone does not provide proof of negligent maintenance. A

pothole patch that deteriorates in less than ten days is prima facie evidence of specific negligent maintenance. See *Matala v. Ohio Department of Transportation*, Ct. of Cl. No. 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*, Ct. of Cl. No. 2006-101343-AD, jud, 2006-Ohio-7173; *Lutz v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-06873-AD, 2008-Ohio-7029.

**{¶ 11}** 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. *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.

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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.

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MILES C. DURFEY

Entry cc:

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RDK/laa
2/19
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