[Cite as *Hummel v. Ohio Dept. of Transp.*, 2005-Ohio-3241.]

IN THE COURT OF CLAIMS OF OHIO

BARRY D. HUMMEL	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02176-AD
OHIO DEPT. OF TRANS., DISTRICT 3	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶ 1} 1) On January 10, 2005, plaintiff, Barry D. Hummel, was traveling on State Route 241 approximately .7 miles north of Mt. Eaton, Ohio, in Wayne County, when his automobile hit two large potholes causing tire and rim damage to the vehicle. Plaintiff submitted a photograph of the damage-causing potholes. This photograph depicts a roadway area exhibiting substantial pavement deterioration in multiple areas.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover $680.30, the cost of automotive repair and related expenses which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation, in maintaining the roadway. The $25.00 filing fee was paid.

{¶ 3} 3) Defendant has denied liability based on the fact it had no knowledge of the pothole prior to plaintiff's property damage occurrence. Defendant denied receiving any calls or complaints concerning potholes on State Route 241.

{¶ 4} 4) Plaintiff did not provide sufficient evidence to indicate the length of time the potholes existed prior to the

incident forming the basis of this claim.

{¶ 5} 5) Defendant has asserted maintenance records show no pothole patching operations were needed in the general vicinity of plaintiff's incident during the six-month period preceding the January 10, 2005, property damage event.

CONCLUSIONS OF LAW

{¶ 6} 1) Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 7} 2) 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.

{¶ 8} 3) To establish a breach of 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 incident. *McClellan v. ODOT* (1986), 345 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. 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 defective condition developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶ 9} 4) In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after the dangerous condition appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD. Size of the defect is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297. "A finding of constructive notice is a determination the court must make on the facts of each case not simply by applying a pre-set-time standard for the discovery of certain road hazards." *Bussard*, supra at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.* (Feb. 4, 1993), Franklin App. No. 92AP-1183.

{¶ 10} 5) Plaintiff has not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show 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. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

IN THE COURT OF CLAIMS OF OHIO

BARRY D. HUMMEL	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02176-AD
OHIO DEPT. OF TRANS., DISTRICT 3	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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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. 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:

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RDK/laa
5/4
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