## [Cite as Swatzel v. Ohio Dept. of Transp., 2005-Ohio-3526.]

## IN THE COURT OF CLAIMS OF OHIO

JAMES F. SWATZEL	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02729-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 10	:	MEMORANDUM DECISION
Defendant	:	

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## FINDINGS OF FACT

 $\{\P 1\}$  1) On or about February 10, 2004, plaintiff, James F. Swatzel, was traveling west on US Route 33 in Athens County, when his 1993 Dodge Stealth struck a pothole in the traveled portion of the roadway causing substantial damage to the vehicle.

 $\{\P 2\}$  2) Plaintiff filed this complaint seeking to recover \$2,452.32, the total cost of replacement parts and repair costs for his damaged automobile, plus \$25.00 for filing fee reimbursement. Plaintiff acknowledged receiving \$1,952.32 from his insurance carrier to pay for automotive repairs. Therefore, pursuant to R.C.  $2743.02(D)^{1}$ , plaintiff's damage claims shall be limited to \$500.00, his insurance coverage deductible, plus \$25.00 for filing fee. Plaintiff contends his car was damaged as a proximate cause of negligence on

<sup>&</sup>lt;sup>1</sup> R.C. 2743.02(D) states:

<sup>&</sup>quot;(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."

the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. Plaintiff submitted photographs depicting the damage-causing pothole on US Route 33.

{¶3}3) Defendant denied liability based on the fact it professed to have no knowledge of the damage-causing pothole prior to plaintiff's incident. Defendant suggested the pothole plaintiff's car struck probably existed, "for only a relatively short amount of time before plaintiff's incident." Defendant denied receiving any prior complaints about the pothole which DOT located at, "milepost 20.70 on US 33 in Athens County."

 $\{\P 4\}$  4) Defendant has asserted maintenance records show one pothole patching operation was needed in the general vicinity of plaintiff's incident during the six-month period prior to the February 10, 2004, property damage event.

 $\{\P 5\}$  5) Furthermore, defendant explained DOT employees conduct roadway inspections on a routine basis and had any of these employees detected a roadway defect that defect would have promptly been repaired. Defendant contended, plaintiff did not produce sufficient evidence to prove DOT breached any duty of care owed to the traveling public in respect to roadway maintenance.

 $\{\P 6\}$  6) Despite filing a response, plaintiff did not submit any evidence to establish the length of time the pothole existed prior to his damage occurrence. Plaintiff pointed out defendant had knowledge of a pothole problem on US Route 33 in Athens County since DOT records show potholes were patched in the particular vicinity of plaintiff's incident on January 23, 2003 and patching occurred in the general vicinity on February 2, 2004 and February 10, 2004. Plaintiff stated defendant, "knew or should have known about the potential hazard on US 33 in Athens County, Ohio based on [DOT's] own records." Additionally, plaintiff argued DOT had to have known about the pothole due to the fact DOT personnel conducted pothole patching on US Route 33 on January 23, 2004, February 2, 2004, and February 10, 2004. Records show patching was performed at various locations between milepost 5.00 and milepost 29.10 on these three occasions. Plaintiff's incident occurred at about milepost 20.7 on US Route 33. Plaintiff explained DOT repaired the pothole his car struck on February 10, 2004, the same day the incident forming the basis of this claim occurred. Plaintiff therefore reasoned, "[d]efendant had to have prior knowledge (of the pothole) in order to schedule a crew to this particular area." Plaintiff related he contacted DOT on February 10, 2004, advising defendant about the pothole his vehicle struck. CONCLUSIONS OF LAW

 $\{\P,7\}$  1) 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.

 $\{\P 8\}$  2) 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.

 $\{\P 9\}$  3) There is no evidence defendant had actual notice of the damage-causing pothole.

 $\{\P \ 10\}$  4) 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 (pothole) developed. Spires v. Highway Department (1988), 61 Ohio Misc. 2d

262. No evidence has shown defendant had constructive notice of the pothole.

 $\{\P 11\}$  5) 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.

{¶ 12} 6) 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 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. Consequently, plaintiff's claim is denied.

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JAMES F. SWATZ	EL	:		
Plaintiff		:		
v.		:	CASE NO.	2005-02729-AD
OHIO DEPARTMEN TRANSPORTATION		:	ENTRY OF	ADMINISTRATIVE
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:

James F. Swatzel 14453 Shade Road Shade, Ohio 45776 Plaintiff, Pro se

Gordon Proctor, Director Department of Transportation 1980 West Broad Street Columbus, Ohio 43223 For Defendant

RDK/laa 6/9 Filed 6/17/05 Sent to S.C. reporter 7/8/05