

# 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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WILLIAM R. FLAUTE

Plaintiff

v.

OHIO DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2007-01240-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

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## FINDINGS OF FACT

{¶ 1} On October 25, 2006, at approximately 8:15 a.m., plaintiff, William R. Flaute, was traveling west on US Route 35 through a construction zone in Montgomery County, when his automobile struck a pothole causing wheel damage to the vehicle.

{¶ 2} Plaintiff filed this complaint seeking to recover \$208.66, his total cost of replacement parts, automotive repair, and filing fees, which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway. The \$25.00 filing fee was paid.

{¶ 3} Defendant explained the area where plaintiff’s damage occurred was located within a construction zone under the control of DOT contractor, Kokosing Construction Company, Inc., (“Kokosing”). Additionally, defendant denied liability in the matter based on the allegation that neither DOT nor Kokosing had any knowledge of the pothole plaintiff’s vehicle struck. Defendant submitted evidence showing Kokosing repairs roadway defects as soon as notice of the defect is received. Kokosing received notice of the particular pothole around 9:00 a.m. on October 25, 2006, and immediately patched the defect.

{¶ 4} Plaintiff did not submit any evidence to establish the length of time the pothole was on the roadway prior to the October 25, 2006, property damage event.

{¶ 5} Defendant asserted Kokosing, by contractual agreement, was responsible for

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maintaining the roadway within the construction area. Therefore, DOT argued Kokosing is the proper party defendant in this action. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular section of roadway.

#### CONCLUSIONS OF LAW

{¶ 6} The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 7} Defendant has the duty to maintain its highway 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} 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.

{¶ 9} 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

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appeared on the roadway. *Spires v. Ohio 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.

{¶ 10} 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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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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

William R. Flaute  
85 Quinby Lane  
Riverside, Ohio 45432

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

RDK/laa  
3/22  
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