

# 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

THOMAS C. COOPER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05919-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

{¶ 1} Plaintiff, Thomas C. Cooper, filed this action contending defendant, Department of Transportation (DOT), failed to adequately maintain State Route 754 in Holmes County free of defects, which resulted in damage to his automobile wheels from traveling over deteriorated roadway areas during a ten-month period ending on May 1, 2009. Plaintiff related he traveled on State Route 754 at least four times a day during a ten-month period and the section of roadway he traveled was in disrepair consisting of dips, bumps, and deteriorated pavement areas where pothole patching material had failed. Plaintiff explained a seven-mile section of roadway did not receive any attention from defendant's personnel despite the fact it continued to deteriorate and had heavy traffic from many types of vehicles. Plaintiff submitted photographs depicting sections of State Route 754 showing multiple areas where patching repairs have been made. Plaintiff asserted defendant should have installed reduced speed signs on the roadway or post signage advising motorists of roadway condition. Plaintiff argued the damage to his automobile wheels was proximately caused by negligence on the part of DOT in essentially keeping an undriveable roadway open to vehicle traffic. Plaintiff requested

damages in the amount of \$1,692.20, the cost of replacement parts and related repair expenses. The filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 2} Plaintiff submitted a statement from Joan Williamson, who noted she has a residence adjacent to State Route 754 in Holmes County and travels on the roadway “four times a day.” Williamson advised “[t]here are many pot holes (Deep) on this road along with alot of dips due to culvert replacement.”

{¶ 3} Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of defective roadway conditions on State Route 754 “between mileposts 0.00 and 6.73 in Holmes County.” Defendant related, “[b]ecause ODOT did not receive notice of the subject condition prior to the time in question, (July 1, 2008 to May 1, 2009) defendant has no way of knowing or determining exactly how long the pothole(s) existed prior to Plaintiff Cooper’s incident.” Defendant suggested “it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff’s incident.” Defendant asserted plaintiff failed to offer any evidence to prove the damage claimed was attributable to conduct on the part of DOT.

{¶ 4} Furthermore, defendant argued plaintiff failed to prove his damage was proximately caused by negligent maintenance. Defendant explained the DOT “Holmes County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month.” No inspection records covering the dates from July 1, 2008 to May 1, 2009 were submitted. Defendant did submit records showing DOT personnel patched potholes in the vicinity of plaintiff’s incident on December 11, 2008, January 21, 2009, January 22, 2009, January 23, 2009, February 4, 2009, March 2, 2009, March 12, 2009, and April 9, 2009. Defendant observed “that if ODOT personnel had detected any defects they would have been promptly scheduled for repair.” Defendant submitted DOT records showing no pothole complaints were received for State Route 754 during the time frame from November 1, 2008 to May 1, 2009.

{¶ 5} 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. This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

{¶ 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} Generally, 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} In order to recover in any suit involving injury proximately caused by roadway conditions including potholes or other defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defects 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. Plaintiff has not produced sufficient evidence to indicate the length of time the particular defective conditions were present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown defendant had actual

notice of the defects. Therefore, any liability in this claim must be based on a finding of constructive notice. To prove 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. Dept. of Transportation* (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 287, 587 N.E. 2d 891. "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*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "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. 92AP-1183. Plaintiff has not produced sufficient evidence to prove DOT had constructive notice of the roadway condition. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice of knowledge. *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 48 O.O. 231, 105 N.E. 2d 429. 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 or other defect 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 any defective condition. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, 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. 2006-01343-AD, jud, 2006-Ohio-7173*. 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 conditions. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-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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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/laa  
9/17  
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