

# 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

PAUL H. WARNER

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05943-AD

Clerk Miles C. Durfey

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶ 1} 1) On February 13, 2009, at approximately 7:30 p.m., plaintiff, Paul H. Warner, was traveling north on Interstate 71 “in the middle lane at mile marker 3/6, opposite William Howard Taft exit on I-71 South,” when his 2001 Volkswagen Jetta struck a large pothole, “12” wide 10’ long (and) 1.5” deep,” causing substantial damage to the vehicle. Plaintiff supplied multiple photographs of the particular damage-causing pothole and roadway area surrounding the defect. The photographs depict a massive pothole that appears to have been previously patched and the patching material has almost completely deteriorated. The surrounding roadway area depicted is in general disrepair with multiple patched places in various stages of deterioration.

{¶ 2} 2) Plaintiff asserted that the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of hazardous defects such as the pothole on Interstate 71. Plaintiff filed this complaint seeking to recover \$1,162.98, the complete cost of automotive repair resulting from the February 13, 2009 incident. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular pothole on the roadway prior to plaintiff's property damage occurrence. Defendant related that phone logs show no complaints were on file regarding a pothole on Interstate 71 which DOT located "at milepost 3.67 in Hamilton County under the Lincoln Avenue Bridge." Defendant asserted that plaintiff failed to offer any evidence to prove his property damage was attributable to conduct on the part of DOT personnel. Defendant explained that the DOT "Hamilton County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." Apparently no potholes were discovered at milepost 3.67 on Interstate 71 the last time that section of roadway was inspected before February 13, 2009. Defendant's maintenance records show that "no pothole patching operations were performed at milepost 3.67" during the six-month period preceding February 13, 2009. Defendant stated that "if ODOT personnel had detected any potholes they would have been reported and promptly scheduled for repair."

{¶ 4} 4) Despite filing a response, plaintiff did not produce evidence to establish the length of time the pothole at milepost 3.67 existed prior to 7:30 p.m. on February 13, 2009. Plaintiff pointed out that the pothole his car struck was repaired on February 20, 2009.

#### CONCLUSIONS OF LAW

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} Plaintiff has not produced sufficient evidence to indicate the length of time that the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown that 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 that 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.

{¶ 8} 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.

{¶ 9} Ordinarily in a claim involving roadway defects, plaintiff must prove that 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 manner, or 2) that defendant in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. Defendant acknowledged that 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 negligent maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which has 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. 2006-0133-AD, jud, 2006-Ohio-7173.

{¶ 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 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; *Lutz v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2008-06873-AD, 2008-Ohio-7029.

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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  
Clerk

Entry cc:

Paul H. Warner  
1793 Kingsway Court  
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RDK/laa  
9/8  
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