

# 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

ROBIN WEIRAUCH

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 2

Defendant

Case No. 2009-03061-AD

Clerk Miles C. Durfey

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶ 1} 1) On February 17, 2008, at approximately 10:15 p.m., plaintiff, Robin Weirauch, was traveling on State Route 108 in Henry County, when her 2004 Ford Focus struck a pothole causing tire damage to the vehicle. Plaintiff located the pothole “at the entrance of the ramp to US 24 west from SR 108 in Napoleon, Ohio.”

{¶ 2} 2) Plaintiff asserted that the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation (DOT), in failing to maintain the roadway free of dangerous conditions, such as “an unreasonably deep pothole.” Plaintiff filed this complaint seeking to recover \$130.00, the estimated cost of a replacement tire. The filing fee was paid.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff’s February 17, 2009 property damage occurrence. Defendant denied receiving prior calls or complaints about the pothole plaintiff’s car struck, which DOT located at approximately milemarker 17.41 on State Route 108 in Henry County. Defendant

asserted that plaintiff did not produce any evidence to indicate the length of time the damage-causing pothole existed prior to February 17, 2009. Defendant suggested that “it is likely the pothole existed for only a short time before the incident.” Defendant stated that the DOT “Henry County Manager inspects all state roadways within the county at least two times a month.” Apparently, no potholes were discovered at milemarker 17.41 on State Route 108 the last time that section of roadway was inspected prior to February 17, 2009. Defendant submitted documentation showing that the particular pothole was reported on February 18, 2009 at 8:10 a.m. The pothole was filled that same day. DOT records indicate that potholes were patched in the vicinity of plaintiff’s incident on August 13, 2008, September 12, 2008, November 18, 2008, January 5, 2009, and February 12, 2009.

#### CONCLUSIONS OF LAW

{¶ 4} 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.

{¶ 5} In order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove that either: 1) defendant had actual or constructive notice of the pothole 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.

{¶ 6} To prove a breach of duty by defendant to maintain the highways, plaintiff must establish, by a preponderance of the evidence, that DOT 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. No evidence has shown that defendant had actual notice of the damage-causing pothole.

{¶ 7} 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 defective condition (pothole) developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no evidence of constructive notice of the pothole.

{¶ 8} Plaintiff has not produced any evidence to infer that 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 that plaintiff may have suffered from the pothole.

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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:

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Filed 8/7/09  
Sent to S.C. reporter 12/11/09