[Cite as *Danko v. Ohio Dept. of Transp.*, 1992-Ohio-264.]

IN THE COURT OF CLAIMS OF OHIO

JO ANN DANKO	:	
Plaintiff	:	**CASE NO. 90-05881**
v.	:	**DECISION**
DEPARTMENT OF TRANSPORTATION	:	**Fred J. Shoemaker**
Defendant	:	

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{¶ 1} This cause arises from an automobile accident that occurred between 8 p.m. and 9 p.m. on the evening of June 29, 1989, in Jefferson County, Ohio. Plaintiff was driving northbound on State Route 7, a four—lane highway, when she lost control of her automobile. Ultimately, the vehicle rode up onto the concrete median and turned over, trapping plaintiff inside.

{¶ 2} On June 13, 1990, plaintiff filed the within complaint, in which it was alleged that the accident was caused by a large pothole in the highway. Plaintiff alleged, and testified at trial, that after striking the pothole, she was no longer able to control the automobile. The road is maintained by defendant, Ohio Department of Transportation (ODOT), and plaintiff alleges that defendant knew of, yet failed to remedy, the defective condition in the highway, and therefore proximately caused the accident at issue. The matter proceeded to trial and is determined upon the evidence submitted and the applicable law.

{¶ 3} The plaintiff has the burden of proof to show by a preponderance of the evidence that defendant was negligent under

all of the circumstances. The essential elements of negligence are: a duty of care owed to plaintiff; a breach of that duty by a negligent act or omission; and injury proximately resulting from the breach. *Strother* v. *Hutchinson* (1981), 67 Ohio St. 2d 282; *DiGildo* v. *Caponi* (1969), 18 Ohio St. 2d 125; *Sloan* v. *Ohio Department of Highway Safety* (1989), 61 Ohio Misc. 2d 64.

{¶ 4} As pointed out by plaintiff, the state has a duty to maintain its highways in a reasonably safe condition. However, the state is not an insurer of the safety of highways, and has only a duty of ordinary care to maintain the highways under its jurisdiction in a reasonably safe condition for those travelers who exercise reasonable and ordinary care. *Knickel* v. *Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. Further, the state cannot be charged with neglect unless it is demonstrated that the state had knowledge, either constructive or actual, of the roadway defect complained of, and within sufficient time to remedy it. *Ruwe* v. *Bd. of Commissioners of Hamilton County* (1985), 21 Ohio St. 3d 80; *In re Fahl's Estate* (1950), 90 Ohio App. 195.

{¶ 5} A major issue at trial was whether defendant had such knowledge of the existence and condition of the pothole at issue that it ought to have repaired it prior to the time of plaintiff's accident. As shown in the photographs and supported by the testimony, the pothole was actually a series of four smaller potholes that had deteriorated into one long pothole. Also, the pothole ran in the direction of the flow of traffic rather than across the lane.

{¶ 6} Despite the eventual size the pothole attained, it was not necessarily apparent to defendant as a driving hazard. Evidence presented at trial indicates that ODOT regularly

inspected the highway at issue, and did so at least twice monthly. There was conflicting evidence as to whether this particular pothole had been discovered on the most recent inspection. The court finds that plaintiff has failed to prove by a preponderance of the evidence that defendant had either actual or constructive notice of this pothole. Even if ODOT had been made aware, the agency must be given a reasonable amount of time to mobilize its resources for the repair of highway defects and also to prioritize among competing repair needs of the state's highways.

{¶ 2} Similarly, the Ohio State Patrol routinely travels over all of the highways in the area and is responsible for reporting any defect in the highway that would amount to a hazardous condition or a likely obstruction of the highway. While admittedly this pothole had been observed by the highway patrol, its condition had not yet deteriorated to such an extent that a report was required.

{¶ 3} Furthermore, there was competent evidence to the effect that this pothole had been a rather stable indentation in the road that later reached a stage of rapid deterioration. The pothole had obviously been repaired once before, perhaps with a mere patch over the preceding winter. Also, plaintiff and others recalled driving over it with little incident save a firm resolve to avoid it on future trips. More to the point, the traffic in the area was quite voluminous at times. Also, there were numbers of heavy duty trucks that hauled coal from area mines over the road in question, and these would more than likely have driven in the right lane. Such vehicles could cause the rapid deterioration that probably occurred.

{¶ 4} In conclusion, plaintiff did not prove by a

preponderance of the competent and credible evidence that defendant knew of this pothole's condition within sufficient time to remedy it.

{¶ 5} Plaintiff asserts that the impact with the pothole caused her left front tire to rupture. Plaintiff points to the photos of the vehicle taken at the accident scene which depict her tire and wheel. It is plaintiff's contention that the severe indentation in the metal wheel was caused by the impact with some part of the pothole. However, the photo indicates that there are two severe indentations in the metal wheel. It is unlikely that both indentations were made by the pothole at issue. In fact, it is more likely that these indentations were caused by the same collision that virtually obliterated the left front quarter panel and ruptured the left front tire of plaintiff's vehicle.

{¶ 6} Based on the totality of the evidence, including expert witness testimony, the court finds the proximate cause of this accident was the fact that plaintiff oversteered her vehicle after contact with the pothole. While the oversteering was no doubt caused by her encounter with the pothole, a reasonable driver would not have lost complete control of her vehicle under similar circumstances.

{¶ 7} Accordingly, judgment will be rendered in favor of defendant and against plaintiff.

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FRED J. SHOEMAKER
Judge

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JO ANN DANKO :		
Plaintiff	**:**	**CASE NO. 90-05881**
v.	**:**	**JUDGMENT ENTRY**
DEPARTMENT OF TRANSPORTATION	**:**	**Fred J. Shoemaker**
Defendant	**:**	

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This action came on for trial on December 12, 1991. Upon consideration of all the evidence and for the reasons set forth in the decision rendered concurrently herewith, judgment is rendered for defendant and against plaintiff. 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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FRED J. SHOEMAKER
Judge

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