[Cite as *Sims v. Ohio Dept. of Transp.*, 2004-Ohio-4736.]

IN THE COURT OF CLAIMS OF OHIO

HEATHER L. SIMS	:	
Plaintiff	:	
v.	:	CASE NO. 2004-05091-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶1} 1)On March 21, 2004, at approximately 3:00 p.m., plaintiff, Heather L. Sims, was traveling east on the Columbia Parkway near the Interstate 471 exit at the base of Mt. Adams close to downtown Cincinnati when her automobile struck a large pothole causing tire damage to the vehicle. The Columbia Parkway area of U.S. Route 50 was under construction at the time of plaintiff's incident.

{¶2} 2)Plaintiff filed this complaint seeking to recover $203.46 for automotive repair resulting from striking the pothole in the traveled portion of the roadway. Plaintiff also requested reimbursed of the $25.00 filing fee. Plaintiff asserted she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation (DOT), in failing to properly maintain the roadway near a construction zone on U.S. Route 50 in Hamilton County. The requisite material filing fee was paid.

{¶3} 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 this 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 became aware of potholes on eastbound U.S. Route 50 from Ft. Washington Way on March 22, 2004, the day after plaintiff's property damage event. Multiple potholes were repaired on U.S. Route 50 by 3:00 p.m. on March 22, 2004.

{¶4} 4)Evidence in another claim filed in this court has established potholes were present on the particular area of Columbia Parkway at 5:20 p.m. on March 19, 2004. See *Newman v. Department of Transportation* (2004), 2004-04256-AD. Potholes on the Columbia Parkway had to form sometime prior to 5:20 p.m. on March 19, 2004.

{¶5} 5)Defendant asserted Kokosing, by contractual agreement, was responsible for 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. Defendant has promoted this argument in numerous claims since March 30, 2004.

{¶6} 6)Furthermore, defendant again denied having any notice of the damage-causing pothole. Defendant contended plaintiff failed to introduce evidence proving any requisite notice.

CONCLUSIONS OF LAW

{¶7} 1)The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD, jud.

{¶8} 2)Defendant has the duty to maintain its highway in a reasonable 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.

{¶9} 3)In order to prove a breach of 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. 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 defective condition developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶10} 4)In order for there to be 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. Jackson* (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 297. "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*, supra, at 4. "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. No. 92AP-1183.

{¶11} 5)In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (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. In the instant claim, sufficient evidence has been offered to prove constructive notice, negligent maintenance and resulting liability. Sufficient time had elapsed for defendant or its contractor to have discovered the hazard presented by the pothole. Defendant is therefore liable to plaintiff for her repair costs associated with the damage caused by the pothole, plus filing fees, which may be reimbursed as compensable damages pursuant to *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

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IN THE COURT OF CLAIMS OF OHIO

HEATHER L. SIMS	:	
Plaintiff	:	
v.	:	CASE NO. 2004-05091-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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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 plaintiff in the amount of $228.46, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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For Defendant

RDK/laa
6/22
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