

[Cite as *Stern v. Ohio Dept. of Transp.*, 2005-Ohio-1243.]

IN THE COURT OF CLAIMS OF OHIO

JOYCE K. STERN	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09894-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	

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FINDINGS OF FACT

{¶ 1} 1) On June 23, 2004, at approximately 2:25 p.m., plaintiff, Joyce K. Stern, was traveling east on US Route 30 at milepost 20.76 in Stark County, when her automobile struck a pothole causing damage to the vehicle. Plaintiff related, a person identified as John Shirley of the street department was subsequently called to the scene of her property damage incident. According to submitted documents, Shirley made preliminary repairs to the pothole when he "put a bag of patch down and placed a cone on the hole." Shirley apparently told plaintiff personnel of defendant, Department of Transportation ("DOT") had been in the area repairing potholes earlier in the day on June 23, 2004.

{¶ 2} 2) Plaintiff contended the damage to her vehicle was proximately caused by negligence on the part of defendant in failing to repair the pothole or warn motorists of the hazard. Plaintiff filed this complaint seeking to recover \$248.44, her cost of automotive repair, plus a claim for filing fee reimbursement. The filing fee was paid.

{¶ 3} 3) Defendant denied any liability in this matter based on

the allegation DOT did not have any notice of the pothole prior to plaintiff's property damage occurrence. Defendant asserted DOT first received notice of the pothole on July 2, 2004, "when plaintiff called the Akron Office and reported it." Defendant speculated the pothole defect likely was formed a short time before the June 23, 2004, incident. Defendant denied John Shirley, on June 23, 2004, was employed by DOT or affiliated with DOT. Defendant's records show DOT last employed a person named John Shirley in 1991. Defendant suggested John Shirley was employed by the East Clinton, Ohio Street Department at the time of plaintiff's property damage event. Defendant insisted no DOT employees had knowledge of the pothole prior to plaintiff's incident.

{¶ 4} 4) Defendant argued plaintiff failed to produce evidence to establish DOT was negligent in maintaining the roadway. Defendant related US Route 30 was in good condition at the time of plaintiff's damage occurrence. Records show six pothole patching operations were needed in the general vicinity of plaintiff's incident during the six-month period prior to the June 23, 2004, damage event.

{¶ 5} 5) Plaintiff has not provided any evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim.

CONCLUSIONS OF LAW

{¶ 6} 1) Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 7} 2) 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. 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.

{¶ 8} 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.

{¶ 9} 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 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.

{¶ 10} 5) In order to recover on a claim of this type,

plaintiff must prove 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.

{¶ 11} 6) Plaintiff has not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show 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 the pothole appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶ 12} 7) Plaintiff as 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 failed to show that the damage-causing pothole was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the roadway area, or that there was any negligence on the part of defendant or its agents. *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. Consequently, plaintiff's claim is denied.

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OHIO DEPARTMENT OF : ENTRY OF ADMINISTRATIVE
TRANSPORTATION : DETERMINATION
Defendant :
: :

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. 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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RDK/laa
2/3
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