[Cite as *Mustard v. Ohio Dept. of Transp.*, 2005-Ohio-3214.]

IN THE COURT OF CLAIMS OF OHIO

CYNTHIA D. MUSTARD	:	
Plaintiff	:	
v.	:	CASE NO. 2005-01501-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} On January 5, 2005, at approximately 6:40 a.m.[1], plaintiff, Cynthia D. Mustard, was traveling north on State Route 753 south of Ghormley Road in Fayette County, when her automobile struck tree branches which had protruded onto the traveled portion of the northbound lane of the roadway. The tree branches were part of a limb which had apparently fallen from a tree growing adjacent to State Route 753. The limb had fallen into a ditch along the berm of the roadway and branches from the downed limb protruded out over and into the northbound lane area of State Route 753. Plaintiff related when her automobile struck the protruding tree branches she had just driven around a curve in the roadway and was unable to stop or move her vehicle away from the branches due to oncoming traffic traveling south on State Route 753. According to plaintiff, contact with the branches was unavoidable. As a result of her car striking the tree branches, plaintiff suffered substantial body damage to the vehicle, a 1991 Ford Crown Victoria.

[1] Plaintiff filed a crash report with the Fayette County Sheriff regarding the January 5, 2005, incident. The reported time the incident occurred as indicated on this crash report was 10:35 a.m.

{¶ 2} Plaintiff contended the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition (tree branches) on the traveled portion of the roadway. Consequently, plaintiff filed this complaint seeking to recover $1,543.13, her cost of automotive repair resulting from the January 5, 2005, damage occurrence. The filing fee was paid.

{¶ 3} Plaintiff submitted a written statement from her mother, Hazel Satterfield, who was a passenger in plaintiff's car and witnessed the incident forming the basis of this claim. Satterfield recalled she was traveling with plaintiff on State Route 753 North during the morning of January 5, 2005. Conditions were dark with a hard rain falling. Satterfield related, "at approximately 6:40 a.m. as we went around a curve there were tree limbs in the edge of the roadway . . . and due to oncoming traffic there was no way to avoid them." Satterfield further related, "[t]he limbs struck the (my) side of the car breaking the mirror and some of the area around the headlight and scratching the whole right side."

{¶ 4} Defendant denied any liability in this matter based upon the contention that DOT did not have any knowledge of the fallen tree limb prior to plaintiff's property damage event. Defendant denied receiving any calls or complaints about fallen tree limbs protruding onto State Route 753 before 6:40 a.m. on January 5, 2005. Defendant suggested the roadway hazard created by the fallen tree limb, "existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 5} Furthermore, defendant contended insufficient evidence has been produced to prove plaintiff's property damage was proximately caused by a negligent act or omission on the part of DOT personnel. Defendant pointed out DOT's Fayette County Manager, "conducts

roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." The most recent roadway inspection of State Route 753 in Fayette County prior to January 5, 2005, was perhaps October 29, 2004. Defendant did submit a maintenance record showing highway maintenance activities were performed on the particular relevant portion of State Route 753 on four occasions in the one month period before January 5, 2005. The last DOT activity conducted in the area before January 5, 2005, was a traffic detour operation performed on December 23, 2004. Litter patrol and litter pickups were last conducted on December 7, 2004, and December 13, 2004. Defendant asserted due care was exercised in maintaining State Route 753 for the general safety of the motoring public.

{¶ 6} Plaintiff countered that defendant had constructive knowledge regarding the dangerous condition of the fallen tree limb and therefore, DOT should bear liability for the property damage event of January 5, 2005. Plaintiff asserted weather conditions such as recent ice storms should have put defendant on notice of the potential for fallen tree limbs. Also, plaintiff submitted photographic evidence depicting the damage-causing tree branches which show many areas where the branches have been broken. Plaintiff professed the depicted condition of these tree branches constitutes some evidence that the branches had been struck multiple times before plaintiff's incident and consequently, some evidence of constructive notice.[2]

{¶ 7} Plaintiff submitted a written statement from Sharon Little, who frequently travels on State Route 753 to and from work. Little related she observed fallen tree branches along the roadway many days prior to January 5, 2005, the date of plaintiff's

[2] Plaintiff filed a response.

property damage event. In fact, Little noted she had to swerve her vehicle crossing the roadway center line to avoid striking fallen tree branches protruding onto State Route 753. Little stated, "[f]or more than a week and a half after the ice storm of December 22, 2004, there were tree limbs laying in the roadway just south of Ghormley Road," the approximate location of plaintiff's incident.

{¶ 8} 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 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} 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. 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} No evidence has been presented to show defendant had actual notice of the tree branch debris protruding onto the traveled portion of the roadway. Therefore, in order for plaintiff to prevail, constructive notice of the debris must be established. This legal concept of notice is of two distinguishable types, actual and constructive. The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of

information obtained. Wherever from competent evidence the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *In re Estate of Fahle* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

{¶ 11} To establish that defendant had constructive notice of a nuisance or defect in the highway, the hazard "must have existed for such length of time as to impute knowledge or notice." *McClellan*, supra, at 250. "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. In the instant claim, evidence has been offered by plaintiff to prove constructive notice of the tree branch condition. The statement of Sharon Little confirms the hazardous condition presented by the fallen tree limb had existed for at least ten days prior to plaintiff's January 5, 2005, property damage occurrence. Sufficient time had elapsed for defendant to have discovered the hazard presented by the fallen tree branches. Defendant is therefore liable to plaintiff for her repair costs associated with the damage caused by the tree branches, 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.

IN THE COURT OF CLAIMS OF OHIO

CYNTHIA D. MUSTARD	:	
Plaintiff	:	
v.	:	CASE NO. 2005-01501-AD
OHIO DEPARTMENT OF	:	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 $1,568.13, 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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RDK/laa
5/13
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