

[Cite as *Duncan v. Ohio Dept. of Transp.*, 2005-Ohio-3243.]

IN THE COURT OF CLAIMS OF OHIO

MRS. ROBERT DUNCAN (OLIVE) :  
Plaintiff :  
v. : CASE NO. 2005-02591-AD  
OHIO DEPARTMENT OF : MEMORANDUM DECISION  
TRANSPORTATION :  
Defendant :  
: : : : : : : : : : : : : : : : : :

## FINDINGS OF FACT

{¶1} 1) On December 27, 2004, at approximately 5:40 a.m., plaintiff, Olive Duncan, was traveling north on State Route 226 about 1/4 mile south of Shreve, Ohio when her automobile struck a pothole in the traveled portion of the roadway. The impact of striking the pothole caused damage to the spring and strut of plaintiff's vehicle. Plaintiff observed there were numerous potholes in this particular section of State Route 226 with some defects measuring eight inches in depth.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$623.26, the cost of automotive repair which plaintiff contends she incurred as a result of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway. Plaintiff submitted the \$25.00 filing fee.

{¶3} 3) Defendant denied liability based on the assertion DOT personnel had no knowledge of the particular pothole on State Route 226 prior to plaintiff's property damage occurrence. Defendant suggested the damage-causing pothole likely was formed only a short period of time before the December 27, 2004, incident. Defendant

denied receiving any complaints or being notified in any way about the pothole in question. Defendant stated State Route 226, "was in relatively good condition at the time of plaintiff's incident."

{¶ 4} 4) Furthermore, defendant explained DOT employees conduct roadway inspections on a routine basis and had any of these employees detected a roadway defect that defect would have been promptly repaired. Defendant contended, plaintiff did not produce sufficient evidence to prove DOT breached any duty of care owed to the traveling public in respect to roadway maintenance.

{¶ 5} 5) Defendant has asserted maintenance records show two pothole patching operations were needed in the general vicinity of plaintiff's incident during the six-month period preceding the December 27, 2004, property damage event.

{¶ 6} 6) Plaintiff did not provide sufficient evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim.

#### CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 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.

{¶ 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) To prove 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) 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. 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.

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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

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