

[Cite as *Stryker v. Ohio Dept. of Transp.*, 2005-Ohio-3244.]

IN THE COURT OF CLAIMS OF OHIO

CAROL A. STRYKER :  
Plaintiff :  
v. : CASE NO. 2005-02605-AD  
DEPARTMENT OF TRANSPORTATION, : MEMORANDUM DECISION  
et al. :  
Defendants :  
: :

FINDINGS OF FACT

{¶ 1} 1) On January 7, 2005, at approximately 5:15 a.m., plaintiff, Carol A. Stryker, was traveling east on US Route 30, "just before reaching Township Rd 179 & State Route 57," when her automobile struck a pothole causing tire and rim damage to the vehicle. Immediately after striking the pothole, plaintiff pulled her car off to the side of the roadway and a call was forwarded for a tow truck and assistance from defendant, Ohio State Highway Patrol ("OSHP").

{¶ 2} 2) Before the tow truck arrived at the location of plaintiff's damage occurrence, an OSHP Trooper pulled up in a patrol vehicle. The OSHP Trooper lit two flares, placed the lit flares on the ground at the rear of plaintiff's car, and then left the scene. Plaintiff related as she waited for the summoned tow truck, wind gusts caused by passing traffic blew one lit flare under the left rear tire of her automobile. The lit flare ignited the tire, burning a hole in the tire. Plaintiff explained she tried to stop the fire by stamping on the burning area with her suede boots, but in the process burned and melted her boots. From

the described incidents plaintiff suffered damage to two tires, a rim, and one pair of boots.

{¶ 3} 3) Consequently, plaintiff filed this complaint seeking to recover \$352.95, the cost of replacement tires, a replacement rim, boots, and filing fees, plus a claim for expenses incurred for copying photographs. Plaintiff asserted defendant, OSHP, is responsible for the loss of her boots and one tire. Additionally, plaintiff contended the automotive damage she sustained from striking the pothole was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT") in maintaining US Route 30.

{¶ 4} 4) Defendant, DOT, denied liability based on the assertion DOT personnel had no knowledge of the particular pothole on US Route 30 prior to plaintiff's property damage occurrence. Defendant, DOT, suggested the damage-causing pothole likely was formed only a short period of time before the January 7, 2005, incident. Defendant denied receiving any complaints or being notified in any way about the pothole in question. Defendant stated US Route 30, "was in good condition at the time and in the general vicinity of plaintiff's incident."

{¶ 5} 5) DOT provided maintenance records showing one pothole patching operation was needed in the general vicinity<sup>1</sup> of plaintiff's incident in the four-week period preceding the January 7, 2005, property damage event. Another patching operation was conducted in the particular vicinity on US Route 30 after 7:00 a.m. on January 7, 2005.

{¶ 6} 6) Defendant, OSHP, admitted liability for the damage caused to plaintiff's tire and boots by the flare set by an OSHP Trooper. Plaintiff expressed her agreement with this admission.

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<sup>1</sup> DOT located the pothole plaintiff's vehicle struck at milepost 18.0 on US Route 30 in Wayne County.

{¶ 7} 7) However, plaintiff disputed defendant, DOT's denial that it did not have knowledge of the damage-causing pothole on US Route 30 prior to the incident forming the basis of this claim. Plaintiff related when she reported the pothole to the DOT, "dispatcher and then to the claims department, both informed me that I had not been the only one that had placed a call to report this pothole." Defendant denied any DOT employees received a complaint regarding this pothole prior to 5:15 a.m. on January 7, 2005. Plaintiff contended the size of the damage-causing pothole which, "spanned the entire width" of the roadway, made it "highly unlikely that the pothole only existed for a brief period of time." Furthermore, plaintiff stated that she was told by the DOT dispatcher that DOT had made plans to fill the pothole due to receiving prior complaints. Plaintiff asserted she offered sufficient proof to establish defendant, DOT, had requisite notice of the damage-causing pothole. Plaintiff submitted photographs depicting the roadway area where her damage occurred after pavement repairs and patching had been performed. Plaintiff did not submit any statement from DOT personnel acknowledging prior notice of the pothole on US Route 30.

#### CONCLUSIONS OF LAW

{¶ 8} 1) Defendant, DOT 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, DOT 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.

{¶ 9} 2) Defendant, DOT 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.

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} 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, DOT, is not liable for any damage plaintiff may have suffered from the pothole.

{¶ 14} 7) Plaintiff has 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.* (1988), 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 for damages caused by the pothole on US Route 30 is denied.

{¶ 15} 8) Plaintiff's claim for the cost of photographic prints



Deputy Clerk

Entry cc:

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5/4  
Filed 6/1/05  
Sent to S.C. reporter 6/24/05