

Apparently, DOT dispatched a repair crew to the pothole site at sometime after 7:30 p.m. on January 12, 2005.

{¶ 3} Defendant denied having any knowledge of the damage-causing pothole prior to plaintiff's incident. Defendant located the pothole "at milepost 9.86 on SR 3 in Medina County." Defendant acknowledged receiving a telephone complaint on January 12, 2005, regarding this pothole on State Route 3 at the intersection of Lexington Ridge Road. The complainant, Kristina Pelligrino, had apparently suffered automobile damage from striking the pothole. A copy of the recorded complaint was submitted. However, the approximate time the complaint was received on January 12, 2005, was not recorded. Defendant did not submit a copy of DOT telephone logs from Medina County. Defendant denied being aware of the pothole on State Route 3 before the incident forming the basis of this claim.

{¶ 4} Defendant suggested the damage-causing pothole probably, "existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant did not offer a more precise opinion regarding how long this large defect was present before 7:00 p.m. on January 12, 2005. Defendant did profess roadway inspections of State Route 3 are conducted by DOT personnel, "on a routine basis, at least one to two times a month."

Defendant did not submit when State Route 3 in the vicinity of Lexington Ridge Road was last inspected prior to January 12, 2005.

Defendant did not provide information concerning the method of these routine inspections. Defendant asserted the roadway in the vicinity of plaintiff's incident was in good condition with maintenance records showing no pothole patching operations were needed in that area during the six-month period preceding January 12, 2005. Defendant contended plaintiff failed to produce any evidence establishing acts or omissions on the part of DOT caused

her property damage.

{¶ 5} 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.

{¶ 6} To prove a breach of duty by defendant to maintain the highways plaintiff must establish, by a preponderance of the evidence, that DOT 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. No evidence has shown defendant had actual notice of the damage causing pothole. Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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.

{¶ 7} 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.

{¶ 8} Evidence in another claim filed in this court has shown the pothole on State Route 3 north of Lexington Ridge Road was present in that particular area at 7:00 a.m., on January 12, 2005. See, *Barrow v. Ohio Department of Transportation, District 3*, 2005-02443-AD, 2005-Ohio-2890. The pothole on State Route 3 had to form sometime prior to 7:00 a.m., on January 12, 2005, more than twelve hours prior to plaintiff's property damage event. In the instant claim, sufficient evidence to prove defendant had constructive notice of the damage-causing pothole has been established. See *McGuire v. Ohio Department of Transportation* (2002), 2001-08722-AD; *Piscioneri v. Ohio Dept. of Transportation, District 12*, 2002-10836-AD, 2003-Ohio-2713, jud; *Kill v. Ohio Department of Transportation*, 2003-01512-AD, 2003-Ohio-2620, jud; *Grothouse v. Ohio Department of Transportation, District 1*, 2003-01521-AD, 2003-Ohio-2621, jud; *Zeigler v. Department of Transportation*, 2003-01652-AD, 2003-Ohio-2625; *Sheaks v. Ohio Department of Transportation*, 2003-02179-AD, 2003-Ohio-2176, jud. Sufficient time elapsed for defendant to have been aware of the pothole and taken measures to initiate repairs. Since constructive notice has been proven, defendant is consequently liable to plaintiff for all damages claimed.

IN THE COURT OF CLAIMS OF OHIO

MICHELLE POMPIGNANO :
Plaintiff :
v. : CASE NO. 2005-02117-AD

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 3

:

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 \$319.63, 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
6/29
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