

[Cite as *McCormish v. Ohio Dept. of Transp.*, 2005-Ohio-7099.]

IN THE COURT OF CLAIMS OF OHIO

|                                      |   |                            |
|--------------------------------------|---|----------------------------|
| GAYLE M. MCCORMISH                   | : |                            |
| Plaintiff                            | : |                            |
| v.                                   | : | CASE NO. 2005-09171-AD     |
| OHIO DEPARTMENT OF<br>TRANSPORTATION | : | <u>MEMORANDUM DECISION</u> |
| Defendant                            | : |                            |
| : : : : : : : : : : : : : : : :      |   |                            |

FINDINGS OF FACT

{¶ 1} 1) On July 26, 2005, plaintiff, Gale M. McCormish, was traveling west on State Route 18, "between Beach Road and Bonita Road," when her automobile struck a large pothole causing tire and rim damage.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$313.30, her total 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. The \$25.00 filing fee was paid and plaintiff requested reimbursement for that amount.

{¶ 3} 3) Defendant denied liability based on the fact it professed to have no knowledge of the damage-causing pothole prior to plaintiff's incident. Defendant suggested the pothole plaintiff's car struck probably existed "for only a relatively short amount of time before plaintiff's incident." Defendant denied receiving any prior complaints about the pothole which DOT located "between mileposts 17.50 and 16.55 on SR 18 in Medina County."

{¶ 4} 4) Plaintiff did not submit any evidence to establish the length of time the pothole existed prior to the July 26, 2005,

property damage event.

{¶ 5} 5) Furthermore, defendant explained a DOT employee conducts roadway inspections of State Route 18 at least two times a month and any discovered defects are 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.

#### CONCLUSIONS OF LAW

{¶ 6} 1) 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.

{¶ 7} 2) 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.

{¶ 8} 3) There is no evidence defendant had actual notice of the damage-causing pothole.

{¶ 9} 4) 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 (pothole) developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶ 10} 5) Size of the defect (pothole) is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297.

{¶ 11} 6) In order for there to be constructive notice,

plaintiff must show sufficient time has elapsed after the dangerous condition (pothole) appears, so that under the circumstances, defendant should have acquired knowledge of the existence of the defects. *Guiher v. Department of Transportation* (1978), 78-0126-AD.

{¶ 12} 7) No evidence has shown defendant had constructive notice of the pothole.

{¶ 13} 8) Furthermore, plaintiff has failed to show defendant negligently maintained the roadway.

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| Plaintiff                            | : |                                                  |
| v.                                   | : | CASE NO. 2005-09171-AD                           |
| OHIO DEPARTMENT OF<br>TRANSPORTATION | : | <u>ENTRY OF ADMINISTRATIVE<br/>DETERMINATION</u> |
| 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.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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For Defendant

RDK/laa  
11/22  
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