[Cite as *Edwards v. Ohio Dept. of Transp., Dist. 8*, 2006-Ohio-7173.]

IN THE COURT OF CLAIMS OF OHIO

DENISE A. EDWARDS	:	
Plaintiff	:	
v.	:	CASE NO. 2006-01343-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶ 1} 1) On November 20, 2005, at approximately 1:00 p.m., plaintiff, Denise A. Edwards, was traveling south on Interstate 75 over the Ohio River bridge near milepost 1 in Cincinnati, when her automobile struck a deep pothole in the roadway. The pothole caused damage to both the front and rear left tires of plaintiff's vehicle.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover $426.05, her total cost of automotive repair, plus a claim for filing fee reimbursement. Plaintiff contended she incurred these expenses as a result of negligence on the part of defendant, Department of Transportation("DOT"), in maintaining the roadway.

{¶ 3} 3) Defendant denied liability based on the assertion it professed to have no knowledge of the damage-causing pothole prior to plaintiff's November 20, 2005, incident. Defendant denied receiving any calls or complaints before November 20, 2005, about a pothole that DOT located at, "approximately milepost 0.21 on I-75 in Hamilton County," on the Brent Spence

Bridge. Defendant suggested, "it is likely the pothole existed for only a short time before the incident."

{¶ 4} 4) Defendant related the particular section of Interstate 75 is inspected, "at least two times a month," and DOT conducts proper roadway maintenance.

{¶ 5} 5) Plaintiff, in her response to defendant's investigation report, observed defendant submitted documents showing pothole repairs were conducted between mileposts .2 and .1 on Interstate 75 South on June 15, 2005. Plaintiff pointed out the pothole patching material used on June 15, 2005, was described as "cold patch." Plaintiff contended defendant should have used "hot mix asphalt" to repair potholes and consequently, plaintiff argued the failure by defendant to use "hot mix asphalt" for pothole patching represents negligent maintenance on the part of DOT. Furthermore, plaintiff related defendant's submitted complaint record shows DOT received a pothole complaint on August 12, 2005, and the pothole was reportedly located at "75 SB just before the brent spence 2nd lane from right." Plaintiff explained this reported location is the same location of the pothole her car struck on November 20, 2005. Defendant's record noted the pothole reported on August 12, 2005, had been repaired before the August 12, 2005, complaint was received. Additionally, defendant's complaint record shows DOT received two complaints about the damage-causing pothole on November 22, 2005, two days after plaintiff's damage occurrence.

{¶ 6} 6) Plaintiff submitted a document self described as "exhibit B." This document appears to be a phone log regarding reports of roadway hazards on Interstate 75 Southbound at the

Brent Spence Bridge. The governmental entity who compiled this phone log was not identified. An entry on the log reveals a roadway hazard complaint was reported in the location of plaintiff's incident at about 1:00 p.m. on November 19, 2005. Plaintiff argued this November 19, 2005, logged complaint of a roadway hazard on Interstate 75 South at the Brent Spence Bridge imputes prior actual notice to DOT of the roadway defect which damaged her car twenty-four hours later.

CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 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. Although evidence has shown some entity received actual notice of the defect on November 19, 2005, about twenty-four hours before plaintiff's incident (see plaintiff's exhibit B), this evidence of actual

notice cannot be imputed to defendant. Actual notice of a roadway defect to a public safety governmental entity does not constitute actual notice of the defect to DOT without evidence DOT received notice of the defect from the governmental entity. See *McClellan*, supra; *Geilinger v. Dept. of Transp.*, 2004-02211-AD, 2004-Ohio-2890.

{¶ 9} 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.

{¶ 10} 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. Dept. of Transportation* (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 apply 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} Evidence has shown the pothole on Interstate 75 was present at least twenty-four hours prior to plaintiff's property damage event. The issue presented is whether this evidence constitutes a finding of constructive notice of the defect. 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, 197. Constructive notice of roadway potholes has been determined in multiple claims involving less than a twenty-four hour time frame. See *McGuire v. Ohio Department of Transportation* (2002), 2001-08722-AD; *Piscioneri v. Ohio Dept. of Transportation, District 12*, 2002-10836-AD, 2003-Ohio-2173, 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.

{¶ 12} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, 2005-02117-AD, jud; 2005-Ohio-3976, in a Motion for Court Review, the court concluded in reversing a determination by the Clerk that thirteen hours constructive notice of a defect is insufficient notice to invoke liability on DOT. The court in reversing the finding of constructive notice quoted and adopted DOT's argument:

{¶ 13} "It is inappropriate that ODOT be held negligent for not patrolling every square mile of roadway every twelve hours. Such a ruling is against all case law created outside the

limited arena of these administrative decisions." (Defendant's motion for court review, page 7). In its reversal order the court also recognized a constructive notice standard involving downed signage. The court noted in finding, "that evidence of a stop sign being down for less than 24 hours was not enough time to impute constructive notice of its condition to ODOT." See *Cushman v. Ohio Dept. of Transp.* (June

{¶ 14} 8, 1995), Court of Claims No. 91-11591; affirmed (Mar. 14, 1996), Franklin App. No. 95API07-8844. The court, in the instant claim, is required to follow existing precedent. Consequently, plaintiff has failed to prove defendant had sufficient constructive notice of the damage-causing pothole to invoke liability.

{¶ 15} Furthermore, the court concludes plaintiff has failed to produce evidence showing the roadway was negligently maintained by DOT's choice to repair potholes with cold mix. 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. Although some evidence exists to indicate plaintiff's car was damaged by a pothole that had been previously patched, this evidence alone does not prove negligent maintenance. A pothole patch which deteriorates in less than ten days is prima facie evidence of negligence maintenance. See *Matala v. Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a decision to use cold mix to patch a pothole which may have or may not have deteriorated over several months does not

constitute in and of itself conclusive evidence of negligent maintenance.

{¶ 16} 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 has failed to show that the damage-causing pothole was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD.

IN THE COURT OF CLAIMS OF OHIO

DENISE A. EDWARDS	:	
Plaintiff	:	
v.	:	CASE NO. 2006-01343-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8	:	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 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:

Denise A. Edwards
2657 Algonquin Pkwy.
Toledo, Ohio 43606

Plaintiff, Pro se

Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

For Defendant

RDK/laa

3/24
Filed 4/11/06
Sent to S.C. reporter 5/11/06