

[Cite as *Marsh v. Ohio Dept. of Transp.*, 2006-Ohio-7204.]

IN THE COURT OF CLAIMS OF OHIO

THERESIA MARSH :  
 :  
 Plaintiff :  
 :  
 v. : CASE NO. 2006-01912-AD  
 :  
 OHIO DEPT. OF TRANSPORTATION : MEMORANDUM DECISION  
 :  
 Defendant :

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FINDINGS OF FACT

{1} 1) On February 28, 2005, at approximately 8:00 p.m., plaintiff, Theresia Marsh, was traveling south on Interstate 75 in Cincinnati on the Brent Spence Bridge spanning the Ohio River, when her automobile struck, "a very big pothole." The pothole caused tire and wheel damage to plaintiff's vehicle.

{2} 2) Plaintiff filed this complaint seeking to recover \$366.03, her total cost of automotive repair, including 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 February 28, 2005, incident. Defendant denied receiving any calls or complaints before February 28, 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. Defendant submitted records showing DOT conducted litter patrols and litter pickups in the area of plaintiff's incident on December 2, 3, 15, 16, 17, 2004 and January 7, 10, 26, and February 28, 2005. DOT records note pothole patching operations were conducted in the area on January 3, 7, 12, 25, 26, February 11, and 18, 2005. No pothole repairs were recorded on Interstate 75 in Hamilton County from February 18, to February 28, 2005. Sign maintenance was performed in the area on February 24, 2005, four days before plaintiff's incident.

{5} 5) In her response to defendant's investigation report, plaintiff insisted the particular section of roadway where her damage event occurred, "has been a chronic problem for deep and recurring potholes for years." Plaintiff related that although potholes on the Brent Spence Bridge are repaired, "it never takes long before they open up again." Plaintiff suggested the pothole that damaged her car had been patched not long before her incident. Plaintiff contended defendant negligently maintained the roadway due to DOT's perceived inability to deal with newly formed potholes and properly patch recurring potholes.

#### CONCLUSIONS OF LAW

{6} 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} 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.

{8} Therefore, to find liability on a notice theory 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.

{9} 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. Department 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. 3, 1993), Franklin App. No. 92AP-1183. Plaintiff has failed to prove defendant had constructive notice of the particular defect considering insufficient evidence has been presented to establish the length of time the defect existed prior to plaintiff's February 28, 2005, incident.

{10} Although liability based on notice of the defect has not been present in this claim, plaintiff has proven, by a preponderance of the evidence, that defendant did in a general sense, maintain the highway negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. The fact defendant needed to repair numerous defects in a brief time frame is conclusive evidence of negligent maintenance. *Carter v. Highway Department Transportation O.D.O.T.* (1997), 97-03280-AD; *Reese v. Ohio Dept. of Transportation* (1999), 99-05697-AD. Furthermore, the trier of fact finds plaintiff's car struck a pothole which had been most recently patched on February 18, 2005. A pothole patch which deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618; *Schrock v. Ohio Dept. of Transp.*, 2005-02460-AD, 2005-Ohio-2479.

{11} The fact the pothole plaintiff's car struck deteriorated in a time frame of slightly more than ten days does not negate application of the standard expressed in *Matala*, supra.

{12} Negligence in this action has been proven and defendant is liable for the damage claimed.

IN THE COURT OF CLAIMS OF OHIO

THERESIA MARSH :

Plaintiff :

v. :

CASE NO. 2006-01912-AD

OHIO DEPT. OF TRANSPORTATION :

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 \$366.03, 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/la

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