[Cite as *Gelarden v. Ohio Dept. of Transp., Dist. 4,* 2007-Ohio-3047.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CORINNE GELARDEN

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION, DISTRICT 4

Defendant

Case No. 2007-02521-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On December 26, 2006, at approximately 8:45 p.m., plaintiff, Corinne Gelarden, was traveling east on State Route 18, "between Creekrun and S. Hametown," in Summit County, when her automobile struck, "a deep, large hole in the road." The impact of striking the pothole caused tire and wheel damage to plaintiff's vehicle, a 2002 Volvo C70. Plaintiff related she was told she was the fifth person to receive damage from that particular pothole on State Route 18 on the evening of December 26, 2006.

{¶2} 2) Plaintiff filed this complaint seeking to recover $250.00, her insurance coverage deductible for automotive repair and related expenses resulting from the December 26, 2006, incident. Plaintiff's damage claim for repair costs is limited to her insurance deductible.[1] Plaintiff has asserted she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining the roadway on State Route 18 in Summit County. The filing fee was paid.

{¶3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole on the roadway prior to plaintiff's December 26, 2006, property damage occurrence. Defendant asserted plaintiff failed to produce any evidence showing how long the pothole existed prior to 8:45 p.m. on December 26, 2006. Defendant located the damage-causing pothole, "close to milepost 1.01 on SR 18 in Summit County."

{¶4} 4) Defendant's evidence suggests the pothole plaintiff's vehicle struck may have been the same pothole struck by another motorists at about 6:30 p.m. on December 26, 2006. See *Newberry v. Ohio Department of Transportation, District 4*, 2007-01380-AD, 2007-Ohio-1999. Defendant explained DOT received one prior complaint made on November 17, 2006, about a pothole on State Route 18. This pothole was promptly repaired after the complaint was received. Defendant denied receiving any calls or complaints regarding the particular pothole before plaintiff's incident. Defendant explained DOT employees conduct roadway inspections, "at least two times a month." Apparently,

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[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances"

no potholes were discovered during a previous roadway inspection. Defendant suggested the pothole likely, "existed for only a short time before the incident."

CONCLUSIONS OF LAW

{¶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 the 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 incident. *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.

{¶7} 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. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶8} 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 287. "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. 92AP-1183, 1993 Ohio App. LEXIS 636.

{¶9} Evidence has shown the pothole on State Route 18 was present at least two hours prior to plaintiff's property damage event. The issue presented is whether this evidence constitutes a finding of constructive notice of the defect. "[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198. 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.

{¶10} 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: "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 determination." (Defendant's motion for court review, page 7.) In its reversal order the court also recognized a constructive notice standard involving down 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.* (1995), 1991-11591; affirmed (March 14, 1996), Franklin App. No. 95AP107-

844, 1996 Ohio App. LEXIS 990. 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.

{¶11} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio Misc. 3d 75, 77. Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 1981, approved and followed.

{¶12} Although some evidence suggests the pothole plaintiff's vehicle struck may have been the same pothole that was previously patched on November 17, 2006, this evidence alone, if established, does not provide proof of negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute in and of itself conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation, District 8*, 2006-01343-AD, jud, 2006-Ohio-7173.

{¶13} 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.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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:

Corinne Gelarden
3090 Pioneer Way Drive
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James Beasley, Director
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1980 West Broad Street
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RDK/laa
4/9
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