[Cite as *Brown-Rouse v. Ohio Dept. of Transp.*, 2007-Ohio-4501.]

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

SHANNAN BROWN-ROUSE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2007-03072-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On February 20, 2007, at approximately 10:15 p.m., plaintiff, Shannan Brown-Rouse, was traveling east on US Route 62, "between St. Elmo and Maple," in Stark County, when her automobile struck a pothole in the right roadway lane. The pothole caused tire and rim damage to plaintiff's vehicle.

{¶2} 2) Plaintiff filed this complaint seeking to recover $367.77, the cost of replacement parts and automotive repair resulting from the February 20, 2007, incident. Plaintiff asserted she incurred these damages as a proximate cause 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 that amount along with her damage claim.

{¶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 property damage occurrence. Defendant located the pothole on US Route 62, "between mileposts 23.69 and 23.83 in Stark County." Defendant asserted plaintiff failed to produce evidence showing how long the pothole existed prior to the incident forming the basis of this claim. In another claim, *Nickoson v. Ohio Department of Transportation*, 2007-02769-AD, evidence was presented to show plaintiff in that claim suffered automotive damage from the same pothole on US Route 62 at about 9:15 p.m. on February 20, 2007. Therefore, evidence exists to establish the damage-causing pothole was present on the roadway at least one hour prior to plaintiff Brown-Rouse's property damage occurrence. Defendant suggested, "it is more likely than not the pothole existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶4} 4) Defendant denied receiving any calls or complaints regarding the particular pothole prior to plaintiff's damage event. Defendant explained DOT employees conduct roadway inspections on all state roadways on a routine basis, "at least one to two times a month." Apparently, no potholes were discovered on US Route 62 between mileposts 23.69 and 23.83 during previous roadway inspections. Defendant denied DOT employees were negligent in regard to roadway maintenance.

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 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 DOT received actual notice of the defect from plaintiff on February 22, 2007, there is no indication from defendant actual notice was received before 10:15 p.m. on February 20, 2007.

{¶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. Additionally, size of a pothole is insufficient to prove notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287.

{¶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. "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 US Route 62 was present at least one

hour 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. 194, 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.

{¶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 decisions." (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), 91-11591; 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.

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Shannan Brown-Rouse
2405 Bollinger Avenue N.E.
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James Beasley, Director
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RDK/laa
6/13
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