

# 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

SUSAN LAKE

Plaintiff

v.

DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2007-05369-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶1} 1) Plaintiff, Susan Lake, stated she was traveling on State Route 123, when her automobile, “hit a massive pothole,” causing tire and rim damage to the vehicle. Plaintiff pointed out the location of the damage-causing pothole was on a bridge spanning Interstate 71. Plaintiff recalled the pothole was reported by local law enforcement on the scene to defendant, Department of Transportation (“DOT”), and repairs were supposedly scheduled. According to plaintiff, she was again traveling on State Route 123, the evening following her first damage event, when her automobile again struck the same pothole causing the same damage. Defendant related the dates of these two separate incidents at the same location were March 24, and March 25, 2007. Plaintiff submitted photographs depicting the particular roadway area after pothole patching repairs had been performed. These photographs show repairs were made for a substantial roadway defect.

{¶2} 2) Plaintiff asserted her property damage was proximately caused by DOT’s negligence in failing to maintain the roadway. Consequently, plaintiff filed this complaint seeking to recover \$354.10, her stated cost of replacement parts needed after the two separate described incidents. The filing fee was paid.

{¶3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage events. Defendant denied receiving any previous reports of a pothole which DOT located at milepost 14.97 on State Route 123 in Warren County. Defendant noted the pothole was reported on March 26, 2007, and subsequently repaired. Defendant contended plaintiff failed to produce any evidence to indicate the length of time the pothole existed prior to her initial March 24, 2007, incident. Defendant suggested, "it is likely the pothole existed for only a short time before the incident." Defendant explained, "[t]he Warren County Manager inspects all state roadways within the county at least two times a month." Apparently, no potholes were discovered at milepost 14.97 on State Route 123 the last time this roadway was inspected before March 24, 2007.

{¶4} 4) Despite filing a response, plaintiff did not submit any evidence to establish the length of time the damage-causing pothole existed prior to March 24, 2007.

#### 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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶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, 517 N.E. 2d 1388. 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, 31 OBR 64, 507 N.E. 2d 1179. No evidence has shown defendant had actual notice of the

damage causing pothole. Although plaintiff claimed the pothole on State Route 123 was reported to local law enforcement on March 24, 2007, this assertion, whether or not accurate is irrelevant to the issue of DOT's notice. 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; Geilinger v. Dept. of Transp.*, Ct. of Cl. No. 2004-02211-AD, 2004-Ohio-2890.

{17} 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, 577 N.E. 2d 458.

{18} 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, 587 N.E. 2d 891. "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*, 31 Ohio Misc. 2d at 4, 31 OBR 64, 507 N.E. 2d 1179. "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-11836.

{19} Evidence has shown the pothole on State Route 123 was present a day before plaintiff's second property damage event on March 25, 2007. 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, 197-198, 105 N.E. 2d 429. 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*; Ct. of Cl. No. 2002-10836-AD, 2003-Ohio-2173, jud; *Kill v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-01512-AD, 2003-Ohio-2620, jud; *Grothouse v. Ohio Department of Transportation, District 1*, Ct. of Cl. No. 2003-01521-AD, 2003-Ohio-2621, jud; *Zeigler v. Department of Transportation*, Ct. of Cl. No. 2003-01652-AD, 2003-Ohio-2625; *Sheaks v. Ohio Department of Transportation*, Ct. of Cl. 2003-02179-AD, 2003-Ohio-2176, jud.

{¶10} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, Ct. of Cl. No. 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 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 8, 1995), Ct. of Cl. No. 91-11591; affirmed (Mar. 14, 1996), Franklin App. No. 95API107-8844. 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 at any time to invoke liability.

{¶11} 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

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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.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

Susan Lake  
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Oregonia, Ohio 45054

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RDK/laa  
8/29  
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