

# 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

BONNIE BENDER, et al.

Case No. 2008-03874-AD

Plaintiffs

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPT. OF TRANSPORTATION

Defendant

## FINDINGS OF FACT

{¶ 1} 1) On March 10, 2008, at approximately 9:03 p.m., plaintiff, Bonnie Bender, was traveling north on State Route 45 “coming up on Depot Rd” in Columbiana County, when her automobile struck a “very deep” pothole at the crest of a hill causing tire and rim damage to the vehicle. Plaintiff submitted multiple photographs depicting a massive pothole in the traveled portion of the roadway.

{¶ 2} 2) Plaintiff implied her property damage was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway. Plaintiff filed this complaint seeking to recover \$313.56, the total cost of automotive repair incurred resulting from the March 10, 2008 incident. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with her damage claim.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the damage-causing pothole prior to plaintiff’s property damage occurrence. Defendant denied receiving any previous calls or complaints regarding the particular pothole, which DOT located near milepost 23.98 on State Route 45 in Columbiana County. Defendant asserted plaintiff did not produce any evidence to establish the length of time the pothole was present on the roadway before 9:30 p.m. on

March 10, 2008. Defendant suggested “it is likely the pothole existed for only a short time before the incident.”

{¶ 4} 4) Defendant contended plaintiff failed to prove her damage was proximately caused by negligent maintenance on the part of DOT. Defendant explained the DOT “Columbiana County Manager inspects all state roadways within the county on a routine basis, at least two times a month.” Apparently no potholes were discovered near milepost 23.98 on State Route 45 the last time that specific section of roadway was inspected prior to March 10, 2008. DOT records show pothole repairs were conducted in the vicinity of plaintiff’s damage occurrence on December 24, 2007, January 4, 2008, and January 25, 2008.

#### 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} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant 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.

{¶ 7} Plaintiff has not produced sufficient evidence to indicate the length of time that the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown that defendant had actual notice of the

pothole. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time that the pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication that defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer that 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. Size of the defect (pothole) 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. Therefore, defendant is not liable for damage that plaintiff may have suffered from the pothole.

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ENTRY OF ADMINISTRATIVE  
DETERMINATION

[Cite as *Bender v. Ohio Dept. of Transp.*, 2008-Ohio-5782.]

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 plaintiffs.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/laa  
7/9  
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