**[Cite as *Hovestreydt v. Ohio Dept. of Transp.*, 2014-Ohio-5894.]**

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

DEBRA HOVESTREYDT

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00100-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

**{¶1}** Plaintiff, Debra Hovestreydt, filed this action against defendant, Ohio Department of Transportation ("ODOT"), which stated: "I was driving on I75 South bound in Shelby County. I had just passed a semi and was moving from the left lane back into the right lane of traffic. As I crossed back into the right lane I hit one of the many pot holes on that stretch of road. I heard a loud bang as my right rear tire blew out. . . This occurred just South of exit #93, or state route 29." Plaintiff noted the damage-causing incident occurred on January 28, 2014 at approximately 8:00 a.m. Plaintiff asserted the damage to her vehicle was a proximate result of negligence on the part of ODOT in maintaining a hazardous condition on I 75.

**{¶2}** Plaintiff did not enter any amount in blank #14 (total claim), however, she provided a receipt for repairs totaling $161.45. She submitted the required $25.00 filing fee.

**{¶3}** Defendant denied liability based on the contention that no ODOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's incident. Defendant's investigation revealed that the location of plaintiff's incident "was between

93.85 and 93.00 on IR 75 in Shelby County." This section of roadway has an average daily traffic count of between 25,500 and 38,940 vehicles. Defendant asserted that plaintiff did not offer any evidence to establish the length of time that the potholes existed at this location prior to plaintiff's incident. Defendant suggested that "[s]ince [it] is not aware of any incidents at or near the location, it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident."

**{¶4}** Defendant asserted that it received six complaints regarding potholes on IR 75 in the six months prior to plaintiff's incident, "one (1) inclusive of the incident area (received and documented on January 16, 2014)." Defendant contended that there were pothole patching operations on January 14, 2014, before the January 16, 2014 incident. Therefore, the pothole involved in plaintiff's incident "would have been repaired before Plaintiff's incident on January 28, 2014."

**{¶5}** 5) Additionally, defendant contended that plaintiff did not offer any evidence to prove that the roadway was negligently maintained. Defendant related that ODOT "Shelby County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month." There were also 32 pothole patching operations performed on IR 75, in Shelby County, in the six months prior to this incident. Defendant maintained, "if ODOT personnel had detected any defects they would have been promptly scheduled for repair."

**{¶6}** Plaintiff submitted a response to defendant's investigation report in which she implied that defendant was negligent in maintaining this section of IR 75. She contended: "[w]hile it may be ODOT's procedure to repair any serious potholes when they inspect the road ways regularly, it is evident that the Shelby county road ways are falling apart . . . I believe if the state would check the records they would see that in fact the state has paid a large amount of overtime and road maintenance in the Shelby county area due to the horrendous conditions of these roads. These roads had been coming apart all winter, starting in early winter, December, or even November, and while the state

worked on these roads all winter they are still in need of serious resurfacing." Plaintiff included pictures of the roadway in question. The pictures were "not taken immediately after the incident." Rather, they were taken much later for purposes of filing plaintiff's response. However, "the condition of the road is very visible."

CONCLUSIONS OF LAW

**{¶7}** 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 Company, Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). 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.*, 145 Ohio St. 198, 61 N.E. 2d 198 (1945), approved and followed.

**{¶8}** Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App. 2d 335, 361 N.E. 2d 486 (10th Dist. 1976). However, defendant is not an insurer of the safety of its highways. *Kniskern v. Township of Somerford*, 112 Ohio App. 3d 189, 678 N.E. 2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Trans.*, 67 Ohio App. 3d 723, 588 N.E. 2d 864 (10th Dist. 1990).

**{¶9}** In order to prove a breach of the duty to maintain highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E. 2d 179 (Ct. of Cl. 1986). Plaintiff has produced no evidence that the defendant had actual notice of these potholes on IR 75 prior to January 28, 2014.

**{¶10}** Alternatively, in order to find liability, plaintiff may prove that ODOT 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 that the defective condition developed. *Spires v. Ohio Highway Department*, 61 Ohio Misc. 2d 262, 577 N.E. 2d 458 (Ct. of Cl. 1988).

**{¶11}** In order for there to be constructive notice, plaintiff must show that sufficient time has elapsed after the dangerous condition appears, so that under circumstances defendant should have acquired knowledge of its existence. *Guiher v. Dept. of Transportation*, 78-0126-AD (1978). "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,* at 4. "Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation." *Danko v. Ohio Dept. of Transp.*, 10th Dist. No. 92AP-1183 (Feb. 4, 1993). Plaintiff implied that the potholes began forming in November or December, 2013. However, she provided no evidence that the particular damage-causing pothole was present on the roadway for a sufficient amount of time for a finding of constructive notice.

**{¶12}** Generally, in order to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove either: 1) defendant had actual or constructive notice of the pothole and failed to respond in a reasonable time or responded in a negligent manner, of 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation*, 75-0287-AD (1976). Plaintiff has produced sufficient evidence to infer that defendant, in a general sense, maintains its highways negligently. *Herlihy v. Ohio Department of Transportation*, 99-07011-AD (1999). Plaintiff contended that this section of roadway on IR 75 has been "pot hole riddled" throughout the entirety of the 2013-2014 winter season, despite defendant's "many hours on the road," performing maintenance. Defendant admitted that it conducted 32 pothole patching operations in the six months prior to plaintiff's

incident, including one on January 14, 2014. It is after this pothole patching operation that another motorist claimed he suffered damage. This other claim, plus the photos provided by plaintiff of the current condition of the roadway, coupled with the substantial amount of the patching operations which appear to have had little effect on the roadway condition is sufficient evidence for a finding that defendant negligently maintained this section of IR 75, resulting in damage to the plaintiff's vehicle.

**{¶13}** Therefore judgment is rendered in favor of the plaintiff in the amount of $161.45, plus reimbursement of the $25.00 filing fee as compensable damages pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E. 2d 990 (Ct. of Cl. 1990).

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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 plaintiff in the amount of $186.45, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Interim Clerk

Entry cc:

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DJM/laa
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