

amount of time before the time of the incident." Defendant asserted roadway inspections are conducted on a routine basis at least one to two times a month. Defendant implied individuals inspecting the roadway site prior to January 2, 2005, did not discover any potholes. In fact, defendant related its maintenance records show one pothole patching operation was conducted in the general vicinity of plaintiff's incident one month prior to the January 2, 2005, property damage event. Defendant professed plaintiff did not present any evidence to establish the length of time the pothole existed prior to his property damage event.

{¶ 5} 5) Despite filing a response, plaintiff did not offer evidence to show the length of time the pothole existed prior to the incident forming the basis of this claim. In this response, plaintiff insisted DOT was negligent in maintaining the roadway considering the severe winter weather conditions which had occurred in the area for the two-week period preceding the January 2, 2005, incident. Plaintiff suggested defendant should have been aware of the presence of potholes due to weather factors and frequent snow removal operations conducted by DOT crews. Plaintiff submitted photographs of the subsequently patched pothole that caused the vehicle damage on January 2, 2005. The photographs depict a patched repaired area massive in size. Plaintiff did not produce evidence to establish when the damage-causing pothole developed prior to January 2, 2005.

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 7} 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. 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. In order to recover in any suit involving injury proximately caused by roadway conditions 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, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD.

{¶ 8} Plaintiff has not produced any evidence to indicate the length of time the pothole was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show 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 the pothole appeared on the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the pothole. Plaintiff has not provided sufficient evidence to infer 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. When constructive notice of a roadway defect is alleged, the plaintiff must produce evidence to 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. Jackson* (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 297. "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. No. 92AP-1183. In the instant claim, plaintiff has not established defendant had prior notice of the defect.

{¶ 9} 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 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. Consequently, plaintiff claim is denied.

JERRY D. NICHOLS :
 Plaintiff :
 v. : CASE NO. 2005-03521-AD
 OHIO DEPARTMENT OF : ENTRY OF ADMINISTRATIVE
 TRANSPORTATION : DETERMINATION
 Defendant :
 : : : : : : : : : : : : : : : : :

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:

Jerry D. Nichols
 459 E. Walnut Street
 Ashland, Ohio 44805

Plaintiff, Pro se

Gordon Proctor, Director
 Department of Transportation
 1980 West Broad Street
 Columbus, Ohio 43223

For Defendant

RDK/laa
 5/19
 Filed 6/17/05
 Sent to S.C. reporter 7/8/05