[Cite as *Tapper v. Ohio Dept. of Transp.*, 2003-Ohio-5554.]

IN THE COURT OF CLAIMS OF OHIO

CYNTHIA L. TAPPER	:	
Plaintiff	:	
v.	:	CASE NO. 2003-06191-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} On May 6, 2003, at approximately 4:15 p.m., plaintiff, Cynthia L. Tapper, was traveling west on State Route 113 between the village of South Amherst and Baumheart Road when her automobile struck a large pothole in the traveled portion of the roadway. The pothole caused tire and rim damage to plaintiff's vehicle. Plaintiff filed this complaint seeking to recover $745.38, the complete cost of automotive repair, plus $25.00 for filing fee reimbursement, and $4.00 for copying costs to obtain an accident report. Fees incurred to obtain an accident report are not compensable damage elements in a claim of this type and are therefore denied. Plaintiff asserted she sustained her vehicular damage as a proximate cause of negligence on the part of defendant, Department of Transportation, in failing to repair a hazardous condition on the roadway.

{¶2} Defendant denied liability based on the fact it professed to have no knowledge of the damage-causing pothole prior to plaintiff's incident. Defendant located the pothole between mileposts 3.75 and 4.41 on State Route 113 in Lorain County. Defendant asserted no calls or complaints about a pothole between mileposts 3.75 and 4.41 on State Route 113 were received before May 6, 2003. In fact, defendant related its employees did not receive notice of the pothole until June 9, 2003 when defendant

received a copy of plaintiff's complaint. Defendant also related a pothole at milepost 4.5 on State Route 113 was repaired by Department of Transportation personnel on May 7, 2003, presumedly without notice of any other roadway defects. Defendant explained its county manager conducts roadway inspections on State Route 113 at least one to two times a month. Apparently, the roadway inspection of State Route 113 between May 6, 2003 and June 9, 2003 did not discover a defect between mileposts 3.75 and 4.41.

{¶3} On August 25, 2003, plaintiff filed a response to defendant's investigation report. Plaintiff insisted the pothole on State Route 113 her car struck was present on the roadway for at least two weeks prior to the May 6, 2003 incident. Plaintiff submitted a signed statement from Thom Deichler, the owner of the local tire sales shop where plaintiff's vehicle was repaired. Deichler declared in his statement, that he knew the damage-causing pothole on State Route 113 became dangerous to roadway traffic at the end of April, 2003. Plaintiff also submitted signed statements from local residents concerning the length of time the pothole was present on the roadway prior to May 6, 2003. Pat Tucker stated, "I recall the pothole being present in the spring." Tina Dorsey recollected, "I believe it (pothole) was there at least one month or longer." Joseph N. Nruel stated, "I remember the pothole on SR 113 which had been there in May and had been there for some time." Awenita Aquino recalled, "I remember the pothole on 113 awhile ago around before May 2003." Marsha Gill related, "The pothole on 113 by my house was there for at least a week or more." Based on the information contained in these statements plaintiff suggested defendant should have known about the pothole and was negligent in failing to make timely repairs.

{¶4} 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 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.

{¶5} In order to prove a breach of 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. Ohio Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. 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. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶6} 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. 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 287. "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.

{¶7} In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (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. In the instant claim, plaintiff has offered sufficient evidence to prove constructive notice and resulting liability. Sufficient time had elapsed for defendant to have discovered the hazard presented by the pothole. Defendant is therefore liable to plaintiff for her repair costs associated with the damage caused by the pothole, plus filing fees, which may be reimbursed as compensable damages pursuant to *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

{¶8} 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 $770.38, which includes the filing fee. Court costs are assessed against defendant. 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:

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RDK/laa
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