

# 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  
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TONIA YISRAEL

Plaintiff

v.

DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2007-03731-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

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### FINDINGS OF FACT

{¶1} 1) On February 21, 2007, between 6:00 and 6:30 p.m., plaintiff, Tonia Yisrael, was traveling on US Route 22 (Montgomery Road) in Hamilton County, when her automobile struck a large pothole destroying the front right tire and rim of the vehicle. Plaintiff recalled the damage-causing pothole was obscured due to being filled with water from recent snow and rainfall.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$481.52, for replacement parts for her automobile. Plaintiff asserted she incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway on US Route 22 in Hamilton County. The filing fee was paid.

{¶3} 3) Defendant observed that the area where plaintiff’s damage occurred was located within a construction zone under the control of DOT contractor, Barrett Paving Materials Incorporated (“Barrett”). Defendant explained the construction zone maintained by Barrett spanned mileposts 10.21 to 11.07 on US Route 22 in Hamilton County. Defendant contacted plaintiff regarding the location of the pothole her vehicle struck and it was determined the pothole was located near 7505 Montgomery Road which was within the limits of the maintained construction zone. Defendant denied liability in this matter based on the contention that neither DOT nor Barrett had any knowledge of the particular

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pothole plaintiff's car struck. Defendant has no record of receiving any calls or complaints about a pothole at 7505 Montgomery Road prior to February 21, 2007.

{¶4} 4) Defendant submitted a written statement dated May 31, 2007, from Barrett representative, Dennis Brunton, concerning the pothole at 7505 Montgomery Road. Brunton recorded this pothole was located in an area where Barrett had not performed any repaving work and had probably been repaired by some entity other than Barrett. Brunton denied having any prior knowledge of the pothole that he estimated was originally twelve inches wide and thirty inches long. Photographs of the patched pothole were submitted. The photographs were taken well after February 21, 2007.

{¶5} 5) Defendant asserted that Barrett, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Barrett is the proper party defendant in this action. Defendant implied that all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects were delegated when an independent contractor takes control over a particular section of roadway. All construction was to be performed to DOT requirements and specifications.

#### CONCLUSIONS OF LAW

{¶6} The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151.

{¶7} 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, 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

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864.

{¶18} 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 condition of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1, 507 N.E. 2d 1179.

{¶19} Plaintiff has not produced sufficient evidence to indicate the length of time the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown 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. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. 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, 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. 92AP-1183, 1993 Ohio App. LEXIS 636. Plaintiff has failed to produce sufficient evidence to prove DOT or Barrett had constructive notice of the roadway condition. Although evidence in another claim, *Zaidan v. Ohio Department of Transportation*, 2007-04320-AD, seemingly establishes the pothole was present at 7505 Montgomery Road at least forty minutes prior to plaintiff's incident, this fact does not prove

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sufficient for a finding of constructive notice. “[C]onstructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 105 N.E. 2d 429, 431. 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*; 2002-10836-AD, 2003-Ohio-2173, jud; *Kill v. Ohio Department of Transportation*, 2003-01512-AD, 2003-Ohio-2620, jud; *Grothouse v. Ohio Department of Transportation, District 1*, 2003-01521-AD, 2003-Ohio-2621, jud; *Zeigler v. Department of Transportation*, 2003-01652-AD, 2003-Ohio-2625; *Sheaks v. Ohio Department of Transportation*, 2003-02179-AD, 2003-Ohio-2176, jud.

{¶10} However, in the matter of *Pompignano v. Ohio Dept. of Transp.*, 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 down 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.* (1995), 91-11591; affirmed (March 14, 1996), Franklin App. No. 95AP107-844, 1996 Ohio App. LEXIS 990. 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 to invoke liability. Furthermore, plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that

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defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Plaintiff's claim is denied.

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ENTRY OF ADMINISTRATIVE  
DETERMINATION

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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:

Tonia Yisrael  
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Cincinnati, Ohio 45239

James G. Beasley, Director  
Department of Transportation  
1980 West Broad Street  
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RDK/laa  
7/25  
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