

# 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

DAWN M. DELPRINCIPE

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2009-05676-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶ 1} 1) On May 8, 2009, at approximately 11:30 a.m., plaintiff, Dawn DelPrincipe, was traveling west on State Route 224 in Mahoning County, when her 2001 BMW 325i struck “a very very large-potentially dangerous pothole” causing tire and rim damage to the vehicle.

{¶ 2} 2) Plaintiff asserted her property damage was proximately caused by negligence on the part of defendant, Department of Transportation (ODOT), in failing to maintain the roadway free of defects such as the pothole her vehicle struck. Plaintiff filed this complaint seeking to recover \$426.21, the cost of replacement parts and related repair expense she incurred. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no ODOT personnel had any knowledge of the particular pothole on State Route 224 prior to plaintiff’s damage event. Defendant explained “[t]he radio logs for the (ODOT) Canfield Garage show that a complaint was called in at 12:20 p.m. and (the pothole) was repaired at 1:37 p.m. on May 8, 2009.” Defendant asserted plaintiff failed to

produce evidence to establish the length of time the particular pothole was present on the roadway prior to 11:30 a.m. on May 8, 2008. Defendant reported its investigation “indicates that the location of plaintiff’s incident is near milepost 19.53 on SR 224 in Mahoning County”. Defendant denied receiving any calls or complaints regarding a pothole at that location prior to plaintiff’s damage occurrence. Defendant suggested “it is likely the pothole existed for only a short time before the incident.” Defendant contended State Route 224 is well maintained and the maintenance history (copy submitted) for the roadway show ODOT crews patched potholes in the vicinity of plaintiff’s incident on December 18, 2008 and February 5, 2009. Defendant related the ODOT “Mahoning County Manager inspects all state roadways within the county at least two times a month.” Apparently, no potholes were discovered in the westbound lane of State Route 224 at milepost 19.53 the last time that section of roadway was inspected prior to May 8, 2009.

#### CONCLUSIONS OF LAW

{¶ 4} 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 Buy Company, Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. 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.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E. 2d 198, approved and followed.

{¶ 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 pothole 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} Ordinarily, to recover in a suit involving damage proximately caused by roadway conditions including potholes, plaintiff must prove that either: 1) defendant had actual or constructive notice of the potholes 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. There is no evidence to show ODOT had actual notice of the pothole prior to plaintiff's property damage event.

{¶ 8} Additionally, there is no evidence defendant had constructive notice of the pothole at milepost 19.53 on State Route 224. In order for plaintiff to prevail, constructive notice must be proven. 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. 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 any damage that plaintiff may have suffered from the pothole based on constructive notice. 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.

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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 defendant. Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/laa  
9/18  
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