



# 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

SHIRLEY A. LILES, : Case No. 2011-02905-AD  
Plaintiff,  
v. : Acting Clerk Daniel R. Borchert  
DEPARTMENT OF TRANSPORTATION,  
Defendant. : MEMORANDUM DECISION

{¶ 1} Plaintiff, Shirley Liles, filed this action against defendant, Department of Transportation (ODOT), contending that she suffered property damage as a proximate result of negligence on the part of ODOT in maintaining a hazardous condition on Interstate 71 southbound in Cincinnati. In her complaint, plaintiff provided a narrative description of her damage event recording she “[d]rove my 2006 Lexus into a huge hole on I-71 south just south of the Taft exit in Cincinnati.” Plaintiff recalled that the described incident occurred on February 15, 2011 at approximately 12:55 p.m. Plaintiff requested damage recovery in the amount of \$462.21, the stated total cost to replace two rims. The filing fee was paid.

{¶ 2} Defendant determined that plaintiff’s incident occurred at milepost 3.33 on I-71 in Hamilton County. Defendant denied liability based on the contention that no ODOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff’s February 15, 2011 incident. Defendant related that, “[t]his section of roadway has an average daily traffic count” of over 125,000 vehicles. Defendant asserted that plaintiff did not offer any evidence to establish the length of time that the pothole existed on I-71 southbound prior to her incident.

{¶ 3} Additionally, defendant contended that plaintiff did not offer any evidence to prove that the roadway was negligently maintained. Defendant advised that the

ODOT “Hamilton County Manager conducts roadway inspections on all state roadways within the county on a routine basis, at least one to two times a month.” Apparently, no potholes were discovered in the vicinity of plaintiff’s incident the last time that section of roadway was inspected prior to February 15, 2011. The claim file is devoid of any inspection record prepared by the Hamilton County Manager. Defendant argued that plaintiff has failed to offer any evidence to prove that her property damage was attributable to any conduct on the part of ODOT personnel. Defendant asserted that the roadway was “in relatively good condition at the time of plaintiff’s incident.” Defendant stated that, “[a] review of the six-month maintenance history [record submitted] for the area in question reveals that one (1) Pothole Patching Repair was performed on I-71 at milepost 3.3.” However, this repair was completed on January 26, 2011. Defendant noted, “that if ODOT personnel had detected any potholes they would have been reported and promptly scheduled for repair.”

{¶ 4} Plaintiff filed a response asserting that defendant was or should have been aware of the pothole, that the area in question has never been pothole-free, and that there are multiple potholes remaining in the area as of May 23, 2011.

{¶ 5} 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, ¶8 citing *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707. Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant’s negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. 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. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51, 14 OBR 446, 471 N.E. 2d 477.

{¶ 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, 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.

{¶ 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, 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.

{¶ 8} Generally, in order 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 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. Plaintiff has not submitted any evidence to establish that ODOT had actual notice of the pothole prior to plaintiff's incident. Therefore, in order to recover plaintiff must produce evidence to prove constructive notice of the defect or negligent maintenance.

{¶ 9} “[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, 47 O.O. 231, 105 N.E. 2d 429. “A finding of constructive

{¶ 10} 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.

{¶ 11} 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. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458.

{¶ 12} In order for there to be constructive notice, plaintiff must show that 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. "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. No evidence has shown that ODOT had constructive notice of the pothole.

{¶ 13} Plaintiff has not produced sufficient 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. Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

{¶ 14} In the instant claim, plaintiff has failed to introduce sufficient evidence to prove that defendant maintained known hazardous roadway conditions. Plaintiff failed to prove that her property damage was connected to any conduct under the control of defendant, or that defendant was negligent in maintaining the roadway area, or that there was any actionable negligence on the part of defendant. *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's claim is denied.



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SHIRLEY A. LILES,

: Case No. 2011-02905-AD

Plaintiff,

v.

: Acting Clerk Daniel R. Borchert

DEPARTMENT OF TRANSPORTATION,

Defendant.

: 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  
Acting Clerk

6/8

Filed 7/27/11

Sent to S.C. reporter 11/4/11