

[Cite as *Goldman v. Ohio Dept. of Transp.*, 2005-Ohio-2872.]

IN THE COURT OF CLAIMS OF OHIO

GERI GOLDMAN :  
Plaintiff :  
v. : CASE NO. 2005-01382-AD  
OHIO DEPARTMENT OF : MEMORANDUM DECISION  
TRANSPORTATION :  
Defendant :  
: : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶ 1} 1) On January 4, 2005, at approximately 4:00 p.m., plaintiff, Geri Goldman, was traveling on the entrance ramp to Interstate 275 East from Montgomery Road in Hamilton County, when her automobile struck a pothole in the traveled portion of the roadway causing tire and wheel damage to the vehicle. Plaintiff submitted photographs depicting the subsequently repaired pothole on the roadway entrance ramp.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover \$450.74, the cost of automotive repair which plaintiff contends she incurred as a result of negligence on the part of defendant, Department of Transportation, in maintaining the roadway. Plaintiff submitted the \$25.00 filing fee.

{¶ 3} 3) Defendant has denied liability based on the fact it had no knowledge of the pothole prior to plaintiff's property damage occurrence. Defendant suggested the pothole developed "a relatively short amount of time before plaintiff's incident." Defendant asserted roadway inspections are conducted on a routine basis at least one to two times a month. Defendant implied individuals inspecting the Interstate 270 East entrance ramp site

prior to January 4, 2005, did not discover any potholes. In fact, defendant related its maintenance records show no pothole patching operations were needed in the general vicinity of plaintiff's incident during the six-month period preceding the January 4, 2005, property damage event. Defendant located the site of the damage-causing pothole at milepost 16.15 on US Route 22 in Hamilton County.

{¶ 4} 4) Plaintiff located the damage-causing pothole on "Ramp J, which runs from Northeast bound US 22 to Southeast bound I-275," not at milepost 16.15 on US Route 22. Plaintiff submitted photographs of the roadway area where her property damage occurred. These photographs depict a patched pothole in the traveled portion of the roadway and surrounding roadway surface including the delineated berm area with an abutting curb. Plaintiff contended the photographs show the roadway was not well maintained due to the presence of "debris, heaves, cracks, and other anomalies." [sic] The trier of fact, after viewing the submitted photographs, finds the photographs depict a traveled portion of roadway surface open to traffic which appears to be adequately maintained and relatively free of deterioration.

{¶ 5} 5) Plaintiff disputed defendant's assertion that the particular area of roadway was inspected periodically. Plaintiff did not offer any evidence to establish the roadway was not inspected other than to claim the submitted photographs support the contention the roadway was not routinely inspected.

{¶ 6} 6) Additionally, plaintiff pointed out her property damage incident occurred during the winter season in a period where daily temperatures fluctuated many degrees above and below the freezing temperature point of 32° F. From plaintiff's submitted evidence, daily temperatures in the Hamilton County area ranged from a high of 60° F to a low of -4° F in the two-week period prior to January

4, 2005. Plaintiff asserted defendant was aware of these temperature fluctuations and knew that drastically rising and falling temperatures create conditions conducive to pothole formation. Plaintiff argued defendant was negligent in not conducting more frequent roadway inspections considering the general knowledge possessed about the weather and its effect on highway surfaces. Plaintiff seemingly stressed defendant's knowledge about seasonal weather conditions constituted constructive notice of the particular pothole her automobile struck. Plaintiff did not produce evidence to show that more frequent roadway inspections would have discovered the damage-causing pothole on the ramp to Interstate 275 East. Plaintiff did not provide evidence to indicate the length of time the pothole existed prior to the January 4, 2005, incident forming the basis of this claim.<sup>1</sup>

{¶ 7} 7) On March 17, 2005, defendant filed a document titled, Defendant's Reply To Plaintiff's Response To Its Investigation Report. On March 31, 2005, plaintiff filed a response to defendant's reply. Neither 2743.10 nor the Rules of the Court of Claims of Ohio provide for a reply to a response to an investigation report or a response to a reply. Therefore defendant's March 17, 2005, reply and plaintiff's March 31, 2005 response to the reply are stricken. Defendant or plaintiff shall not file further pleadings unless they comply with the applicable rules or statute.

#### CONCLUSIONS OF LAW

{¶ 8} 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,

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<sup>1</sup> Plaintiff filed a response on March 8, 2005.

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.

{¶ 9} 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.

{¶ 10} 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 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. In the instant claim, plaintiff has not established defendant had prior notice of the defect.

{¶ 11} 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's claim is denied.

