

# 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

LORRIE TRIPP

Plaintiff

v.

OHIO DEPARTMENT OF  
TRANSPORTATION

Defendant

Case No. 2008-01197-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

### FINDINGS OF FACT

{¶ 1} 1) On December 12, 2007, at approximately 3:00 p.m., plaintiff, Lorrie Tripp, was traveling on the on-ramp from Mitchell Avenue in Cincinnati to Interstate 75 North when her 2002 Ford Taurus struck a pothole in the traveled portion of the roadway causing rim damage to the vehicle. Plaintiff submitted photographs taken on December 13, 2007 depicting the pothole her car struck.

{¶ 2} 2) Plaintiff implied the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation (“DOT”), in failing to maintain the roadway. Consequently, plaintiff filed this complaint seeking to recover \$448.50, the total cost of replacement parts. Plaintiff submitted the filing fee.

{¶ 3} 3) Defendant denied liability based on the contention that no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff’s December 12, 2007 property damage occurrence. Defendant denied receiving prior calls or complaints about the pothole plaintiff’s car struck, which DOT located at approximately milemarker 6.46 on Interstate 75 in Hamilton County. Defendant asserted plaintiff did not produce any evidence to indicate the length of time the damage-causing pothole existed prior to December 12, 2007. Defendant suggested “it is likely the pothole existed for only a short time before the incident.” Defendant

Case No. 2008-01197-AD	- 2 -	MEMORANDUM DECISION
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Case No. 2008-01197-AD	- 2 -	MEMORANDUM DECISION
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stated the DOT “Hamilton County Manager inspects all state roadways within the county at least two times a month.” Apparently, no potholes were discovered at milemarker 6.46 on Interstate 75 the last time that section of roadway was inspected prior to December 12, 2007. Defendant’s maintenance records show pothole patching was performed in the vicinity of plaintiff’s incident on June 19, 2007 and November 30, 2007.

{¶ 4} 4) Plaintiff filed a response referring to the photographs she submitted depicting the damage-causing pothole. Plaintiff noted the photographs show “the hole does exist and some repair has been made.” Plaintiff also noted “[t]he hole was somewhat repaired, yet not enough to prevent damage to my car.” The trier of fact, upon examining the submitted photographs, cannot determine conclusively if the pothole depicted is a defect newly formed or formed due to a deteriorated patch.

#### CONCLUSIONS OF LAW

{¶ 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.

Case No. 2008-01197-AD	- 3 -	MEMORANDUM DECISION
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Case No. 2008-01197-AD	- 3 -	MEMORANDUM DECISION
------------------------	-------	---------------------

{¶ 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 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. No evidence has been shown defendant had actual notice of the damage-causing pothole.

{¶ 7} Therefore, to find liability plaintiff must prove DOT had constructive notice of the defect. 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. There is no indication defendant had constructive notice of the pothole. Plaintiff has not produced any 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. 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. Although

Case No. 2008-01197-AD	- 4 -	MEMORANDUM DECISION
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Case No. 2008-01197-AD	- 4 -	MEMORANDUM DECISION
------------------------	-------	---------------------

plaintiff has shown some evidence that her car was damaged by a pothole that had been previously patched, this assertion alone, if established, does not provide proof of negligent maintenance. A pothole patch that deteriorates in less than ten days is prima facie evidence of negligence maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618. However, a pothole patch which may or may not have deteriorated over a longer time frame does not constitute, in and of itself, conclusive evidence of negligent maintenance. See *Edwards v. Ohio Department of Transportation, District 8*, Ct. of Cl. No. 2006-01343-AD, jud, 2006-Ohio-7173. Plaintiff has failed to prove the pothole that damaged her car had been previously patched or was patched with material subject to rapid deterioration since the last previous pothole repair made by DOT in the vicinity of her incident was on November 20, 2007. Furthermore, plaintiff also failed to establish the general time frame when the roadway condition depicted in her photographs initially appeared. Plaintiff, in the instant claim, has not produced 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. Plaintiff has failed to show that the proximate cause of her damage was connected to any conduct under the control of defendant, or that defendant was negligent in

Case No. 2008-01197-AD	- 5 -	MEMORANDUM DECISION
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Case No. 2008-01197-AD	- 5 -	MEMORANDUM DECISION
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maintaining the roadway area. *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.

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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:

Lorrie Tripp  
7939 Larrywood Drive  
West Chester, Ohio 45069

James G. Beasley, Director  
Department of Transportation  
1980 West Broad Street  
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RDK/laa  
5/2  
Filed 5/21/08  
Sent to S.C. reporter 8/1/08