

# 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

LILIA VERGARA

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2010-06168-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

{¶ 1} Plaintiff, Lilia Vergara, filed this action against defendant, Department of Transportation (ODOT), contending her 2005 Dodge Magnum was substantially damaged as a proximate cause of negligence on the part of ODOT in maintaining a hazardous condition on US Route 33 in Franklin County. Specifically, plaintiff related her vehicle was damaged when it struck a large pothole “located south of Fishinger Rd in front of Zollinger and Clifton” on US 33. Plaintiff recalled her damage incident occurred on March 30, 2010 at approximately 8:30 p.m. In her complaint, plaintiff requested damage recovery in the amount of \$938.70, the total cost of replacement parts and related repair expense. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with her damage claim.

{¶ 2} Defendant denied liability based on the contention that no ODOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff’s March 30, 2010 described occurrence. Defendant located the pothole “between mileposts 9.65 and 9.76 on US 33 in Franklin County” and advised that “ODOT did not receive any reports of the pothole or have any knowledge of the pothole

prior to the (March 30, 2010) incident.” Defendant asserted that plaintiff failed to produce any evidence to establish the length of time the pothole existed on US Route 33 prior to her damage occurrence. Defendant suggested that “it is likely the pothole existed for only a short time before the incident.”

{¶ 3} Furthermore, defendant argued that plaintiff failed to prove that the roadway was negligently maintained. Defendant explained that the ODOT “Franklin County Manager inspects all state roadways within the county at least two times a month.” Apparently no potholes were detected between mileposts 9.65 and 9.76 on US Route 33 the last time that section of roadway was inspected before March 30, 2010. The claim file is devoid of any roadway inspection records. Defendant did submit a “Maintenance History” for US Route 33 covering the period from September 30, 2009 to March 30, 2010. These records show that pothole patching repairs were needed in the vicinity of mileposts 9.65 and 9.76 on January 19, 2010, January 22, 2010, January 27, 2010, February 23, 2010 and March 12, 2010.

{¶ 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, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 79, 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.

{¶ 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 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. There is no evidence that defendant had actual notice of the pothole. Therefore, for the court to find liability on a notice theory, evidence of constructive notice of the pothole must be presented.

{¶ 7} “[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 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. “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. In order for there to be a finding of constructive notice, plaintiff must prove, by a preponderance of the evidence, 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; *Gerlarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶ 8} The trier of fact is precluded from making an inference of defendant’s constructive notice, unless evidence is presented in respect to the time that the pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. No evidence was presented to establish the length of time that the particular pothole was present. 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. Plaintiff has failed to prove that defendant had constructive notice of the pothole. 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. Therefore, defendant is not liable for any damage that plaintiff may have suffered from the roadway defect.

## 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](http://www.cco.state.oh.us)

LILIA VERGARA

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2010-06168-AD

Deputy Clerk Daniel R. Borchert

### 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.

---

DANIEL R. BORCHERT

Deputy Clerk

Entry cc:

Lilia Vergara  
3579 Edson Drive  
Columbus, Ohio 43228

Jolene M. Molitoris, Director  
Department of Transportation  
1980 West Broad Street  
Columbus, Ohio 43223

RDK/laa  
9/15  
Filed 10/15/10  
Sent to S.C. reporter 2/2/11