

The Hole Truth

IN "THE POTHOLE," the 150th episode of the sitcom *Seinfeld*, the neurotic George Costanza loses a commemorative key ring George Steinbrenner gave him. Costanza believes the ring may have fallen inside a pothole he broad-jumped over, which was subsequently paved over. To avoid having to pay a professional to do the job competently, George jackhammers the area himself, striking a water main, which violently erupts.

To most people, potholes present more of a problem when they are not repaired. This was the situation in *Klingensmith v. Ohio Department of Transportation*, decided on January 7, 2011, by the Court of Claims of Ohio.

According to the court, plaintiff Leonard Klingensmith claimed that on June 16, 2010, at approximately 9:15 p.m., he was driving his 1966 Lincoln Continental on State Route 46 North in Trumbull County. The Lincoln hit a large pothole, which Klingensmith assessed as 35 inches long by 17 inches wide by 4-½ inches deep. The impact caused a bit of a "Continental shift," damaging the wheels, tires and suspension. Klingensmith paid \$990.40 for replacement parts and repair expenses.

Klingensmith sued the Ohio Department of Transportation, claiming the damage was caused by ODOT's negligence in maintaining a hazardous condition on the highway. He sought recovery of the \$990.40.

Defendant ODOT denied liability, contending that no ODOT personnel had any knowledge of the particular damage-causing defect prior to the accident.

The court ruled for ODOT.

The court began its analysis by noting what Klingensmith was required to establish. "For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries... 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.'

"Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public... However, defendant is not an insurer of the safety of its highways.

"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... Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct."



The court was distinguishing between two situations. The first, actual notice, is where the defendant is specifically aware of the dangerous condition, such as in a situation where its representative sees it or has it reported to him or her. The second, constructive notice, is where (and different jurisdictions may define it a bit differently) the hazardous condition has existed for such a time and/or is of such an obvious or other nature or location that the defendant should have known about or discovered it through reasonable diligence.

"There is no evidence that defendant had actual notice of the pothole on State Route 46 prior to June 16, 2010. Therefore, to find liability, plaintiff must prove that ODOT had constructive notice of the defects. 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... Size of the defect is insufficient to show notice or duration of existence... '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... Obviously, the requisite length of time sufficient to constitute constructive notice varies with each specific situation... No evidence has shown that ODOT had constructive notice of the pothole.

"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 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... The fact that defendant's 'Maintenance History' reflects pothole repairs were made in the vicinity of plaintiff's incident on various occasions does not prove negligent maintenance of the roadway on the part of ODOT. 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... Therefore, defendant is not liable for any damage plaintiff may have suffered from the pothole.

"In the instant claim, plaintiff has failed to introduce sufficient evidence to prove that defendant maintained a known hazardous roadway condition. Plaintiff failed to prove that his 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... Consequently, plaintiff's claim is denied." ❖

In the past, claims against federal, state and local governments were generally blocked by "sovereign immunity," a relic from times when and lands where kings were deemed "to do no wrong" and were thus immune from suit. Many modern jurisdictions, to varying degrees and with certain limitations and restrictions, now allow claims for relief to be asserted.