[Cite as *Crosby v. Ohio Dept. of Transp.*, 2004-Ohio-1357.]

IN THE COURT OF CLAIMS OF OHIO

MICHAEL RYAN CROSBY	:	
Plaintiff	:	
v.	:	CASE NO. 2003-11739-AD
DEPT. OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

FINDINGS OF FACT

{¶1} 1) On November 9, 2003, plaintiff, Michael Ryan Crosby, was traveling on State Route 317 near milepost 1.49 in Franklin County, when his automobile struck a pothole causing damage to the vehicle.

{¶2} 2) Plaintiff filed this complaint seeking to recover $839.95, the cost of automotive repair and filing fees which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation, in maintaining the roadway. Plaintiff submitted the 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.

{¶4} 4) Plaintiff has not submitted sufficient evidence to indicate the length of time the pothole existed prior to the incident forming the basis of this claim.

{¶5} 5) Defendant has asserted maintenance records show one pothole patching operation was needed in the general vicinity of plaintiff's incident during the six-month period preceding the property damage event.

{¶6} 6) Photographs of the roadway area show the majority of the roadway

defect was located off the traveled portion of the roadway. Defendant's photographic evidence depicts the pothole on November 5, 2002. At the time this photograph was taken, the pothole appeared as an off-road defect.

{¶7} 7) On February 13, 2004, plaintiff also submitted photographic evidence where it appears the defect was located off the traveled portion of the roadway.

CONCLUSIONS OF LAW

{¶8} 1) This court has previously held that the Department of Transportation is not to be held liable for damages sustained by individuals who used the berm or shoulder of a highway for travel without adequate reasons. *Colagrossi v. Department of Transportation* (1983), 82-06474-AD.

{¶9} 2) In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (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} 3) There is no evidence defendant had actual notice of the damage-causing pothole on the traveled portion of the roadway.

{¶11} 4) 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 (pothole) developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶12} 5) 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 297.

{¶13} 6) In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after dangerous condition (pothole) appears. so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD.

{¶14} 7) No evidence has shown defendant had constructive notice of the pothole on the traveled portion of the roadway.

{¶15} 8) The shoulder of a highway is designed to serve a purpose which may include travel under emergency circumstances. It is for the trier of fact to determine whether driving on the shoulder is a foreseeable and reasonable use of the shoulder of the highway. *Dickerhoof v. City of Canton* (1983), 6 Ohio St. 3d 128. In the case at bar, plaintiff has offered no reasonable explanation or excuse for using the berm of the highway.

{¶16} 9) Plaintiff, in the instant case, has shown no adequate reason for the driver's action of driving on the berm of the highway, consequently, based on the rationale of *Colagrossi*, supra, this case is denied. If a plaintiff sustains damage because of a defect located off the marked, regularly traveled portion of a roadway, a necessity for leaving the roadway must be shown. *Lawson v. Jackson* (1977), 75-0612-AD. Inadvertent travel based on inattention is not an adequate reason or necessity for straying from the regularly traveled portion of the roadway. *Smith v. Ohio Department of Transportation* (2000), 2000-05151-AD.

{¶17} 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. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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