

{¶5} Defendant has asserted maintenance records show three pothole patching operations were needed in the general vicinity of plaintiff's incident during the five-month period preceding the October 11, 2004, property damage event.

CONCLUSIONS OF LAW

{¶6} 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, 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.

{¶7} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of this evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶8} 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} 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} There is no evidence defendant had actual notice of the damage-causing pothole on the traveled portion of the roadway.

{¶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.

{¶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.

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

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

{¶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.

{¶9} Plaintiff, in the instant case, has shown no adequate reason for her 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. Assuming plaintiff had reason to drive off the roadway she has failed to produce evidence establishing defendant's notice of the defective condition.

[Cite as *Kline v. Ohio Dept. of Transp.*, 2005-Ohio-2048.]

IN THE COURT OF CLAIMS OF OHIO

ANGELA R. KLINE :

Plaintiff :

v. :

CASE NO. 2005-01595-AD

OHIO DEPT. OF TRANSPORTATION :

ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant :

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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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