[Cite as *Ryan v. Ohio Dept. Transp.*, 2006-Ohio-7147.]

IN THE COURT OF CLAIMS OF OHIO

DOUGLAS P. RYAN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-11230-AD
DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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FINDINGS OF FACT

{¶ 1} 1) On October 28, 2005, plaintiff, Douglas P. Ryan, stated he was traveling west on Interstate 76 exiting onto State Route 94 in Medina County, when the automobile he was driving struck a large hole causing damage to the vehicle.

{¶ 2} 2) Plaintiff filed this complaint seeking to recover $250.00, his insurance coverage deductible for automotive repair which plaintiff contends he incurred as a result of negligence on the part of defendant, Department of Transportation, in maintaining the roadway. The $25.00 filing fee was paid and plaintiff requests reimbursement of that amount.

{¶ 3} 3) Defendant has denied liability based on the fact it had no knowledge of the hole prior to plaintiff's property damage occurrence.

{¶ 4} 4) Plaintiff has not submitted any evidence to indicate the length of time the hole existed prior to the incident forming the basis of this claim. Plaintiff submitted photographs of the roadway defect which damaged the vehicle plaintiff was driving. The photographs depict a deteriorated

area well off the traveled portion of the roadway.

CONCLUSIONS OF LAW

{¶ 5} 1) 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.

{¶ 6} 2) 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. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St. 3d 79, 81, 2003-Ohio-2573 at ¶8, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77.

{¶ 7} 3) 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.

{¶ 8} 4) In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains is highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD.

{¶ 9} 5) There is no evidence defendant had actual notice of the damage-causing defect located off the traveled portion of the roadway.

{¶ 10} 6) 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. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶ 11} 7) Size of the defect is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 297.

{¶ 12} 8) In order for there to be constructive notice, plaintiff must show 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.

{¶ 13} 9) No evidence has shown defendant had constructive notice of the defect located off the traveled portion of the roadway.

{¶ 14} 10) 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.

{¶ 15} 11) Plaintiff, in the instant case, has shown no adequate reason for his 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. Department of Transportation* (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 he has failed to produce evidence establishing defendant's notice of the defective condition.

IN THE COURT OF CLAIMS OF OHIO

DOUGLAS P. RYAN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-11230-AD
DEPARTMENT 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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Douglas P. Ryan
594 Crestwood Avenue
Wadsworth, Ohio 44281

Plaintiff, Pro se

Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

For Defendant

RDK/laa
2/22
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