[Cite as *Lowry v. Ohio Dept. of Transp.*, 2008-Ohio-7114.]

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

LAUREN LOWRY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08141-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On July 5, 2008, at approximately 11:00 p.m., plaintiff, Lauren Lowry, was traveling south on US 23 in Delaware County when her automobile struck a "huge hole" causing tire and rim damage to the vehicle. Plaintiff submitted photographs depicting the damage-causing "huge hole." The photographs show a depression located entirely off the traveled portion of the roadway on the unpaved roadway berm.

{¶ 2} 2) Plaintiff asserted the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway. Consequently, plaintiff filed this complaint seeking to recover $1,719.98, the cost of replacement parts and related repair expenses. The filing fee was paid.

{¶ 3} 3) Defendant denied liability in this matter based on the contention that no DOT personnel had any knowledge of the pothole prior to plaintiff's property damage occurrence. Defendant denied receiving any previous calls or complaints regarding the particular damage-causing pothole which DOT located at approximately milepost 13.74

on US Route 23 in Delaware County. Defendant asserted plaintiff failed to provide evidence to establish the length of time the pothole existed prior to 11:00 p.m. on July 5, 2008. Defendant suggested "it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident."

{¶ 4} 4) Defendant contended plaintiff failed to produce any evidence to show her damage was proximately caused by negligent roadway maintenance on the part of DOT. Defendant related that DOT "Delaware County Manager conducts roadway inspections of all state roadways within the county on a routine basis, at least one to two times a month." Apparently, no potholes were discovered at or near milepost 13.74 on US Route 23 the last time that particular section of roadway was inspected before July 5, 2008. DOT records show potholes were patched in the vicinity of plaintiff's damage occurrence on sixteen occasions between February 5, 2008 and June 6, 2008. All of these patching operations occurred in the northbound lanes of US Route 23. Furthermore, defendant submitted to the court photographs of the damage-causing defect and it appears the defective condition depicted is located on the roadway berm; completely outside the portion of the roadway designed for travel.

CONCLUSIONS OF LAW

{¶ 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.

{¶ 7} Plaintiff has not produced sufficient evidence to indicate the length of time that the particular pothole was present on the roadway prior to the incident forming the

basis of this claim. Plaintiff has not shown defendant had actual notice of the pothole. Additionally, 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 pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262, 577 N.E. 2d 458. There is no indication defendant had constructive notice of the pothole. Plaintiff has not produced any evidence to infer 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. 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.

{¶ 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. There is no evidence defendant had actual notice of the damage-causing defect located off the traveled portion of the roadway. No evidence has shown defendant had constructive notice of the defect located off the traveled portion of the roadway.

{¶ 9} The shoulder of the 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, 6 OBR 186, 451 N.E. 2d 1193. In the instant claim, plaintiff has offered no reasonable explanation or excuse for using the berm of the highway.

{¶ 10} 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*, 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 a reason to drive off the roadway she has failed to produce evidence establishing defendant's notice of

defective condition. *Landers v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2006-06264, 2007-Ohio-1273.

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

LAUREN LOWRY

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-08141-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:

Lauren Lowry
112 Acton Court
Delaware, Ohio 43015

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
11/24
Filed 12/16/08
Sent to S.C. Reporter 3/6/09