

[Cite as *Repasky v. Ohio Dept. of Transp.*, 2005-Ohio-5383.]

IN THE COURT OF CLAIMS OF OHIO

MICHELE LEE REPASKY :
Plaintiff :
v. : CASE NO. 2005-02699-AD
OHIO DEPARTMENT OF : MEMORANDUM DECISION
TRANSPORTATION :
Defendant :
: : : : : : : : : : : : : : : :

{¶ 1} On December 22, 2004, at approximately 2:00 p.m., plaintiff, Michele Lee Repasky, was traveling west on Interstate 70 in Guernsey County, when she decided to exit the interstate roadway by taking exit 176. Plaintiff recalled traveling at a speed of 55 mph as she drove onto the exit ramp from the roadway. When she moved onto the ramp, plaintiff recalled she saw a sign reading "Exit Ramp Closed" positioned immediately at the entrance of the ramp in the center of the driving lane. Plaintiff related she tried to avoid a collision by driving to the left of the stationary sign. However, in her attempt to drive around the sign, plaintiff scraped the right side of her automobile against the left side of the sign causing substantial body damage to the vehicle. Plaintiff estimated she was traveling about 55 mph when she exited Interstate 70 onto the exit 176 ramp. Plaintiff stated she stopped her car on the exit ramp after striking the sign and spoke with employees of defendant, Department of Transportation ("DOT"), who were at the scene. The DOT employees had apparently installed the ramp closed sign on the roadway exit ramp minutes prior to plaintiff's incident. After speaking with the DOT personnel at the scene, plaintiff drove home and reported the damage occurrence to DOT

County Manager Darryl Foset. Pursuant to instructions from DOT, plaintiff subsequently filed a traffic crash report with the local Ohio State Highway Patrol ("OSHP").

{¶ 2} In this OSHP report compiled on January 3, 2005, the date and time of plaintiff's property damage event was recorded as about 2:00 p.m. on December 22, 2004. The OSHP report included a written statement from plaintiff where she noted she was traveling west on Interstate 70 following a semi-truck with attached trailer when she turned her vehicle onto the State Route 723 Exit ramp (Exit 176). Plaintiff noted as she proceeded onto the ramp her car struck a road sign placed in the center of the roadway about three to four car lengths up the ramp. Plaintiff acknowledged she saw the sign for "maybe two seconds" before the collision occurred.

{¶ 3} The OSHP crash report also contained a statement from DOT employee, Dave McCauley, who had helped set up the sign on the State Route 723 exit ramp and was at the scene at the time of plaintiff's collision incident. McCauley stated he was part of a DOT work crew that placed an "Exit Ramp Closed" sign at the beginning of the State Route 723 exit ramp off Interstate 70 West. This ramp closed sign measuring 48" by 48" bore an orange reflective finish and was placed in the center of the ramp at about 12:30 p.m. on December 22, 2004. Traffic cones were set at intervals behind the sign further up the ramp. A DOT truck with flashers on was parked across the ramp behind the cones. DOT closed the ramp due to emergency circumstances, a previous motor vehicle crash. McCauley, who was standing on a hillside near the closed exit ramp, related he heard but did not see plaintiff's vehicle collide with the DOT sign. McCauley further related plaintiff, immediately after the collision, parked her car on the ramp near the positioned traffic cones and made remarks to the DOT work crew about not being able to see the exit ramp closed sign.

McCauley added the sign was not moved after plaintiff's incident and he did not observe any other motorists attempt to enter the ramp during the time he was at the site.

{¶ 4} Plaintiff has implied the damage to her automobile was the result of negligence on the part of DOT in the placement of the ramp closed sign. Consequently, plaintiff filed this complaint seeking to recover \$1,668.14, the total cost of automotive repair needed after her car was damaged on December 22, 2004. Plaintiff admitted she carries car insurance and received \$1,418.14 from her insurer to pay for repair costs resulting from the December 22, 2004, property damage event. Therefore, pursuant to R.C. 2743.02(D)¹, plaintiff's damage claim shall be limited to \$250.00, her unreimbursed insurance coverage deductible, plus \$25.00 for filing fee costs.²

{¶ 5} Defendant explained DOT maintenance crews were performing traffic control in the westbound lanes of Interstate 70 in Guernsey County on December 22, 2004, due to an accident that had occurred about 1:20 p.m. Part of the traffic control DOT used was the placement of a sign reading "Exit Ramp Closed" at the State Route 723 exit ramp from Interstate 70 West. Traffic control cones and a DOT truck with working flashers were positioned behind the sign further up the exit ramp. Defendant submitted several photographs of the Interstate 70 approach to the exit ramp and the ramp itself. These photographs depict a straight stretch of roadway and it appears the exit ramp entrance can be readily seen by motorists from a great distance. Defendant asserted these photographs

¹ R.C. 2743.02(D) states in pertinent part:
"Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant."

² The filing fee was paid on February 14, 2005.

demonstrate such visually discernable conditions where motorists like plaintiff had sufficient time to react to the ramp closure and avoid the sign placed on the ramp by defendant's crew. Defendant contended plaintiff failed to produce sufficient evidence to prove her property damage was caused by negligence on the part of DOT in locating the closed ramp sign. Defendant further contended plaintiff's own inability to adequately protect her property from the clearly visible traffic control placement was the sole proximate cause of the damage claimed. Defendant denied any negligent act by DOT personnel resulted in plaintiff's loss.

{¶ 6} Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. Breach of this duty, however, does not necessarily result in liability. Defendant is only liable when plaintiff proves, by a preponderance of the evidence, that defendant's negligence is the proximate cause of plaintiff's damages. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285.

{¶ 7} 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.

{¶ 8} DOT's duty in placing signs to advise motorists of maintenance activity and closures of particular roadway areas is established by the Ohio Manual of Uniform Traffic Control Devices for Streets and Highways ("Manual"). *Dunn v. Ohio Dept. of Transp.* (Jan. 18, 1992), Ct. of Claims No. 90-07280, unreported. The scope of defendant's duty to ensure the safety of state highways is defined by the Manual. *Leskovac v. Ohio Dept. of Transp.* (1990),

71 Ohio App. 3d 22, 27, 593 N.E. 2d 9. Certain portions of the Manual are permissive, meaning some decisions are within defendant's discretion and engineering judgment. *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App. 3d 487, 584 N.E. 2d 794. The issue of whether an act constitutes a mandatory duty or a discretionary act determines the scope of the state's liability because DOT is immune from liability for damages resulting from not performing a discretionary act. *Gregory v. Ohio Dept. of Transp.* (1995), 107 Ohio App. 3d 30, 33-34, 667 N.E. 2d 1009 citing, *Winwood v. Dayton* (1988), 37 Ohio St. 3d 282, 525 N.E. 2d 808. A deviation from the mandatory standards of the Manual renders DOT negligent per se and liable in damages if proximate causation is established. *Madunisky v. Ohio Dept. of Transp.* (1996), 109 Ohio App. 3d 418; *Perkins v. Ohio Dept. of Transp.* (1989), 65 Ohio App. 3d 487, 494; *Wax v. Department of Transportation*, 2001-Ohio-1856.

{¶ 9} In the instant claim, plaintiff has argued she did not receive proper prior warning of DOT's act in closing the ramp from Interstate 70 West and consequently, did not have sufficient time to avoid contact with DOT's sign when she tried to drive onto an exit ramp she believed was open to travel. Section 6-G.19 of the Manual deals with traffic control through an incident area, a particular situation which defendant encountered on December 22, 2004. Section 6-G.19 states:

{¶ 10} "An incident is an emergency road user occurrence, a natural disaster, or special event.

{¶ 11} "The primary functions of temporary traffic control at an incident area are to move road users safely and expeditiously through or around the incident, and to reduce the likelihood of secondary crashes. Examples include a stalled vehicle blocking a lane, a road user crash blocking the traveled way, a chemical spill along a highway, floods and severe storm damage, a planned visit by

a dignitary, or a major sporting event."

{¶ 12} This Manual section further states:

{¶ 13} "While some incidents might be anticipated and planned for, emergencies and disasters might pose more severe and unpredictable problems. The ability to install proper temporary traffic control might greatly reduce the effects of an emergency. An essential part of fire, rescue, spill clean-up, and enforcement activities is the proper control of road users through the incident area . . .

{¶ 14} "For unexpected incidents, particularly those of an emergency nature, temporary traffic control devices on hand may be used for the initial response as long as they do not themselves create unnecessary additional hazards."

{¶ 15} By closing the exit ramp off Interstate 70, defendant's personnel created a "temporary traffic control zone" as explained in the Manual. Section 6-B.01 particularly provides:

{¶ 16} "The control of road users through a temporary traffic control zone shall be an essential part of highway construction, utility work, maintenance operations, and incident management.

{¶ 17} "Support:

{¶ 18} "Construction, maintenance, utility, and incident zones can all benefit from temporary traffic control to compensate for the unexpected or unusual situations faced by road users. When planning for temporary traffic control in these zones, it can be assumed that it is appropriate for road users to exercise extra caution. Even though road users are assumed to be using extra caution, special care is still needed in applying temporary control techniques . . .

{¶ 19} "Road user movement should be inhibited as little as practical, based on the following considerations:

{¶ 20} "A. Temporary traffic control at work and incident

sites should be designed on the assumption that drivers will only reduce their speeds if they clearly perceive a need to do so (see Section 6C.01).

{¶ 21} "B. Frequent and abrupt changes in geometrics such as lane narrowing, dropped lanes, or main roadway transitions that require rapid maneuvers, should be avoided.

{¶ 22} "C. Provisions should be made for the reasonably safe operation of work, particularly on high-speed, high-volume roadways.

{¶ 23} "D. Road users should be encouraged to use alternative routes that do not include temporary traffic control zones . . .

{¶ 24} "Drivers, bicyclists, and pedestrians should be guided in a clear and positive manner while approaching and traversing temporary traffic control zones and incident sites. The following principles should be applied:

{¶ 25} "A. Adequate warning, delineation, and channelization should be provided to assist in guiding road users in advance of and through the temporary traffic control zone or incident site by using proper pavement marking, signing, or other devices that are effective under varying conditions.

{¶ 26} "B. Temporary traffic control devices inconsistent with intended travel paths through temporary traffic control zones should be removed or covered. However, in intermediate-term stationary, short-term, and mobile operations, where visible permanent devices are inconsistent with intended travel paths, devices that highlight or emphasize the appropriate path should be used."

{¶ 27} Section 6.C.04 of the Manual which addresses advanced warning in a temporary traffic control zone states:

{¶ 28} "The advance warning area is the section of highway where road users are informed about the upcoming work zone or

incident area.

{¶ 29} "Options:

{¶ 30} "The advance warning area may vary from a single sign or rotating/strobe lights on a vehicle to a series of signs in advance of the temporary traffic control zone activity.

{¶ 31} "Guidance:

{¶ 32} "Typical distances for placement of advance warning signs on expressways and freeways should be longer because drivers are conditioned to uninterrupted flow. Therefore, the advance warning sign placement should extend on these facilities as far as 800 m (0.5 mi) or more."

{¶ 33} Evidence in the instant claim has shown, defendant did not install any advance warning signs on Interstate 70 warning motorists about the exit ramp closure for exit 176. It appears the first warning utilized was the placement of the Exit Closed sign across the traveled portion of the exit ramp itself. Although DOT could have placed an "Exit Closed Ahead" sign over the permanent exit 176 sign on Interstate 70, no advance warning sign was used. No other advance warning signs were positioned at any point of approach to the exit 176 ramp. The Manual provides that advanced warning signs should be placed about 1000 feet or more in advance of the closed freeway exit ramp. (See Section 6F.16). An advanced warning sign includes an "Exit Closed" sign.

{¶ 34} From a review of the Manual in application to the circumstances surrounded the present claim, it appears Manual guidelines point out advance warning signs of the exit closure "should" have been placed on Interstate 70. Use of the word "should" connotes an advisory, but not mandatory condition and consequently, does not constitute negligence per se when DOT failed to act on this advisory notation. See *Kocur v. Ohio Dept. of Transp.* (1993), 63 Ohio Misc. 2d 342. After examining all evidence

in the claim file, including narratives, statements, and photographs, the court concludes the sole proximate cause of plaintiff's damage was her own negligence in failing to avoid the readily discernible exit closed sign placed in a stationary position in the center of the roadway. Plaintiff's driving probably constituted a violation of R.C. 4511.21(A)³ and, therefore, her claim is denied.

IN THE COURT OF CLAIMS OF OHIO

MICHELE LEE REPASKY :
Plaintiff :
v. : CASE NO. 2005-02699-AD
OHIO DEPARTMENT OF : ENTRY OF ADMINISTRATIVE
TRANSPORTATION : DETERMINATION

³ R.C. 4511.21(A) states:

"(A) No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead."

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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

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