[Cite as *Drummond v. Ohio Dept. of Transp.*, 2005-Ohio-6121.]

IN THE COURT OF CLAIMS OF OHIO

JUDITH L. DRUMMOND	:	
Plaintiff	:	
v.	:	CASE NO. 2005-07801-AD
OHIO DEPT. OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} During February and March, 2005, on two separate occasions, a mobile home and detached wooden deck porch owned by plaintiff, Judith L. Drummond, were moved to a real property location purchased by plaintiff at 7351 Walnut Street, Belle Center, Ohio. The property at the Walnut Street address abuts and is adjacent to State Route 117 in Logan County. The contractor, who plaintiff hired to move her mobile home and deck, moved the deck first, placing this porch several feet off the berm area of the highway lane of State Route 117 directly on the roadway right of way. The roadway right of way to State Route 117 falls under the maintenance jurisdiction of defendant, Department of Transportation ("DOT"). Plaintiff submitted photographs depicting the wooden deck porch positioned near the paved roadway berm area on DOT's right of way.

{¶ 2} According to plaintiff, her wooden deck was left on the berm of State Route 117 because her yard at the Walnut Street address was too wet to support the porch. This deck, minus a roof, remained positioned near the berm area of State Route 117 even after plaintiff's mobile home was moved to the site on March 19,

2005. On March 21, 2005, plaintiff moved into her newly sited mobile home, but the wooden deck porch remained on the property where it was originally positioned in February, 2005. Plaintiff recalled on or about April 6 or April 7, 2005, employees of defendant removed her wooden deck from the roadway berm area by sawing the porch rails into pieces and carting the remnants away. Plaintiff related she was told the deck "was ordered to be removed it was litter in the ditch."

{¶ 3} Plaintiff contended defendant should bear the cost of replacing her wooden deck porch that was destroyed by DOT employees. Consequently, plaintiff filed this complaint seeking to recover $2,500.00, the estimated replacement cost of a wooden deck. The filing fee was paid.

{¶ 4} Defendant explained DOT personnel discovered plaintiff's deck structure standing on the State Route 117 right of way in mid February, 2005. Defendant further explained DOT personnel assumed the deck "was unclaimed litter." Furthermore, defendant's employees believed the porch deck constituted a safety hazard to motorist travel on State Route 117. Therefore, a decision was made by defendant to remove this obstacle which apparently presented a safety hazard. Defendant denied having any knowledge the wood deck positioned on the State Route 117 right of way was owned by plaintiff. Defendant insisted DOT employees concluded the deck was abandoned property.

{¶ 5} Defendant acknowledged a DOT work crew was dispatched on April 6, 2005, to remove the porch deck from the State Route 117 right of way. While the DOT crew was dismantling the deck to facilitate its removal, plaintiff appeared on the scene and asked why her deck was being destroyed. Defendant maintained plaintiff was advised by a DOT employee that the deck was considered litter and a hazard since the porch had sat on the State Route 117 right

of way for nearly two months prior to April 6, 2005. At the time plaintiff appeared to claim ownership of the deck, the DOT crew had already removed (sawed off) the roof support planks and porch railing from the floor platform. Defendant advised the DOT crew offered to move the deck floor platform onto plaintiff's property, but plaintiff decided to have DOT remove the entire dismantled porch deck since she considered the deck ruined by the removal actions already taken.

{¶ 6} Plaintiff disputed defendant's conclusion the deck structure presented a hazard on the roadway right of way. Plaintiff asserted DOT workers should have informed her of their plans to remove the deck considering she was present in her mobile home on April 6, 2005, when removal work began. Plaintiff pointed out she had been residing in her mobile home for almost three weeks prior to April 6, 2005, and no DOT personnel tried to inform her of DOT intentions to remove her deck structure. Plaintiff stated she was attempting to have her deck removed from the State Route 117 right of way, but she could not get the deck moved before the events leading to the filing of this claim.

{¶ 7} Defendant argued that under the facts of the present claim, DOT should be immune from liability for the intentional destruction of plaintiff's property. Defendant professed the porch deck was illegally deposited on the roadway right of way constituting an obstructive safety hazard necessitating removal granted by statutory authority. See R.C. 5515.02.[1] Defendant, in

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[1] 5515.02 Removal of structures constituting obstructions or interferences.

"All individuals, firms, and corporations using or occupying any part of a road or highway on the state highway system with telegraph or telephone lines, steam, electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise or permit granted and in force, shall remove from the bounds of the road or highway, their poles and wires connected therewith, and any tracks, switches, spurs, or oil, gas, water, or other pipes, mains, conduits, or other objects or structures, when in the opinion of the director of transportation they constitute

fact, contended DOT was charged with a duty to remove obstructions, such as plaintiff's deck which are determined to interfere with the ability to maintain the roadway in a safe condition. Defendant also asserted DOT had no duty to notify plaintiff of any intention to remove her deck, although R.C. 5515.02 contains a notice requirement unless the obstruction is deemed to "present an immediate and serious threat to the safety of the traveling public." Furthermore, defendant related DOT considered plaintiff's deck abandoned property constituting litter and therefore, had no idea of who or where the original owner was in order to satisfy the

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obstructions, or they interfere or may interfere with the contemplated construction, reconstruction, improvement, maintenance, repair, or use by the traveling public of the roads or highways.

"All individuals, firms, or corporations so occupying any road or highway on the state highway system, under and by virtue of a franchise or permit granted and in force, shall relocate their properties and all parts thereof within the bounds of the road or highway when in the opinion of the director they constitute obstructions, or they interfere with or may interfere with the contemplated construction, reconstruction, improvement, maintenance, repair, or use of the road or highway. The relocation within the bounds of the road or highway shall be in the manner and to the extent prescribed by the director.

"If, in the opinion of the director, such individuals, firms, or corporations have obstructed any road or highway on the state highway system, or if any of their properties are so located that they do or may interfere with the contemplated construction, reconstruction, improvement, maintenance, repair, or use of the road or highway, the director shall notify such individual, firm, or corporation directing the removal of the obstruction or properties, or the relocation of the properties. If the individual, firm, or corporation does not within five days from the service of the notice proceed to remove or relocate the obstruction or properties and complete the removal or relocation within a reasonable time, the director may remove or relocate the same by employing the necessary labor, tools, and equipment. Any notice required under this section shall be made by personal service, certified mail, or express mail.

"If, in the director's opinion, the obstruction or properties present an immediate and serious threat to the safety of the traveling public, the director may remove or relocate the obstruction or properties without prior notice.

"When the director performs a removal or relocation under this section, the costs and expenses shall be paid by the director out of any appropriation of the department of transportation available for the establishment, construction, reconstruction, improvement, maintenance, or repair of highways, and the amount thereof shall be certified to the attorney general for collection by civil action.

"As used in this section, "road" or "highway" has the same meaning as in section 5501.01 of the Revised Code and also includes any part of the right of way."

notice requirement concerning the intent to remove the obstruction. Under the circumstances presented, where the wooden porch deck was present on the property many weeks prior to the arrival of plaintiff's mobile home, defendant contended it was reasonable to conclude the deck was abandoned property apparently unclaimed.

{¶ 8} In *Ritchie v. Ohio Dept. of Transp.* (May 11, 2004), Franklin App. No. 03AP-691, 2004-Ohio-2505, the 10th District Court of Appeals held that DOT had a right to remove obstructing tree limbs from a roadway right of way without bearing any liability to the owner of the trees for damage to the growing trees. This right to enter land to cut down deemed obstructions was promoted under the premise of maintaining safe roadway travel and related highway improvements. From the facts involved, *Ritchie*, id., suggests DOT may enter upon a roadway right of way and remove growing plant life obstructions with consequential immunity for damage to property caused in the process of removing the obstruction. The removal of trees from a right of way is not a taking requiring compensation pursuant to Section 19 Article I of the Ohio Constitution. *Ritchie*, supra, overruling a previous holding by the same court in *Rummel v. Ohio Dept. of Transp.* (1981), 3 Ohio App. 3d 38. The subject private property removed and dismantled in the instant action was a wooden porch deck that had previously been affixed to the entrance of plaintiff's mobile home.

{¶ 9} Section 19, Article I, Ohio Constitution, states:

{¶ 10} "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first

be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deductions for benefits to any property of the owner."

{¶ 11} Generally claims arising out of the United States or Ohio Constitutions, are not cognizable in this court. However, a specific exception exists where the issue involves an uncompensated taking of property in alleged violation of Section 19, Article I of the Ohio Constitution. *Kermetz v. Cook-Johson Realty Corp.* (1977), 54 Ohio App. 2d 220; *Nacelle Land Mgt. Corp. v. Ohio Dept. of Natural Resources* (1989), 65 Ohio App. 3d 481.

{¶ 12} Defendant's act of dismantling and removing plaintiff's wooden deck porch attachment constituted a taking whether the deck was considered a structure, fixture, or improvement on plaintiff's land. The deck was already attached to plaintiff's land and plaintiff's intent was to have the deck serve as a porch entrance attachment to her mobile home. Under the facts of this case, plaintiff is entitled to compensation for her property that was taken by defendant, considering the nature of the property taken.

{¶ 13} Although plaintiff has claimed her wooden deck porch was valued at $2,500.00 and she has filed a replacement cost estimate showing the deck could be replaced at a cost of $2,500.00, the trier of fact finds plaintiff overstated her damages. Compensation assessment for a taking of property shall be set at the fair market value of the property taken. Upon examining photographs of the intact porch deck before it was dismantled by DOT, the trier of fact determines the deck, as it existed on April 6, 2005, had a fair market value of 500.00. Therefore, defendant is liable to plaintiff in the amount of $500,00. plus filing fees, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

IN THE COURT OF CLAIMS OF OHIO

JUDITH L. DRUMMOND	:	
Plaintiff	:	
v.	:	CASE NO. 2005-07801-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 plaintiff in the amount of $525.00, which includes the filing fee. Court costs are assessed against defendant. 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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Plaintiff, Pro se

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For Defendant

RDK/laa
10/19
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