[Cite as *Sandow v. Ohio Dept. of Transp.*, 2006-Ohio-7134.]

IN THE COURT OF CLAIMS OF OHIO

FABIANA SANDOW	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09979-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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FINDINGS OF FACT

{¶ 1} 1) On June 13, 2005, plaintiff, Fabiana Sandow, was traveling north on US Route 22 in Hamilton County, when her vehicle ran over a loose manhole cover which then "flipped up and damaged the front passenger side wheel rim and door" of the vehicle. Plaintiff related the manhole cover was not secure and her vehicle's tire ran over the unsecured cover causing it to strike the side of plaintiff's 2004 Honda Pilot. Plaintiff located the manhole at "approximately 50 feet from the intersection of East Galbraith and Montgomery Rd (US Route 22) heading north."

{¶ 2} 2) Plaintiff filed this complaint seeking to recover $1,567.38, the cost of automotive repair resulting from the June 13, 2005, incident. Plaintiff contended she incurred these damages as a result of negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition on the roadway. The filing fee was paid.

{¶ 3} 3) Defendant explained the area where plaintiff's

damage event occurred was located in a construction zone under the control of DOT contractor, The Ruhlin Company ("Ruhlin"). Construction on widening Montgomery Road began on February 26, 2004, with a completion date of November 3, 2005. It appears roadway construction had been completed in the area of plaintiff's damage occurrence by June 13, 2005. Defendant submitted written comments concerning the damage-causing manhole cover from Ruhlin's Project Superintendent, Norman B. Obert. Obert noted the manhole was adjusted to grade using existing components in October, 2004. Obert related the existing storm sewer manhole was emplaced according to DOT specifications indicating manhole "lids held in place by gravity," with no securing attachments required. Obert further related, the existing lid and casting of the storm sewer manhole was used since DOT did not contract for or request new components be installed.

{¶ 4} 4) Defendant asserted DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant stated Ruhlin, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Ruhlin is the proper party defendant in this action. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular section of roadway.

{¶ 5} 5) Furthermore, defendant denied receiving any prior calls or complaints about the subject condition. Defendant

insisted neither DOT nor Ruhlin had any notice of the manhole cover prior to June 13, 2005. Defendant contended plaintiff failed to prove her property damage was caused by any negligent act or omission on the part of DOT or its agents.

{¶ 6} 6) Defendant submitted photographic evidence of the manhole on US Route 22. This photograph depicts a manhole located entirely off the traveled portion of the roadway on the roadside berm area near but not on a driveway entrance to a private business.

CONCLUSIONS OF LAW

{¶ 7} 1) The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. See *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD, jud, 2004-Ohio-151.

{¶ 8} 2) Defendant has the duty to maintain its highway 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.

{¶ 9} 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. Generally, a

plaintiff is barred from recovery for property damage caused by a defective condition located off the traveled portion of the roadway.

{¶ 10} 4) 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 for driving on the berm area of a roadway.

{¶ 11} 5) 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. 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. Plaintiff has failed to prove her property damage was caused by any negligence on the part of defendant. In fact the sole cause of plaintiff's damage was her own negligent driving. See *Wieleba-Lehotzky v. Ohio Dept. of Transp., Dist.* 7, 2004-03918-AD, 2004-Ohio-4129; *Repasky v. Ohio Dept. of Transp.*, 2005-02699-AD, 2005-Ohio-5383.

IN THE COURT OF CLAIMS OF OHIO

FABIANA SANDOW	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09979-AD
OHIO 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:

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For Defendant

RDK/laa
2/1
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