

[Cite as *Kaltenbach v. Ohio Dept. of Transp., Dist. 6, 2006-Ohio-7172.*]

IN THE COURT OF CLAIMS OF OHIO

JAMES R. KALTENBACH	:	
Plaintiff	:	
v.	:	CASE NO. 2006-01301-AD
OHIO DEPT. OF TRANSPORTATION,	:	<u>MEMORANDUM DECISION</u>
DISTRICT 6	:	
Defendant	:	

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{¶ 1} On December 11, 2005, at approximately 5:00 p.m., plaintiff, James R. Kaltenbach, was traveling through a construction zone on Interstate 70 in Clark County, when he approached an area designated to function as a crossover road for traffic "to merge with I-70 west bound." This construction cross over area was maintained with traffic control devices (orange barrels) and had a posted speed limit of presumed 55 mph. The crossover area consisted of two traffic lanes delineated with a white painted center line and painted edge lines of white on the right lane and orange on the left lane. When plaintiff drove through this area his vehicle drove across the orange painted edge line and into a massive hole adjacent to the painted edge line and off the paved portion of the roadway. As a result of striking this hole off the designated traveled portion of the roadway, plaintiff stated he suffered damage to "the front left (drivers side) rim" of his car. Plaintiff submitted photographs of the location where his property damage occurred. These photographs depict the roadway crossover both before and after repairs were made to the off-road defect.

Before photos clearly show a rut located to the left of the paved crossover area and totally outside the orange painted

{¶ 2} roadway edge line. A photograph is included of a semi-truck trailer traveling precariously close to the off-road rut adjacent to the paved crossover. After photographs depict subsequent asphalt patched repairs made adjacent to the paved area of the crossover. All photographs show the crossover area lined with orange traffic control barrels positioned in a line along both sides of the marked roadway lanes.

{¶ 3} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear responsibility for his property damage. Plaintiff filed this complaint seeking to recover \$368.94 for replacement parts and related expenses resulting from the December 11, 2005, incident. The filing fee was paid.

{¶ 4} Defendant acknowledged the area where plaintiff's damage event occurred was located within a construction zone where multiple repair activities such as grading, draining, paving, and bridge work were being performed on Interstate 70 between mileposts 25.11 to 29.32 in Clark County. Defendant explained the roadway construction zone was under the control of DOT contractor, Kokosing Construction Company ("Kokosing"). On the stated date of plaintiff's damage occurrence, December 11, 2005, a Sunday, no Kokosing personnel were working in the area. In fact, Kokosing did not work on the construction project on December 9, 2005, due to inclement weather (snow) and no activity was recorded on December 10, 2005, a Saturday. Work resumed on the project on December 12, 2005, the day after

plaintiff's stated incident. The immediate area where plaintiff's incident occurred would be close to milepost 25.11, the extreme west end of the construction project. Defendant submitted a written statement from Kokosing representative, Pam J. LeBlanc, regarding the roadway condition that damaged plaintiff's vehicle. Information LeBlanc obtained clearly showed the pothole plaintiff's car struck was located "outside of the work area" on the berm of the temporary roadway crossover. LeBlanc explained the situation involving the crossover noting the following: "This was face-on-face traffic on the freeway. Traffic was leaving the face-on-face to go across the median back to their side, cutting the corner short as they were re-entering old pavement. They were not following the roadway. There was not much of a paved shoulder, so traffic was dropping off the actual asphalt if they went off the roadway. This created a rut and as they hit existing concrete roadway, it became a sharp edge. The immediate fix was to slide a barrel closer to traffic, which made traffic stop cutting the corner short."

{¶ 5} Pursuing an argument promoted in numerous claims, defendant has contended DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant asserted Kokosing, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Kokosing 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 roadway section. 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. Furthermore, despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with a duty to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. 00AP-1119, 2001 Ohio App. LEXIS 2854.

{¶ 6} Plaintiff, in his response to defendant's investigation report, insisted his automobile was damaged as a proximate cause of negligence on the part of defendant in failing to maintain safe roadway conditions. Plaintiff suggested he was directed to drive his car in the rut on the berm area of the crossover, pointing out, "both the barrels and the white line of the road lead into the unpaved area, thus creating the hazardous area." Plaintiff also asserted DOT personnel were aware of the roadway berm area defect prior to his December 11, 2005, property damage event.

{¶ 7} Defendant denied neither DOT nor Kokosing had any notice of a roadway defect prior to December 11, 2005. Defendant argued liability cannot be established when requisite notice of a damage-causing defect cannot be proven. Generally, defendant

is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1.

{¶ 8} 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} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346. In fact the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42. When determining claims involving vehicle damage in a roadway construction zone, the court must look at the totality of the circumstances in concluding whether DOT's actions were sufficient to render the highway reasonably safe for motorists. *Feichtner*, supra; See also *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp.* (1988), 49 Ohio App. 3d 129, 130.

{¶ 10} 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. The shoulder of a highway is designated 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. Plaintiff, in the instant claim, 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; *Roadway Express*, supra.

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JAMES R. KALTENBACH :
Plaintiff :
v. : CASE NO. 2006-01301-AD
OHIO DEPT. OF TRANSPORTATION, : ENTRY OF ADMINISTRATIVE
DISTRICT 6 : 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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For Defendant

RDK/laa

3/29

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