[Cite as *Figer v. Dept. of Transp.*, 2007-Ohio-657.]

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

DONALD L. FIGER

Plaintiff

v.

DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2006-05616-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} On July 20, 2006, plaintiff, Donald L. Figer, was traveling south on Interstate 271, "getting off Chagrin Blvd." through a construction zone, when his automobile wheel struck a "hole" causing body damage to the vehicle. Plaintiff asserted the damage to his car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a hazardous condition on the roadway in a construction area. Plaintiff filed this complaint seeking to recover $250.00, his insurance coverage deductible for automotive repairs. Damages for a claim of this type are limited by the provision provided in R.C. 2743.02(D).[1] The filing fee was paid.

{¶2} Defendant explained the area where plaintiff's damage occurred was located within a construction area under the control of DOT contractor, Shelly Company ("Shelly"). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Shelly had any knowledge of any roadway defect at the location provided by

[1] R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."

plaintiff. Defendant asserted Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Shelly 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.

{¶3} From plaintiff's description of the roadway area where his damage occurred, DOT located the incident site at milepost 8.14 on Interstate 271 in Cuyahoga County. Defendant submitted a statement from Shelly Assistant Safety Officer, Bea Rausch, regarding her contact with plaintiff about the July 20, 2006 incident, the roadway location where the damage occurred, and the actual roadway condition alleged to have caused the damage. Rausch recorded plaintiff informed her that his property damage occurred as he was, "exiting the express lane onto the local lanes of I-271, just before the Chagrin Blvd. exit," when he hit a, "rut in the road." Rausch determined the described "rut in the road" is in actuality the roadway wick drain installed where the express lanes and local lanes merge. Rausch surmised plaintiff's damage occurred as he "decided to exit the express lane prematurely, running over the wick drain."

{¶4} Photographs of the roadway area where the July 20, 2006, incident occurred were submitted. These photographs depict the delineated express lane exit, the delineated local lanes, and the wick drain area positioned between the delineated roadway lanes of travel. The wick drain is clearly shown to be located off the traveled portion of the roadway lanes in between clearly line marked roadway lanes. The wick drain or "slotted drain" as designated by defendant is highly visible and appears at the bottom of a sloped or paved depression between the express lane exit and the local traffic lanes of Interstate 271.

{¶5} Defendant submitted a written statement from DOT Project Engineer, Mark M. Sakian, regarding his observations in respect to roadway slotted drains. Sakian noted

the drain type is common in roadway areas where "a slip ramp connects the express lanes with the local lanes at both entrances and exits." Sakian also noted the drains are intended to be installed "in gore areas and not in travelled, marked lanes." Additionally, Sakian recorded, "[t]raffic was not channeled to cross over the slotted drain." The area where plaintiff's property damage occurred, according to Sakian, was outside the marked portion of the roadway designed for vehicular travel.

{¶6} Defendant denied plaintiff's damage was caused by any negligent act or omission on the part of DOT or its contractors. Defendant contended plaintiff failed to produce any evidence to establish his property damage was caused by a hazardous roadway condition.

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. ODOT 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 defect or any 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 his action of driving off the marked traveled portion 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 his property damage was caused by any negligence on the part of defendant. In fact, the sole cause of plaintiff's damage was his 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.

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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. 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:

Donald L. Figer
10658 Buckingham Place
Concord, Ohio 44077

Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
12/15
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