

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

RUTH ANN BERWANGER

Case No. 2007-07396-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

MEMORANDUM DECISION

OHIO DEPT. OF TRANSPORTATION

Defendant

FINDINGS OF FACT

{¶1} 1) On July 6, 2007, at approximately 3:00 p.m., plaintiff, Ruth Ann Berwanger, was traveling east on the entrance ramp to State Route 32 from State Route 132, when her automobile struck a pothole causing tire and rim damage. Plaintiff related the damage-causing pothole measured eighteen feet in length and ten inches in depth.

{¶2} 2) Plaintiff implied the damage to her car was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the roadway entrance ramp free of hazardous conditions. Consequently, plaintiff filed this complaint seeking to recover \$382.49, the cost of replacement parts and repair expenses resulting from the July 6, 2007 incident. The filing fee was paid.

{¶3} 3) Defendant denied liability in this matter based on the contention no DOT personnel had any knowledge of the particular damage-causing pothole prior to plaintiff's incident. Defendant suggested, "it is more likely than not that the pothole existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant located the alleged defect at Ramp F from milepost 7.42 to 7.64 on State Route 32 in Clermont County.

{¶4} 4) Defendant pointed out the particular damage-causing roadway defect was apparently located off the traveled portion of the roadway. Plaintiff submitted

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photographs depicting the described pothole condition. The specific defect photographed appears clearly outside the lane of travel and outside of the white painted roadway edgeline.

CONCLUSIONS OF LAW

{¶5} 1) 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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864.

{¶6} 2) 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.

{¶7} 3) 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, 6 OBR 186, 451 N.E. 2d 1193. In the case at bar, plaintiff has offered no reasonable explanation for driving on the berm area of a roadway.

{¶8} 4) Plaintiff, in this instant case, has shown no adequate reason for her action of driving off the marked traveled portion of the highway, consequently, based on the rationale of *Colagrossi*, (1983), 82-06474-AD, 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

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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.

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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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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Filed 1/30/08

Sent to S.C. reporter 4/2/08