

[Cite as *Monroe v. Ohio Dept. of Transp.*, 2002-Ohio-6953.]

IN THE COURT OF CLAIMS OF OHIO

EUGENE J. MONROE :
8524 Tanglewood Trail :
Chagrin Falls, Ohio 44023-5652 : Case No. 2002-07681-AD

Plaintiff : MEMORANDUM DECISION

v. :

DEPARTMENT OF TRANSPORTATION :

Defendant :

: : : : : : : : : : : : : : :

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

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FINDINGS OF FACT

{¶1} At approximately 3:15 p.m., on May 22, 2002, plaintiff, Eugene J. Monroe, was traveling south on State Route 44 south of State Route 87 in Geauga County when his automobile struck a deteriorated section of roadway pavement causing tire and rim damage to the vehicle. The general location of plaintiff's property damage event was between milepost 6.30 and 7.5 on State Route 44, Evidence has shown the defective condition which resulted in plaintiff's automotive damage was located on the berm area of the roadway. Plaintiff filed this complaint seeking to recover \$1,055.35, the cost of replacement tire and rims, car rental expenses and repair expenses associated with the May 22, 2002 incident. Plaintiff submitted the filing fee with the complaint. Plaintiff has suggested his damages were proximately caused by negligence on the part of defendant, Department of Transportation,

in failing to maintain the roadway.

{¶2} Defendant denied any liability in this matter. Defendant pointed out the deteriorated pavement which plaintiff's automobile struck was located on the berm area of the roadway. Defendant denied having any knowledge of the defective condition. Defendant argued it cannot be held liable for damage caused by roadway defects located off the traveled portion of the roadway when no adequate reason exists for driving off the roadway.

{¶3} Plaintiff filed a response. Plaintiff explained when he was driving south on State Route 44 a north bound vehicle approached his car and moved close to the yellow painted center line demarcating the north and south lanes of the roadway. Plaintiff indicated he reacted to the driving of the north bound vehicle by veering onto the berm of the roadway and striking the deteriorated pavement area. Plaintiff reasoned he was forced from the traveled portion of the roadway by the oncoming vehicle driving close to the marked center of the roadway. Plaintiff did not make any reference in his original complaint about this incident involving his reaction to another motorist's driving maneuver. The trier of fact does not find plaintiff's explanation particularly persuasive.

CONCLUSIONS OF LAW

{¶4} Generally in order to recover in a claim regarding damage from pavement defects, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. However, when damages rise from a motorist striking a pavement defect located on the berm or shoulder of the roadway, notice of the defect is generally not an issue. 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 reason. *Colagrossi v. Department of Transportation* (1983), 82-06474-AD.

{¶5} 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 or excuse for using the berm of the highway.

{¶6} Plaintiff, in the instant case, has shown no adequate reason for the driver's 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. Jackson* (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, jud. Accordingly, driver overreaction and overcompensation for the acts of fellow motorists do not constitute adequate reasons for driving onto the roadway berm.

{¶7} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶8} IT IS ORDERED THAT:

{¶9} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶10} 2) The court shall absorb the court costs in this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

Sent to S.C. reporter 12/17/02