

In the Common Pleas Court of Montgomery
County, Ohio

BRISTOL et al.,

Case No. 05-2820

Plaintiffs,

v.

Knowles et al.,

Defendants.

DECISION AND ENTRY ON MOTION IN LIMINE

Date of Decision: 05/26/2006

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Appearances:

John E. Breidenbach, for plaintiffs.

Joseph V. Erwin, for defendant Shawna E. Knowles.

C. Joseph McCullough, for defendant USAA.

Gregory G. Beck, for United Healthcare of Ohio, Inc.

FROELICH, Judge.

{¶ 1} With all apologies and due credit to Shel Silverstein, the court is asked to decide “where the roadway ends.”

{¶ 2} It is not disputed in this case that the plaintiff was attempting to overtake and pass the defendant’s automobile and, in doing so, traveled to the right, or outside, of the white edge line, while remaining on the pavement.

{¶ 3} R.C. 4511.28(B) permits the driver of a vehicle to overtake and pass another vehicle under conditions permitting such movement in safety, but “[t]he

[Cite as *Bristol v. Knowles*, 138 Ohio Misc.3d 14, 2006-Ohio-3637.]

movement shall not be made by driving off the roadway.” R.C. 4511.01(EE) defines “roadway” as “that portion of a highway improved, designed, or ordinarily used for vehicular travel, except the berm or shoulder.” “Highway” is defined as “the entire width between the boundary lines of every way open to use of the public as a thoroughfare for purposes of vehicular traffic.” R.C. 4511.01(BB). A “roadway,” as a “portion of a highway,” cannot be more inclusive than a “highway” and, thus, must be something less than the “entire width between the boundary lines.” This is a logical impossibility and may partially explain the lack of clear precedent on this issue.

{¶ 4} These definitions are from the Uniform Act Regulating Traffic on Highways and are used throughout the country. See, e.g., Ky.Rev.Stat. Ann. 189.010(10), Fl.Stat. 316.003(42), Az.Rev.Stat. 28-602(17), La.Rev.Stat. Ann. 48:1(20). Louisiana also defines “shoulder” at La.Rev.Stat. Ann. 48:1(21) as “the portion of the highway contiguous with the roadway for accommodation for stopped vehicles, for emergency use, and for lateral support of base and surface,” but Ohio law contains no such specific definition.

{¶ 5} The defendants contend that plaintiff was in violation of R.C. 4511.28(B), since “roadway” is defined as that portion of the highway designed for travel, except the berm or shoulder, and “highway” is the area between the boundary lines. *Siders v. Reynoldsburg School Dist.* (1994), 99 Ohio App. 3d 173. Therefore, since the defendant traveled outside the white lines, he was off the “highway,” and, by definition, off the “roadway.”

{¶ 6} This analysis is contrary to *Cupp v. Kudla*, 158 Ohio App. 3d 728, 2004-Ohio-5528, and to *Sech v. Rogers* (1983), 6 Ohio St. 3d 462. In *State v. Albers* (March 9, 1992), Warren App. No. CA01-05-044, the defendant argued that although he had driven beyond the road's boundary line, he was not in violation of R.C. 4511.28(B) because he had remained on the hard surface of the roadway. The court did not answer the assigned error, instead finding that there was testimony that the defendant had driven at least partially on the gravel and, thus, off the hard surface of the roadway. However, the concurring judge separately wrote that the defendant "would not have violated the statute had he simply driven over the white edge line without leaving the paved portion of the roadway."

{¶ 7} Suffice it to say that an analysis of these cases and a discussion of what is binding precedent, what is the effect of the "two issue rule," and what is dicta or harmless error merits a law school exam question, rather than a decision on a motion in limine for a case that is set for trial in less than a week.

{¶ 8} A holding as to whether the area outside of the white line is included in the roadway does not necessarily favor a plaintiff or a defendant. In *Cupp*, for example, it was the plaintiff who wanted the area outside of the white line *not* to be considered the roadway. The court found that it was part of the roadway, thereby subjecting the plaintiff-bicyclist to the normal traffic laws and resulting in his being found negligent per se. On the other hand, it is the plaintiff herein who argues that the area outside the white line *is* part of the roadway, so that he is seen to be in compliance with the traffic laws and

is not negligent per se.

{¶ 9} Logic and the legislature’s definitions seem to require the conclusion that for purposes of R.C. 4511.28(B), the area to the right of the white edge line is not part of the roadway. However, the Supreme Court’s explicit finding is that “roadway” would consist of any hard surface of the highway [and] “ ‘it is the paved surface of the highway that we are talking about, not the gravel, if any, or grass, if any.’ ” *Sech v. Rogers*, 6 Ohio St. 3d at 464-465, 6 OBR 515, 453 N.E.2d 705.

{¶ 10} With the facts known to the court at this time, we hold that merely driving to the right of the white line is not driving off the roadway.

Judgment accordingly.