[Cite as *McElroy v. Ohio Dept. of Transp.*, 2004-Ohio-153.]

IN THE COURT OF CLAIMS OF OHIO

MALCOLM MCELROY, et al.	:	
Plaintiffs	:	
v.	:	CASE NO. 2003-03256-AD
OHIO DEPT. OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} On February 11, 2002, plaintiffs, Malcolm and Lori McElory and a real estate agent, David Cropper, met with Monti Perry, an employee of defendant, Department of Transportation (DOT). Prior to this meeting, plaintiffs had entered into negotiations with Cropper to purchase a tract of land adjacent to DOT's right-of-way along U.S. Route 52 in Brown County. Plaintiffs wanted to construct two driveways on this tract of land which would access U.S. Route 52. Because a permit issued by DOT would be required before any driveway construction could commence, plaintiffs decided to meet with Monti Perry, a DOT representative, to discuss the feasibility and procedures involved in obtaining a permit. Plaintiffs asserted Perry addressed the permit matter at the February 11, 2002 meeting by stating that as long as all DOT specifications and requirements were met, a driveway construction permit would be issued. Additionally, David Cropper related he heard Perry state that a permit would be issued as long as all DOT specifications and requirements were met. Plaintiffs further related they were assured by Perry that there would not be a problem obtaining a permit from DOT for driveway access. Based on the matters addressed at the February 11, 2002 meeting plaintiffs subsequently entered into a contract to purchase the forty-three acre tract of land adjacent to U.S. Route 52.

{¶2} After the contract for land purchase was executed, plaintiff, Lori McElroy, made several trips to the Brown County courthouse to conduct research regarding access points on the land for driveway installation. Additionally, plaintiffs engaged an attorney to represent them with final aspects of the land purchase. Plaintiff, Lori McElroy, also traveled on several occasions to meet with surveyors, soil experts, and a DOT representative. All meetings concerned plaintiffs' intent to install driveways on the land they contracted to purchase. Purchase of the real estate was to be finalized contingent upon plaintiffs receiving written permission from DOT to obtain a driveway permit for access from U.S. Route 52 to the property being purchased.

{¶3} On May 1, 2002, plaintiffs received correspondence from DOT employee, Monti Perry, regarding the issuance of a driveway permit. Perry, who was identified as a Permit Expediter, Office of Real Estate, informed plaintiffs that DOT, "will issue you a permit for the property along U.S. 52 in Brown County as long as all ODOT specs and requirements are met." Perry explained the land where plaintiffs wanted to construct a driveway was characterized as a slip area. Therefore, according to Perry, additional requirements for construction might be required by DOT. Perry wrote, "ODOT may request that the drive be placed and built in a certain way to least affect the hillside." Perry further addressed the permit matter stating, "[h]owever, once the property is purchased by you a permit will be issued in your name for a driveway in and out of the property."

{¶4} On May 2, 2002, plaintiffs were sent a letter from DOT employee, Deborah E. Manion, identified as the District 9 Real Estate Administrator. The letter was sent in response to a telephone conversation between plaintiffs and Manion. The telephone conversation involved discussion regarding the correspondence sent from Monti Perry to plaintiffs confirming the probable issuance of a driveway construction permit from DOT. In her May 2, 2002 letter, Deborah E. Manion notified plaintiffs of DOT's intention to rescind all parts of the Perry correspondence concerning assurances that a driveway construction permit would be issued. Manion related the following:

{¶5} "As discussed, our concern lies mainly with the fact that the wide right of way in the area was purchased by the Department to protect the integrity of our roadway due to

this being a potential slip area. We will begin researching our closed files tomorrow to determine what studies were done in the area with regard to the stability of the land.

{¶6} "At your earliest convenience, please provide this office with a detailed driveway construction plan to help us make our determination concerning the issuance of permits for the two drive accesses you are requesting. Your plan should show both accesses, even though I understand that the second drive would not be built until a later time.

{¶7} "After your plan is received and our research and field review is completed, if it is determined that revokable permits can be issued for the drive accesses you are requesting, it is understood that the Department will be including a 'save harmless' clause in the permits."

{¶8} On May 10, 2002, Deborah E. Manion sent plaintiffs another letter addressing plaintiffs' request to obtain a drive access permit. Manion informed plaintiffs she had discussed the situation with other DOT personnel and the responses she received, "were not favorable to allowing a drive to be constructed" in the land area specified by plaintiffs. The primary area of concern was the stability of the hillside at the proposed site of the drive access. Manion again related to plaintiffs that if they wanted to proceed with their permit request they needed to submit a detailed driveway construction plan for review "by ODOT Central Office employees who are experts in soil management." Additionally, Manion outlined other potential requirements and restrictions in the event a permit was granted after review was conducted.

{¶9} On June 7, 2002, defendant's employee Vaughn Wilson sent plaintiff, Lori McElroy, a letter informing her that her request for a drive had been denied after the request was reviewed by DOT's District 9 personnel and Geotechnical Engineering office staff. Wilson, the District 9 Management Administrator, explained two factors for denial of plaintiffs' permit application. These factors for denying the permit request were: 1) the selected drive access site is "located in a slide prone shale, Kape, formation, which when exposed to weathering, deteriorates badly;" 2) "the slopes in the area are approximately 1 1/2:1."

{¶10} Plaintiffs have asserted they were assured a permit would be granted for the construction of a driveway on the property they wished to purchase. Plaintiffs suggested they relied on this assurance and incurred expenses based on this reliance. Plaintiffs have contended defendant, Department of Transportation, should be liable to them for certain expenses incurred as a result of certain verbally expressed and written comments DOT employee, Monti Perry, made in connection with the issuance of a drive access permit. Plaintiffs filed this complaint seeking to recover $262.80 for mileage expenses, $750.00 for legal fees incurred from March 18, 2002 to June 13, 2002, and $25.00 for filing fee reimbursement. Plaintiffs maintained they sustained these damages as a result of representations made by defendant through its employee.

{¶11} Defendant denied any lability in this matter. Defendant denied any of its personnel, including Monti Perry, actually made assurances a permit would be issued to build a driveway. Defendant asserted plaintiffs have failed to prove they are entitled to reimbursement of expenditures incurred based on representations regarding the issuance of a permit. Defendant related plaintiffs were informed on multiple occasions the site where they wanted to construct a driveway was a slip area. Defendant also related plaintiffs were informed the granting of a permit application was conditional upon compliance with DOT's own specifications and requirements. Defendant argued plaintiffs had no right to a permit, were not promised a permit, and therefore cannot recover any expenditures incurred based on the failure to obtain a permit.

{¶12} Furthermore, defendant contended plaintiffs are barred from any recovery founded in estoppel. As a general authority, promissory estoppel cannot be utilized as a basis for recovery against the state. *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St. 3d 306. However, exceptions to this general principle do apply. Defendant has asserted any exception applies on a limited basis under rare circumstances. The Tenth District Court of Appeals in *Pilot Oil Corp. v. Ohio Dept. of Transp.* (1995), 102 Ohio App. 3d 278, at 283, cited such circumstances exist for applying promissory estoppel against the state where:

{¶13} "(1) the state uses its discretion in the interpretation of a law or rule, (2) the

state's interpretation is not violative of legislation passed by the General Assembly of Ohio, and (3) the elements of promissory estoppel are otherwise met." Under the conditions described, "promissory estoppel may be employed to bar the state from asserting a contrary interpretation where the state had full opportunity to make an informed decision and, in fact, did make an informed decision."

{¶14} Defendant argued its employees never decided to grant plaintiffs a revocable permit and did not promise plaintiffs a permit would be granted. Defendant asserted plaintiffs only received, "a limited assurance that if they conformed with ODOT's requirements they may be eligible for a revocable permit." Defendant insisted the elements to establish a claim grounded in estoppel do not apply under the facts of the present action.

{¶15} On September 22, 2003, plaintiffs filed a response to defendant's investigation report. Contrary to defendant's position, plaintiffs have asserted promissory estoppel applies under the facts of the instant claim. Plaintiffs related defendant's employee, Monti Perry, on February 11, 2002, promised a drive access permit would be issued. Plaintiffs maintained they relied on this promise, the reliance was justifiable, and they incurred expenses after relying on the representations made by Perry. Plaintiffs insist their claim is based on detrimental reliance to the assurances made to them by Perry on February 11, 2002. In support of their claim that the doctrine of estoppel is appropriate under the facts of the instant action, plaintiffs cited *Baxter v. Manchester* (1940), 64 Ohio App. 220, *Shapely Inc. v. Norwood Earnings Tax Bd. of Appeals* (1984), 20 Ohio App. 3d 164.

{¶16} However, in the particular cases referenced by plaintiffs, it was determined estoppel can be used against municipalities. Defendant, Department of Transportation, is classified as a state entity and not a municipality. Plaintiffs cited authorities have no bearing on this claim. See R.C. 2743.01(A) and (B); R.C. 2743.02(A)(1), and R.C. 2743.10(A).

{¶17} Plaintiffs insist DOT employee, Monti Perry, verbally promised a drive access permit would be granted to them. Plaintiffs related Perry made this promise on February

11, 2002 and confirmed the promise in written correspondence on May 1, 2002. Plaintiffs argued Perry was the responsible agent of DOT for granting permits in Brown County. Although plaintiffs stated Perry actually granted permits for DOT, no evidence has been presented to establish Perry did in fact enter into the decision making process of granting or denying permit applications. Correspondence dated June 7, 2002 from Vaughn Wilson (DOT District 9 Highway Management Administrator), apparently indicates permit applications are subject to review by several employees of DOT's District 9 Office along with personnel from DOT's Geotechnical Engineering Department. It appears from the information contained in the Wilson correspondence that permit applications are subject to final approval from someone other than Monti Perry. Plaintiffs have not produced sufficient evidence to show Perry was vested with the ultimate authority to grant and issue permits for drive access.

{¶18} Plaintiffs maintained they have offered adequate proof of their entitlement to damages claimed based on promissory estoppel. Plaintiffs asserted they were promised a permit on February 11, 2002, and on May 1, 2002, they received written approval from Monti Perry granting the permit. Despite plaintiffs assertions, the trier of fact finds the May 1, 2002 correspondence from Monti Perry to plaintiffs cannot in any way be construed as written approval granting a drive access permit. Plaintiffs further asserted they received a letter on May 2, 2002 from Deborah Manion rescinding approval of the permit. Since the permit application was never approved, the May 2, 2002 letter cannot constitute notice of rescinding an approved permit. Plaintiffs proof, based on promissory estoppel, is confined to the writing contained in the May 1, 2002 correspondence from Monti Perry.

{¶19} Plaintiffs entire claim for estoppel is founded on verbal and written statements made by Monti Perry on February 11, 2002 and May 1, 2002. Initially to prove their claim, plaintiffs reference verbal statements made by Perry on February 11, 2002. Plaintiffs related Perry said as long as all DOT specifications and requirements are met, a permit would be issued. Plaintiffs asserted Perry also said there will be no problems getting a driveway access permit. Real estate agent, David Cropper, confirmed he heard Perry state a permit would be issued as long as all DOT specifications and requirements are met.

Additionally, plaintiffs cite the written correspondence Monti Perry sent to them on May 1, 2002. In this correspondence Perry wrote, "[t]he Ohio Department of Transportation will issue you a permit for the property along U.S. 52 in Brown County as long as all ODOT specs and requirements are met." Perry closed this correspondence with the following: "[h]owever, once the property is purchased by you a permit will be issued in your name for a driveway in and out of the property." Plaintiffs argue this preceding statement constitutes a promise by Monti Perry the permit would be granted.

{¶20} In the instant claim, plaintiffs have failed to set forth sufficient facts to demonstrate the applicability of estoppel against DOT. Plaintiffs could assert estoppel against defendant only if Monti Perry made a statement that was within his authority to make and that statement actually induced reasonable reliance. *Pilot Oil Corp.*, supra 278, 283. To illustrate the applicability of estoppel under the facts of this claim, therefore, plaintiffs were obligated to demonstrate that it was within the scope of Perry's authority to grant permit applications. Despite Perry's title as a Permit Expediter, he was not charged with the authority to grant permit applications nor did it appear, based on the evidence, that he had any role in making a determination regarding application grants. Perry seemingly did not have a position in the grant process. Furthermore, "the party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143, at 145. In claims founded on estoppel the party claiming estoppel must exhibit reasonable reliance on the actions of defendant's agents. *Burke v. Ohio Dept. of Human Serv.* (1994), 74 Ohio Misc. 2d 50. The facts of the present claim do not establish plaintiffs' reasonable reliance on the statement of Monti Perry. Plaintiffs were aware of the topographical problems associated with the land where they wanted a drive access. Plaintiffs knew or should have known that obtaining a permit for drive access would be difficult based on compliance issues related to the nature of the land area around the potential access site. Perry's communications to plaintiffs may have been premature with unfortunate consequences, but

the conduct is not actionable from an estoppel perspective.

{¶21} Alternatively, to their contentions of estoppel, plaintiffs claim the verbal and written communications of Monti Perry constituted negligent misrepresentation. Negligent misrepresentation occurs when "[o]ne who, in the course of his business, profession or employment * * * supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the

{¶22} information." *Delman v. Cleveland Hts.* (1989), 41 Ohio St. 3d 1, 4, quoting 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1). (Emphasis *sic*.)

{¶23} Although the general rule requires contractual privity to assert a cause of action in negligence for purely economic damages, the plaintiff may recover under a negligent misrepresentation cause of action if a "sufficient nexus" exists between the parties for the lack of contractual privity. *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist.* (1993), 90 Ohio App. 3d 215, 220. Additionally, the rule concerning contractual privity in a negligent misrepresentation claim is limited to situations in which the parties had no direct interaction with one another. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facility Auth.* (1993), 88 Ohio App. 3d 73, 76. Not only did a sufficient nexus exist between plaintiffs and defendants, but the parties had multiple, direct interactions pertaining to plaintiffs' desire to obtain a drive access permit. Accordingly, the lack of privity between the McElroys and DOT does not bar the McElroys' claim for negligent misrepresentation against DOT.

{¶24} Essentially, plaintiffs claim for negligent misrepresentation is based on two statements from Monti Perry. The first statement made on February 11, 2002 and repeated in a correspondence sent to plaintiffs on May 1, 2002 addressed the issue of granting a permit, "as long as all ODOT specs and requirements are met." The second statement contained at the end of the May 1, 2002 correspondence mentioned that, "a permit will be issued in your name for driving in and out of the property." Plaintiffs insisted they justifiably relied on these statements as assurances or promises a drive access permit

would be granted. Establishing justifiable reliance does not require a showing that the plaintiffs reliance conformed to what a "reasonable man" would have believed. *Amerifirst Savings Bank of Xenia v. Krug* (1999), 136 Ohio App. 3d 468, 496. Rather, a determination regarding justifiable reliance involves a fact based inquiry into the circumstances of the claim and the relationship between the parties. *Lepera v. Fuson* (1992), 83 Ohio App. 3d 17, 26. "Reliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances there is no apparent reason to doubt the veracity of the representation." *Crown Property Development, Inc. v. Omega Oil Co.* (1996), 113 Ohio App. 3d 647, 657. Applying the standard to the circumstances in the present claim, the court concludes the McElroys were not justified in relying on Perry's statement that a permit would be issued when taken into context with all other statements made about compliance with specifications and requirements.

{¶25} Furthermore, plaintiffs were aware of problems involved in obtaining a permit for the proposed drive access site. Plaintiffs were really only assured a permit would be granted if contingencies were met. It was simply not reasonable for plaintiffs to rely on a statement contained at the end of a correspondence considering all the additional knowledge plaintiffs possessed. Therefore, justifiable reliance has not been shown. Additionally, plaintiffs have failed to prove the damages claimed were caused by any reliance on statements from DOT personnel. Under the circumstances, plaintiffs would still have incurred these expenses claimed, whether a permit was granted or not. Plaintiffs' claim is denied.

{¶26} 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 plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT
Deputy Clerk

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