[Cite as *Grise v. Ohio Dept. of Transp.*, 2020-Ohio-2935.]

MATTHEW T. GRISE Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2019-00962AD Deputy Clerk Daniel R. Borchert MEMORANDUM DECISION

{¶1} Matthew T. Grise ("plaintiff") filed this claim against the Ohio Department of Transportation ("ODOT"), to recover damages which occurred when his 2015 Cadillac ATS Luxury Sedan was sprayed with wet concrete on July 17, 2019, while traveling on the 670 East exit ramp onto 270 Northbound in Franklin County, Ohio. This road is a public road maintained by ODOT. Plaintiff's vehicle sustained damages in the amount of $9,000.00. Plaintiff submitted the $25.00 filing fee with the form complaint.

{¶2} The evidence in this case reveals that the area where plaintiff had his accident was a construction zone. ODOT had contracted with Complete General Construction to do certain construction work on this section of 670 East to 270 Northbound in Franklin County.

{¶3} In the Investigation Report, ODOT indicates that the incident involving plaintiff's vehicle occurred on IR 670 eastbound, at mile marker 10.43 in Franklin County. The agency reiterates that this area was part of an ongoing construction project being undertaken by the Complete General Construction. The agency maintained that it was not aware of any wet cement spray in the construction area immediately prior to plaintiff's accident.

{¶4} Defendant has a duty to maintain its highways in a reasonable safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App.2d 335, 361 N.E.2d 486 (10th Dist.1976). However, defendant is not an

absolute insurer of the safety of its highways. See *Kniskern v. Township of Somerford*, 112 Ohio App.3d 189, 678 N.E.2d 273 (10th Dist.1996); *Rhodus v. Ohio Dept. of Transp*., 67 Ohio App.3d 723, 588 N.E.2d 864 (10th Dist.1990). Generally, a defendant is only liable for roadway conditions of which it has notice of but fails to correct. *Bussard v. Dept. of Transp*., 31 Ohio Misc.2d 1, 507 N.E.2d 1179 (Ct. of Cl. 1986).

{¶5} Defendant asserts that Complete General Construction, by contractual agreement, was responsible for roadway damages, occurrences, or mishaps within the construction zone. Therefore, ODOT argues that Complete General Construction is the proper party defendant in this action.

{¶6} The duty of ODOT 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. *Cowell v. Ohio Department of Transportation*, Ct. of Cl. No. 2003-09343-AD, jud. 2004-Ohio-159.

{¶7} Defendant relies on the holding in *Gore v. Ohio Department of Transportation*, 10th Dist. No. 02AP-996, 2003-Ohio-1648, to assert it is not liable for the damage to plaintiff's vehicle caused by the cement in the work zone. However, the *Gore* case involved mowing operations performed by an independent contractor. The Court of Appeals in *Gore* found that grass cutting "is not the kind that cannot be accomplished without inherent risk of harm to others, nor is it a type that in the ordinary course of performing it harm would be expected." *Rodic v. Koba*, 8th Dist. No. 77599, 2000 Ohio App. LEXIS 5715 (Dec. 7, 2000). ODOT had no reason to believe that the work, if done properly, would cause injury to anyone. *Id.* at *10. ODOT can contract with independent contractors and should require independent contractors to carry sufficient insurance to cover whatever liability risks are involved. Stated in the words of the third assignment of error, we believe that the duty to cut grass on interstate highways is 'delegable to [an] independent contractor' and that no liability arises from

such delegation, including the obligation to look for movable objects before mowing an area." *Gore* at ¶ 31.

{¶8} However, *Gore* went on to state, "Work is inherently dangerous when it creates a peculiar risk of harm to others unless special precautions are taken." *See Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick,* 61 Ohio St. 215, 55 N.E. 618, (1899) paragraph one of the syllabus; *2 Restatement of the Law 2d, Torts,* Section 427; *Prosser & Keeton* at 512-513, Section 71. Under those circumstances, the employer hiring the independent contractor has a duty to see that the work is done with reasonable care and cannot, by hiring an independent contractor, insulate himself or herself from liability for injuries resulting to others from the negligence of the independent contractor or its employees. *Covington* at paragraph one of the syllabus.

{¶9} "To fall within the inherently-dangerous-work exception, it is not necessary that the work be such that it cannot be done without a risk of harm to others, or even that it be such that it involves a high risk of such harm. It is sufficient that the work involves a risk, recognizable in advance, of physical harm to others, which is inherent in the work itself." *2 Restatement of the Law 2d, Torts,* at 416, Section 427, Comment b.

{¶10} "The inherently-dangerous-work exception does apply, however, when special risks are associated with the work such that a reasonable man would recognize the necessity of taking special precautions. The work must create a risk that is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity arising out of the particular situation created and calling for special precautions." *Gore* at ¶ 20, 21, 23.

{¶11} Thus, defendant's claim that liability for any damages, occurrences, or mishaps is imputed to Complete General Construction is without merit as this court has already determined construction work is an inherently dangerous activity. However, in order for the plaintiff to prevail on a claim for damage to motor vehicles while traveling in a construction zone, the court may only pass judgment on whether the plaintiff has

shown that ODOT breached its duty to the public in managing the contractor and ensuring the safety of the public within the construction zone. ODOT could be found negligent in this type of case only if it failed to properly manage the contractor by reasonably inspecting the construction site and the work performance of the contractor, or if the agency knew or should have known about the hazard that damaged plaintiff's vehicle and failed to repair the hazard or failed to require the contractor to repair the hazard.

{¶12} As we consider whether ODOT breached its duty to the public in keeping the construction area safe, the court must take into account that this was an active construction zone. Ohio law is clear that ODOT cannot guarantee the same level of safety during a highway construction project as it can under normal traffic conditions. *Feichtner v. Ohio Dept. of Transp*., 114 Ohio App.3d 346, 354, 683 N.E.2d 112 (1995). The test is whether, under the totality of the circumstances, "ODOT acted sufficiently to render the highway reasonably safe for the traveling public during the construction project." *Basilone v. Ohio Dept. of Transp*., 1st Dist. No. 00AP-811, 2001 WL 118602 (Feb. 13, 2001) citing *Feichtner*, and *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp*., 49 Ohio App.3d. 129, 551 N.E.2d 215 (1988).

{¶13} Having considered the evidence in the claim file, the court finds the plaintiff has submitted sufficient evidence that, under the totality of the circumstances, ODOT failed to properly manage Complete General Construction's work performance which resulted in property damage to plaintiff's vehicle. Therefore, judgment is rendered in favor of plaintiff.

{¶14} However, "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability, or other collateral recovery received by the claimant." R.C. 2743.02(D). Upon review, plaintiff was fully compensated for the damage to his vehicle by his insurance carrier, a readily available collateral source. However, he should receive $25.00 for the reimbursement of his filing fee as

compensable damages pursuant to the holding of *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc. 2d 19, 587 N.E.2d 90 (Ct. of Cl. 1990).

MATTHEW T. GRISE Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2019-00962AD Deputy Clerk Daniel R. Borchert ENTRY OF ADMINISTRATIVE DETERMINATION

{¶15} 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 the plaintiff in the amount of $25.00. Court costs are assessed against the defendant.

DANIEL R. BORCHERT
Deputy Clerk

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