[Cite as *Hubbard v. Ohio Dept. of Transp.*, 2002-Ohio-5390.]

IN THE COURT OF CLAIMS OF OHIO

TERRY S. HUBBARD
8802 Union Springs Court
Centerville, Ohio 45458

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2002-03708-AD

MEMORANDUM DECISION

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

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

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{¶1} On Wednesday, June 7, 2000, a roadway resurfacing operation was being performed on U.S. Route 35 beginning at approximately 0.25 miles west of Xenia, Ohio and ending at the U.S. Route 68 interchange. The operation was described as a "major rehabilitation and four lane resurfacing project," under the administration of defendant, Department of Transportation. Actual roadway construction was performed by defendant's contractor, S.E. Johnson Companies. During the early morning hours of June 7, 2000, a shoulder failure occurred at the site of the roadway resurfacing construction. Defendant's contractor responded. The contractor rerouted traffic from the shoulder area of the roadway, excavated the failed shoulder, and repaired the failed area with Type 1 Asphalt Concrete using two truck loads of asphalt. The first asphalt carrier was sent at 12:07 p.m. The second carrier was

dispatched at 2:10 p.m. on June 7, 2000. Repairs were conducted.

{¶2} Plaintiff, Terry S. Hubbard, filed a complaint in which he initially stated his automobile sustained body damage on or about June 7, 2000 while traveling east in the left lane of U.S. Route 35. Plaintiff indicated he was driving east on the U.S. Route 35 bypass heading toward U.S. Route 68 at approximately 8:30 a.m. when he was directed to move into the left highway lane because a truck was spreading asphalt pavement in the right highway lane. Plaintiff explained as he drove in the left highway lane he noticed, "a shiny black sticky substance oozing from the side of the pavement in which the right side of the car had to drive through." Plaintiff insisted he could not avoid driving over the "shiny black sticky substance," since there was insufficient clearance in the left driving lane to maneuver around the substance seeping from the right lane. Plaintiff asserted this black sticky substance adhered to the right front wheel well and right side of his car as he drove through the paving site. Furthermore, plaintiff maintained he discovered the substance on the rear seat of his car, his garage floor, the floor of his house, and his daughters' dresses.

{¶3} Plaintiff notified defendant's contractor about the property damage allegedly caused by roadway paving material. S.E. Johnson Companies personnel responded on June 29, 2000 by forwarding an information request form to plaintiff. Plaintiff filled out the information form and submitted the following description of the incident: "While traveling east on 35 bypass heading towards 68, a truck was spreading new pavement in which the fresh tar went into my right/front wheel well. It also sprayed the right front portion of the car. The tar has since dripped onto my garage floor and tracked onto the rear seat of the car (below daughter car seat and floor) also small amounts have been found on the floor and carpet of the house." Plaintiff recalled the paving and resulting damage occurrence as happening at approximately 9:00

a.m. on either June 7, 2000 or June 14, 2000.

{¶4} Plaintiff subsequently filed this complaint seeking to recover $340.00, the cost of removing "tar and overspray" from the interior and exterior of plaintiff's vehicle. Plaintiff also claimed damages of $80.00, the replacement cost of his daughters' stained dresses. Additionally, plaintiff requested reimbursement of the $25.00 filing fee. Plaintiff asserted all his damages were attributable to the negligence of defendant's contractor in conducting roadway resurfacing activities on U.S. Route 35 in Greene County.

{¶5} Defendant denied any liability in this matter. Defendant denied having knowledge of a shiny black substance emanating from the newly paved portion of the roadway within the limits of the resurfacing operation on U.S. Route 35. Furthermore, defendant has asserted plaintiff failed to prove the construction zone on U.S. Route 35 was negligently maintained. Defendant denied breaching any duty of care owed to plaintiff which resulted in plaintiff sustaining any property damage.

{¶6} Plaintiff filed a response in which he admitted the incident forming the basis of this claim could not have occurred on Wednesday, June 7, 2000 or Wednesday, June 14, 2000. Plaintiff related the damage to his car originally appeared while traveling to church on a Sunday morning probably during June, 2000. Plaintiff reiterated the damage occurred as a result of roadway resurfacing activities on the part of defendant's contractor. Plaintiff insisted his damage was caused by negligent roadway maintenance operations, "performed during the time frame in question."

{¶7} Defendant submitted evidence of roadway maintenance activities conducted on U.S. Route 35 during the four Sundays in June, 2000, June 4, 2000, June 11, 2000, June 18, 2000, and June 25, 2000. No work was conducted within the construction zones on either June 18, 2000 or June 25, 2000. No paving operations were

performed on any Sunday during June, 2000. On June 4, 2000, the yellow edge line of the right westbound lane of U.S. Route 35 was removed. On June 11, 2000, yellow and white temporary edge lines were painted on the eastbound right lane of U.S. Route 35.

{¶8} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723. Additionally, defendant has a duty to exercise reasonable care in conducting its roadside construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD. Furthermore, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition, as plaintiff has asserted in the instant matter. See *Bello v. City of Cleveland* (1992), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶9} However, plaintiff has failed to produce sufficient evidence to establish the resurfacing activities of defendant's contractor proximately caused the damage claimed. First, the actual date of plaintiff's property damage occurrence has not been generally or approximately shown. Second, plaintiff's photographic evidence depicting the substance on his car does not demonstrate, in all probability, the substance is tar-like paving material. The trier of fact cannot guess what the substance is from examining the photographs. Finally, plaintiff has not proven the substance on his car came from roadway construction activities under the direction of defendant. Plaintiff has not offered sufficient evidence to establish liability.

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

{¶11} IT IS ORDERED THAT:

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

{¶13} 2) Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT
Deputy Clerk

RDK/laa
9/12
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