[Cite as *Cwalinski v. Ohio Dept. of Transp.*, 2003-Ohio-5561.]

IN THE COURT OF CLAIMS OF OHIO

DEAN E. CWALINSKI	:	
Plaintiff	:	
v.	:	CASE NO. 2003-06778-AD
TRANSPORTATION DEPT. OF OHIO	:	MEMORANDUM DECISION
Defendant	:	

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

{¶1} THE COURT FINDS THAT:

{¶2} 1) On June 12, 2003, plaintiff, Dean Cwalinski, filed a complaint against defendant, Department of Transportation. Plaintiff alleges on May 23, 2003, as he was traveling north on State Route 7 leaving the Village of Shadyside, Ohio state workers were operating a lawn mower, mowing the median between the roadways. The mowing equipment struck a rock or lump of mud which was propelled into his vehicle causing damage to the driver's side window. Plaintiff alleges defendant's negligence caused damages to his vehicle in the amount of $658.57. Plaintiff submitted the filing fee with the complaint;

{¶3} 2) On July 9, 2003, defendant filed an investigation report denying liability. Defendant asserts based on the accident report, the incident occurred on May 16, not May 23, as alleged by plaintiff. Defendant alleges neither its crew or its contractor Tom Mayle & Sons Construction, Inc. were conducting mowing operations on the day. Accordingly, defendant asserts it is not responsible for any damage suffered by plaintiff's vehicle;

{¶4} 3) On July 23, 2003, plaintiff filed a response to defendant's investigation

report. Plaintiff agrees that the damage causing incident occurred on May 16, not May 23, as stated on the complaint. However, plaintiff contends based on conversation with Mr. Tom Johnson, Department of Transportation supervisor in the Morristown, Ohio office and Mr. Mark Davis, District 11 Highway manager, Tom Mayle & Sons were mowing on State Route 7 at the time and location of plaintiff's incident. Tom Mayle & Sons were performing the mowing operations while under contract with defendant. Accordingly, plaintiff asserts judgment should be granted in his favor;

{¶5} 4) On August 8, 2003, defendant filed a reply to plaintiff's response to the investigation report. While defendant concedes that its contractor Tom Mayle & Sons was conducting mowing operations on the date of plaintiff's property damage incident, defendant is not responsible for the negligence of its contractor and the contractor should be responsible for its own negligence. Defendant cites the Tenth District Court of Appeals holding in *Brinda Gore v. Ohio Department of Transportation* No. 02AP-996 for support of this proposition;

{¶6} 5) Plaintiff has not filed a response to defendant's reply.

{¶7} THE COURT CONCLUDES THAT:

{¶8} 1) The damage resulting incident occurred on May 16, 2003, as the result of the actions of defendant's independent contractor Tom Mayle & Sons;

{¶9} 2) Defendant entered into a contract with Tom Mayle & Sons Construction, Inc. for mowing operations in the area in question on January 22, 2003. This contract was in effect at the time of the damage causing incident;

{¶10} 3) As a general rule, although an employer may be liable for the negligent acts of an employee within the scope of that employment, one who engages an independent contractor is not liable for the negligent acts of the contractor or its employees. *Pusey v. Bator* (2002), 94 Ohio St. 3d 275, 278, 2002-Ohio-795. The distinction relates to the right to control the manner of performing the work, and if the manner or means of performing the work is left to one responsible to the employer for the result alone, an independent contractor relationship exists. Id. at 279. There is no dispute that Tom Mayle & Sons acted as an independent contractor for defendant;

{¶11} 4) Ohio case law indicates that a person or entity cannot assign activities which are inherently dangerous to a third party and automatically be free from responsibility for injuries caused when the inherently dangerous activity is conducted. See, e.g., *Richman Bros. Co. v. Miller* (1936), 131 Ohio St. 424, and *Pusey*, supra, at 279. An important question then becomes whether or not mowing a median strip is an inherently dangerous activity.

{¶12} 5) "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* (1899), 61 Ohio St. 215, 55 N.E. 618, 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;

{¶13} 6) "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." 2 Restatement of the Law 2d, Torts, at 385, Section 413, Comment *b*; Prosser & Keeton at 513-514, Section 71.;

{¶14} 7) However, cutting grass is not automatically or inherently dangerous activity. What can make it dangerous is the equipment used. A well guarded mower can be relatively safe. A commercial mower with less guarding is much more dangerous. However, we cannot hold ODOT responsible for the means used to cut the grass in the median if grass cutting is not automatically or inherently dangerous. The inherently-dangerous-work exception applies only to dangerous work and does not extend to proper work, dangerously done. *Joseph v. Consol. Rail Corp*. (Oct. 30, 1987), Butler App. No.

CA87-05-065;

{¶15} 8) Mowing the grass on a median strip of an interstate highway does not create an unreasonable risk of harm to the traveling public. Defendant's duty to the traveling public is to maintain the system of highways free from unreasonable risk by exercising reasonable care. *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. No. 00AP-1119. In that case, which involved a temporary road surface to facilitate lane changes in a construction zone, the duty was satisfied by regular inspection of the work by the independent contractor, remedying defects discovered during the course of the inspections, reducing the speed limit, erecting warning signs and utilizing traffic control barrels. As articulated by this court in *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, "the state is not an insurer of the safety of its highways. Its duty is to maintain its highways in a reasonably safe condition."

{¶16} 9) Mowing operations cannot be accomplished without inherent risk of harm to others, however, it is not the type of activity that in the normal course of performing it harm to others would be excepted. *Rodic v. Koba* (Dec. 7, 2000), Cuyahoga App. No. 77599. Defendant had no reason to believe that the mowing operation, if done properly, would cause injury to anyone. Id. at 4. Defendant can contract with independent contractors and should require independent contractors to carry sufficient insurance to cover whatever liability risks are involved. The duty to cut grass on highways is delegable to an independent contractor and no liability arises from such delegation. *Gore v. Ohio Dept. of Transp.* (March 31, 2003), Franklin App. No. 02AP-996, 2003-Ohio-1648.

{¶17} 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 plaintiff. 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

Entry cc:

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9/16
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