[Cite as *Cowell v. Ohio Dept of Transp.*, 2004-Ohio-151.]

IN THE COURT OF CLAIMS OF OHIO

DAVID P. COWELL	:	
Plaintiff	:	
v.	:	CASE NO. 2003-09343-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} Plaintiff, David P. Cowell, asserted he suffered body damage to his automobile while traveling to work through a roadway construction area on Interstate 75 in Lucas County. Plaintiff explained his car was damaged when pelted by pavement debris propelled into the path of his vehicle by passing motorists driving over a milled roadway area between mileposts 204-202 on Interstate 75. The existing pavement surface had been "ground down" or milled in preparation for resurfacing. According to plaintiff, this milling process left stone debris on the roadway creating a hazard to the motoring public. Plaintiff contended the stone debris should have been swept from the milled roadway surface. Plaintiff stated the body damage to his car occurred on three separate occasions, July 29, 30, and 31, 2003.

{¶2} Plaintiff subsequently filed this complaint alleging defendant, Department of Transportation (DOT), is liable for the body damage to his vehicle. Although DOT's contractor, S.E. Johnson Company actually performed the roadway construction work on Interstate 75 where plaintiff's damage occurred, plaintiff has asserted DOT is ultimately responsible for damage arising from this construction work performed. Plaintiff seeks damages in the amount of $2,150.74 for automotive repair, $231.57 for car rental

expenses, and $25.00 for filing fee reimbursement. Plaintiff did not submit any demonstrative evidence depicting particular damage to his automobile.

{¶3} Defendant acknowledged the roadway area where plaintiff's damage occurred was located in a construction zone under the control of DOT's contractor, S.E. Johnson Company. Defendant also acknowledged on several occasions problems were noted concerning concrete debris remaining on the roadway after the milling process was completed. DOT's roadway inspectors made numerous requests to S.E. Johnson Company to rectify the debris problem. Many complaints were received by DOT personnel about the debris problem. Defendant discussed the problem with S.E. Johnson Company representatives at least three times in July, 2003. S.E. Johnson did employ clean-up crews to handle the debris problem. Although DOT personnel were aware of the chronic situation regarding the dangers presented by roadway milling debris, defendant denied any liability in this matter.

{¶4} Defendant denied any responsibility for the condition of the roadway based on its construction contract with S.E. Johnson Company. Defendant asserted S.E. Johnson Company, through contract, assumed all responsibility for any damage incidents arising from the roadway construction project. Defendant submitted a specific part of its contract with S.E. Johnson Company regarding responsibility for damage claims. The particular contract language appears in section 107.12 of DOT's Construction and Material Specification, which was incorporated into the construction project contract with S.E. Johnson Company. Section 107.12 reads in pertinent part: "[t]he Contractor shall indemnify and save harmless the State and all its representatives, . . . from all suits, actions, claims, damages, or costs of any character brought on account of any injuries or damages sustained by any person or property on account of any negligent act or omission by the Contractor or its subcontractors or agents in the prosecution or safeguarding of the work." Defendant contended DOT by contract, abrogated any duty owed to motorists driving through the construction area and was, consequently, absolved from liability for any damage sustained by motorists within the construction zone. Defendant essentially professed it is not the proper defendant in this action.

{¶5} Defendant also submitted a copy of section 107.13 of its Construction and Material Specifications titled: Reporting, Investigating, and Resolving Motorist Damage Claims.[1] Under this section both DOT and S.E. Johnson Company agreed to jointly handle damage claim events such as the instant action. From a reading of this particular contract section, it appears DOT consented to act as a party defendant to any damage claim arising out of injuries to motorists passing through an area under construction.

{¶6} Defendant contended that DOT cannot be held liable for the negligent acts of an independent contractor such as S.E. Johnson Company. In support of this argument, defendant submitted a prior holding, *Gore v. Ohio Department of Transportation*, Franklin App. No. 02AP-996, 2003-Ohio-1648, where the Tenth District Court of Appeals held the Department of Transportation was not liable for the negligent acts of its independent contractor, who caused injury to a motorist, while engaging in lawn mowing activities on the median strip of Interstate 270. The court in *Gore*, id., found DOT could, by contract, delegate the duty to safely conduct lawn mowing operations along state highways. The court determined lawn mowing, in this context, was not inherently dangerous work and therefore, did not constitute an exception to the general rule specifying an employer cannot be responsible for the acts of an independent contractor.

{¶7} Although defendant acknowledged DOT personnel were aware of roadway pavement problems caused by the construction activities of S.E. Johnson Company,

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[1] 107.13 Reporting, Investigating, Resolving Motorists Damage Claims. The Contractor and the Department are required to report, investigate, and resolve motorist damage claims according to 107.10 and 107.12 and as follows.

When a motorist reports damage to its vehicle either verbally or in writing to the Contractor, the Contractor shall within 3 days make and file a written report to the District's construction office. Forward the report to the Department's Court of Claims Coordinator who, as a co-insured party, will then contact the Contractor's insurance company and request that the insurance company investigate and resolve the claim. In the event that the Department directly receives the motorist's claim, the Department will send the claim report to the Contractor's insurance company and a copy of the claim report to the Contractor. If the Contractor's insurance company does not resolve the claim in a timely manner, the Department will advise the motorist of the option of pursuing the claim in the Ohio Court of Claims.

In the event of a lawsuit filed against the Department in the Ohio Court of Claims by the motorist, the Department, as co-insured party, may request the Contractor's insurance company to defend this lawsuit and hold the Department harmless according to 107.12.

defendant denied its subsequent reaction and conduct were negligent. Defendant suggested any duty of care owed to plaintiff concerning the roadway condition was discharged when DOT's inspector directed S.E. Johnson, on three separate occasions prior to July 29, 2003, to sweep pavement debris left by the roadway milling process. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp*. (June 28, 2001), Franklin App. No. 00AP-1119.

{¶8} However, in order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346. In fact the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic conditions and during highway construction projects. See e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 729; *Feichtner*, supra, at 354.

{¶9} In the instant action, plaintiff insisted DOT should bear responsibility for his property damage regardless of the contract between DOT and S.E. Johnson Company or the relationship created between DOT and S.E. Johnson Company. Plaintiff maintained that S.E. Johnson Company was factually an employee of DOT and, consequently, DOT is liable for any negligent acts of its employee. Alternatively, plaintiff proposed that if S.E. Johnson Company is an independent contractor, DOT is liable for the negligent acts of an independent contractor based on the fact S.E. Johnson Company was engaged in an inherently dangerous activity and therefore DOT cannot delegate any duty of care owed to persons such as plaintiff.

{¶10} Plaintiff suggested S.E. Johnson Company acted as an employee of DOT rather than an independent contractor because DOT concomitantly controlled the manner

and means of work at the Interstate 75 construction site. Plaintiff referenced the contract between S.E. Johnson Company and DOT to establish this employer-employee relationship. Due to the contract language regarding DOT's right to inspection and S.E. Johnson Company's agreement to perform work to DOT's satisfaction, plaintiff contended DOT actually controlled the construction work. As plaintiff cited, under Ohio law, "[t]he chief test in determining whether one is an employee or an independent contractor is the right to control the manner or means of performing the work." *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, paragraph one of the syllabus. Contrary to plaintiff's assertion, the evidence available establishes S.E. Johnson Company as an independent contractor, S.E. Johnson Company owned the equipment and materials needed to complete the roadway construction. S.E. Johnson Company hired and directed the work force needed to accomplish the construction project. S.E. Johnson Company was in control of the details in performing the actual work subject to agreed contractual requirements. These facts support the finding that S.E. Johnson Company was an independent contractor of DOT.

{¶11} Plaintiff additionally contended that DOT can still be held liable for the negligence of S.E. Johnson Company despite a finding the relationship between DOT and S.E. Johnson Company was that of an employer and independent contractor. Plaintiff argued defendant's duty to render the highway free from unreasonable harm is essentially a non-delegable duty and, consequently, DOT may be liable for the negligence of its independent contractor. Generally an employer is not held liable for the torts of the independent contractor. *Bemmes v. Pub. Emp. Retirement Sys. Of Ohio* (1995), 102 Ohio App. 3d 782, 791; *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St. 3d 435, 438. However, exceptions to this general rule apply. The court in *Pusey v. Bator* (2002), 94 Ohio St. 3d 275, expressed these exceptions with the following: "[n]ondelegable duties arise in various situations that generally fall into two categories: (1) affirmative duties that are imposed on the employer by statute, contract, franchise, charter, or common law and (2) duties imposed on the employer that arise out of the work itself because its performance creates dangers to others, i.e., inherently dangerous work. Prosser & Keeton, The Law of Torts (5 Ed. 1984) 511-512, Section 71; *Albain v. Flower*

Hosp. (1990), 50 Ohio St. 3d 251, 260-261, 553 N.E. 2d 1038, 1047-1048. If the work to be performed fits into one of these two categories, the employer may delegate the work to an independent contractor, but he cannot delegate the duty. In other words, the employer is not insulated from liability if the independent contractor's negligence results in a breach of the duty."

{¶12} Plaintiff insisted both of the listed nondelegable duties apply to DOT under the facts of the instant claim. Plaintiff suggested defendant had a statutory and common law duty to maintain the roadway. Furthermore, plaintiff contended the construction work performed by S.E. Johnson Company was inherently dangerous and therefore any duty for the safety of others was nondelegable during the performance of this inherently dangerous work.

{¶13} On December 5, 2003, defendant filed a reply to plaintiff's response. Defendant countered by arguing road construction work, "when performed properly and carefully, is not an inherently dangerous activity." Consequently, defendant asserted DOT cannot be held liable for the negligent acts of its independent contractor while conducting road construction operations which should not be classified as inherently dangerous work. Defendant related the exception for inherently dangerous work, "is limited to dangerous work and cannot be extended to proper work dangerously done." *Newcomb v. Dredge* (1957), 105 Ohio App. 417, 422. Defendant explained road construction work is not inherently dangerous if properly performed although it may be professed that all work is not inherently dangerous if properly performed. Defendant proclaimed the work of S.E. Johnson Company was done safely and did not create a hazard. Defendant did acknowledge its contractor negligently failed to sweep the roadway of small stones which eventually caused plaintiff's property damage.

{¶14} Defendant is charged with a duty to maintain roads in a safe drivable condition. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 325. Additionally, R.C. 5501.11(A) states:

{¶15} "The functions of the department of transportation with respect to highways shall be:

{¶16} "(A) To establish state highways on existing roads, streets, and new locations and to construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon."

{¶17} An employer cannot delegate its duty to comply with a statutorily imposed safety requirement. *State ex. rel Morrissey v. Industrial Comm.* (1985), 18 Ohio St. 3d 285. It would follow that DOT cannot avoid its legal duty to maintain a safe construction zone by delegating this duty through contract. DOT had a statutory duty to maintain the roadway and a common law duty to maintain the roadway and exercise ordinary care for the traveling public. Defendant cannot delegate this absolute duty to an independent contractor. Furthermore, evidence in the instant claim establishes defendant is liable for its own negligence and vicariously liable for the negligence of S.E. Johnson Company. Defendant's negligence lies in its failures to conduct more frequent inspections of the construction site and to address the known neglect by S.E. Johnson with regard to debris removal. Defendant acknowledges its inspectors observed unswept debris remnants on the roadway surface on three separate occasions prior to plaintiff's July 29, 2003 initial incident. Defendant told S.E. Johnson Company to keep the area swept. Defendant was on notice S.E. Johnson Company did not comply with these requests. Defendant should have known S.E. Johnson Company was apt to continue with this inattention about sweeping the milled roadway surface. Defendant is liable for its own negligence and the negligence of its contractor.

{¶18} Contrary to defendant's contention, the court concludes roadway construction is an inherently dangerous activity and the duty to safely conduct the activity is nondelegable. DOT cannot avoid its responsibility by employing an independent contractor once it has determined to undertake an inherently dangerous activity. "Where danger to others is likely to attend the doing of certain work unless care is observed, the person having it to do is under a duty to see that it is done with reasonable care, and cannot, by the employment of an independent contractor, relieve himself from liability for injuries resulting to others from the negligence of the contractor or his servants." *Richman Bros. v. Miller* (1936), 131 Ohio St. 424, 6 Ohio OP. 119, 3 N.E. 2d 360, at paragraph one of the

syllabus; *Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick* (1899), 61 Ohio St. 215, 55 N.E. 618, at paragraph one of the syllabus. A construction site is an inherently dangerous setting. See *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 600. In *Bohme, Inc. v. Sprint International Communications Corp.* (1996), 115 Ohio App. 3d 723, discretionary appeal not allowed (1997), the court explained inherently dangerous work involves "work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others." *Bohme*, supra at 736 (quoting Restatement of the Law 2d, Torts (1965), Section 427, Comment C). A determination regarding an inherently dangerous activity is made on a case-by-case basis. Roadway construction contains many dangers, hazards, and potential for harm not only to workers involved, but to the motoring public such as plaintiff. The duty involved in roadway construction is nondelegable and defendant is therefore liable for plaintiff's property damage caused by the negligent acts and omissions of S.E. Johnson Company.

{¶19} 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 plaintiff in the amount of $2,407.31, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

David P. Cowell
5020 Flanders Road
Toledo, Ohio 43623

Plaintiff, Pro se

Gordon Proctor, Director
Department of Transportation

For Defendant

1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
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