

[Cite as Ganoom v. Ohio Dept. of Transp., 2004-Ohio-1833.]

IN THE COURT OF CLAIMS OF OHIO

OMAR GANOOM	:	
Plaintiff	:	
v.	:	CASE NO. 2003-09548-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
	:

{¶1} Plaintiff, Omar Ganoom, asserted he suffered damage to his automobile while traveling through a roadway construction area on July 14, 2003. Plaintiff explained his car was pelted by pavement debris propelled into the path of his vehicle by passing motorists driving on a milled roadway surface on Interstate 475 in Lucas County. The existing pavement surface had been milled in preparations for resurfacing and stone debris had been left on the roadway as a product of the milling process. Plaintiff implied the stone debris created a known hazard to the motoring public.

{¶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 \$463.88 for automotive repair and \$25 for filing fee

reimbursement.

{¶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 Specifications, 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 safe 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

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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, Investigation, and Resolving Motorists Damage Claims.¹ Under this

{¶a} ¹ 107.13 Reporting, Investigating, Resolving Motorists Damage Claims.

{¶b} The Contractor and the Department are required to report, investigate, and resolve motorists damage claims according to 107.10 and 107.12 and as follows.

{¶c} 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

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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 Dept. of Transp.*, 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

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.

{¶d} 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.

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contractor.

{¶7} Although defendant acknowledged DOT personnel were aware of roadway pavement problems caused by the construction activities of S.E. Johnson Company, 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 discussed the situation with representatives of S.E. Johnson 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 duty 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. 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. 32d 39, 42; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 729; *Feichtner*, supra, at 354.

{¶9} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v.*

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Somerford Twp. (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. See *Cowell v. Ohio Dept. of Transp.* (2004), 2003-09343-AD.

{¶10} 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 acknowledged being aware of the debris problem and discussing the matter with S.E. Johnson Company representatives. 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. Plaintiff is entitled to all damages claimed.

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Plaintiff	:	
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v.	:	CASE NO. 2003-09548-AD
	:	
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>ENTRY OF ADMINISTRATIVE</u>
	:	<u>DETERMINATION</u>
	:	
Defendant	:	
	:	
.....	:	

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 \$488.88, 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:

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Plaintiff, Pro se

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For Defendant

RDK/laa
3/5
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