

[Cite as *Banks v. Ohio Dept. of Transp.*, 2006-Ohio-7153.]

IN THE COURT OF CLAIMS OF OHIO

KIMBERLY BANKS	:	
	:	
Plaintiff	:	
	:	
v.	:	CASE NO. 2005-11060-AD
	:	
OHIO DEPARTMENT OF	:	<u>MEMORANDUM DECISION</u>
TRANSPORTATION	:	
	:	
Defendant	:	

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{¶ 1} Plaintiff, Kimberly Banks, asserted she suffered property damage to the windshield of her automobile while driving through a roadway construction area on August 16, 2005, at about noon. Plaintiff related she was traveling west on Interstate 90, "between M L King and Deadman's Curve in Cleveland, Ohio," when her automobile windshield was pelted by rocks and pebbles that had been kicked up from the roadway surface into the path of her vehicle by preceding motorists. Plaintiff explained this particular roadway surface section of Interstate 90 had recently been ground or milled in preparation for repaving leaving small bits of pavement aggregate on the milled section. Plaintiff pointed out several of these small pieces of aggregate sprayed her vehicle's windshield, "like bullets hitting." Plaintiff stated she did not see any signs posted advising motorists of the road repair work being performed on Interstate 90 on August 16, 2005.

{¶ 2} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear liability for the cost of repairing her windshield. Consequently, plaintiff filed this

complaint seeking to recover \$364.86, the cost of a replacement windshield, plus \$25.00 for filing fee reimbursement. The filing fee was paid.

{¶ 3} Defendant acknowledged the area where plaintiff's damage event occurred was located within a construction zone where the roadway had recently been milled in preparation for resurfacing. Defendant explained this roadway construction zone was under the control of DOT contractor, The Karvo Paving Company ("Karvo"). Defendant noted Karvo milled the eastbound lanes of Interstate 90 on August 15, and August 16, 2005, with no work being done on the westbound roadway lanes during the referenced time period. Plaintiff insisted the westbound lanes of Interstate 90 were milled on August 16, 2005, and her property damage occurred while she was driving in a westbound lane. Karvo denied receiving any complaints on August 16, 2005, about stones or gravel on the milled surface of Interstate 90. Karvo representative, Robin Boer, the Project Superintendent, related Interstate 90, "was milled during the night hours till 6:00 am Tuesday August 16th, 2005 in the East bound direction from E 55th Street and stopped at the Entry Ramp from Martin Luther King."

{¶ 4} Defendant asserted neither Karvo nor DOT had any knowledge of roadway debris in the westbound lanes of Interstate 90 on August 16, 2005. Defendant maintained DOT's Project Engineer, Carlo Hachem was not aware of any particular problem with roadway debris created by Karvos milling of the roadway surface. Defendant insisted Hachem, "would have addressed any problem on the Daily Diary Report for this project if he had

noticed pervasive debris or was notified by either the public or inspectors of its existence." Defendant observed the milled roadway was swept before being opened to traffic. According to Hachem, the milled surface was broomed and cleaned. Furthermore, Robin Boer wrote:

{¶ 5} "For the clean-up behind the milling machine we used a skid steer and a sub-contractor Reilly Sweeping with a sweeper broom which picks up the remaining asphalt of the planed surface. In addition, this project was signed with 'Road work ahead' signs which were placed according to ODOT traffic control standards and visible during the day. Other signs used on this project were 'BUMP' and 'Uneven Pavement' signs that were all visible during the day. This project is being performed at night due to the high volume and intensity of traffic during the daylight hours."

{¶ 6} DOT asserted the milling operation along with the removal of the milled particulate was conducted with due care to protect the motoring public from arising hazardous conditions.

{¶ 7} Pursuing an argument promoted in numerous claims, defendant has contended DOT has no responsibility for damage incidents occurring in a construction zone under the control of a contractor. Defendant asserted Karvo, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Karvo is the proper party defendant in this action. Defendant implied all duties such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects, were delegated when an independent contractor takes control over a particular

roadway section. 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 Department of Transportation* (2004), 2003-09343-AD, jud, 2004-Ohio-151. Furthermore, despite defendant's contentions that DOT did not

{¶ 8} owe any duty in regard to the construction project, defendant was charged with a 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-119, 2001 Ohio App. LEXIS 2854.

{¶ 9} Alternatively, defendant denied neither DOT nor Karvo had notice of any milling debris left on Interstate 90 after milling and clean up attempts had been conducted on August 16, 2005. Defendant professed liability cannot be established when requisite notice of damage-causing debris conditions cannot be proven. Generally, defendant is only liable for roadway conditions of which it has notice, but fails to correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶ 10} On February 27, 2006, plaintiff filed a response to

defendant's investigation report. She asserts work was done on the westbound lanes on August 16, 2005. However, plaintiff did not know how long the debris was on the roadway or if the condition had been reported prior to her encounter with the debris.

{¶ 11} 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.

{¶ 12} 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

{¶ 13} 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. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Plaintiff has not submitted sufficient proof to establish her property damage was caused by any negligent act or omission on the part of DOT or its agents.

IN THE COURT OF CLAIMS OF OHIO

KIMBERLY BANKS

:

Plaintiff

:

v.

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CASE NO. 2005-11060-AD

OHIO DEPARTMENT OF
TRANSPORTATION

:

ENTRY OF ADMINISTRATIVE
DETERMINATION

:

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 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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2/28

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