

[Cite as *Wachs v. Ohio Dept. of Transp., Dist. 12, 2006-Ohio-7162.*]

IN THE COURT OF CLAIMS OF OHIO

JOY L. WACHS :

Plaintiff :

v. :

CASE NO. 2005-09481-AD

OHIO DEPARTMENT OF
TRANSPORTATION, DISTRICT 12 :

MEMORANDUM DECISION

Defendant :

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

{¶ 1} Plaintiff, Joy L. Wachs, asserted she suffered property damage to her automobile windshield and paint chip damage to the hood of her vehicle while driving through a roadway construction area at about 5:30 a.m., on July 19, 2005. Plaintiff related when the property damage incident occurred she was traveling west on Interstate 90 between mile markers 24-22 on a roadway area that had been recently milled in preparation for repaving. Plaintiff further related as she drove on this milled roadway surface, "I could hear road debris severly coming of[f] and around my own tires, there was also traffic on the road at the time." At sometime while traveling on the milled roadway, plaintiff noted, "I heard a loud sound hit my windshield in 2 areas from the road debris." Presumedly, passing traffic propelled pavement debris, left on the roadway by the milling process, into the path of plaintiff's car, cracking the windshield and chipping paint on the hood.

{¶ 2} Plaintiff contended, defendant, Department of Transportation ("DOT"), should bear liability for the cost of replacing her windshield. Consequently, plaintiff filed this complaint seeking to recover \$341.85, her cost of automotive repair, which she contends she incurred as a result of negligence on the part of DOT in failing to safely maintain a roadway area under construction, specifically Interstate 90 in Lake County. 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 Shelly Company ("Shelly"). Defendant asserted DOT's Project Engineer, Kevin King, was not aware of any particular problem with roadway debris created by Shelly's milling of the roadway surface. Defendant maintained King, "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 by Shelly before being opened to traffic. Shelly utilized a mechanical sweeping device during the early morning hours of July 19, 2005. DOT insisted the milling operation itself along with the removal of the milled particulate was conducted with due care to protect the motoring public from arising hazardous conditions. According to a Shelly representative, "the road is swept, then scraped and swept a second time before it is opened to traffic." Both DOT and Shelly denied the construction site

was negligently maintained.

{¶ 4} 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 Shelly, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued Shelly 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 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-1119.

{¶ 5} Alternatively, defendant denied neither DOT nor Shelly had notice of any milling debris left on Interstate 90 after milling and clean up attempts had been conducted on July 19, 2005. In fact DOT asserted, "the area was regularly swept and appeared visually free from debris." 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. In her response, plaintiff insisted the area contained numerous debris. Plaintiff further noted she was told by a DOT employee that several motorists had called and complained of debris prompting Shelly to resweep the milled roadway. Neither plaintiff nor defendant submitted any written statement from this DOT employee, identified as Ed Bais.

{¶ 6} 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.

{¶ 7} 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. Plaintiff, in the instant claim, has failed to prove defendant or its agents breached any duty of care which resulted in property damage. Evidence available seems to point out the roadway area was relatively clean of debris and was maintained properly under DOT specifications. Plaintiff failed to prove her damage was proximately caused by any negligent act or omission on the part of DOT or its agents.

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OHIO DEPARTMENT OF :
TRANSPORTATION, DIST. 12 :

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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RDK/laa

3/21

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