

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
[www.cco.state.oh.us](http://www.cco.state.oh.us)

---

HERBERT E. BOWLING, JR.

Plaintiff

v.

TRANSPORTATION, OHIO  
DEPARTMENT OF

Defendant

Case No. 2006-06647-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

## FINDINGS OF FACT

{¶1} 1) Plaintiff, Herbert E. Bowling, Jr., stated he was traveling west on Interstate 90, “east of the 306 exit,” through a construction zone when a rock struck and damaged, the fender, hood, and windshield of his vehicle. Plaintiff related this property damage incident occurred on September 1, 2006, at about 8:15 a.m., in an area, where “the eastbound and westbound traffic were (traveling) side by side with a concrete barrier between them.” Plaintiff asserted a large rock came across the concrete barrier and struck his car.

{¶2} 2) Plaintiff contended defendant, Department of Transportation (“DOT”), should bear liability for the cost of repairing his automobile. Plaintiff filed this complaint seeking to recover \$500.00, his insurance coverage deductible for automotive repair. Plaintiff’s damage claim for repair costs is limited to his insurance deductible.<sup>1</sup> The filing fee was paid.

{¶3} 3) Defendant explained the area where plaintiff’s damage occurred was located within a construction zone, at about milepost 7.67 on I-90 in Lake County, under the control of DOT contractor, Anthony Allega, Inc. Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Anthony Allega, Inc. had any knowledge of the debris that struck plaintiff’s car.

{¶4} 4) Plaintiff did not submit any evidence to establish the length of time the rock was on the roadway prior to the September 1, 2006, property damage event. Plaintiff did not produce evidence showing the rock debris emanated from any construction activity. Plaintiff could not discern if any construction personnel were present in the area at the time of his property damage occurrence.

{¶5} 5) Defendant denied receiving any prior calls or complaints concerning debris on the roadway in the construction zone.

{¶6} 6) Defendant asserted Anthony Allega, Inc., by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT

---

<sup>1</sup> R.C. 2743.02(D) states:

“(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.”

|                        |       |                     |
|------------------------|-------|---------------------|
| Case No. 2006-06647-AD | - 3 - | MEMORANDUM DECISION |
|------------------------|-------|---------------------|

argued Anthony Allega, Inc. 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 section of roadway.

{¶7} 7) Furthermore, defendant again denied having any notice of the damage-causing debris. Defendant contended plaintiff failed to introduce evidence proving any requisite notice. The claim is devoid of evidence concerning actual or constructive notice of the particular debris by DOT personnel or DOT contractors on September 1, 2006.

#### CONCLUSIONS OF LAW

{¶8} 1) The duty of DOT to maintain the road 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.

{¶9} 2) 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.

{¶10} 3) In order to recover in any suit involving injury proximately caused by roadway conditions plaintiff must prove either: 1) defendant had actual or constructive notice of the debris and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD.

{¶11} 4) Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1.

|                        |       |                     |
|------------------------|-------|---------------------|
| Case No. 2006-06647-AD | - 4 - | MEMORANDUM DECISION |
|------------------------|-------|---------------------|

{¶12} 5) Plaintiff has not produced any evidence to indicate the length of time the debris was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of the debris. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the debris appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the debris. Plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the appearance of the debris. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Therefore, defendant is not liable for any damage plaintiff may have suffered from the debris.

{¶13} 6) Plaintiff has not shown, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show that the damage-causing debris was connected to any conduct under the control of defendant, that defendant was negligent in maintaining the construction area, or that there was any negligence on the part of defendant or its agents. *Taylor v. Transportation Dept.* (1998), 97-10898-AD; *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
[www.cco.state.oh.us](http://www.cco.state.oh.us)

---

HERBERT E. BOWLING, JR.

Case No. 2006-06647-AD

Plaintiff

Deputy Clerk Daniel R. Borchert

v.

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:

Herbert E. Bowling, Jr.  
7346 Trotwood Drive  
Concord, Ohio 44077

Keith Swearingen, Acting Director  
Department of Transportation  
1980 West Broad Street  
Columbus, Ohio 43223

RDK/laa  
1/25  
Filed 2/6/07  
Sent to S.C. reporter 3/20/07

[Cite as *Bowling v. Ohio Dept. of Transp.*, 2007-Ohio-1277.]