IN THE COURT OF CLAIMS OF OHIO

DIANE PARTHE

Plaintiff

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2014-00565-AD

Clerk Mark H. Reed

MEMORANDUM DECISION

{¶1} Plaintiff Diane Parthe filed this claim on June 16, 2014, to recover damages which occurred when a rock struck the windshield of her 2004 Kia Rio while she was traveling on Interstate 675 North on May 16, 2014 in Greene County, Ohio. This road is a public road maintained by the Ohio Department of Transportation. On this date, this section of the interstate was under construction by Barrett Paving Materials. Plaintiff's vehicle sustained damages in the amount of $115.73.

{¶2} In order to recover on a claim for roadway damages against the Ohio Department of Transportation, Ohio law requires that a motorist/plaintiff prove ***all*** of the following:

i. That the plaintiff's motor vehicle received damages as a result of coming into contact with a dangerous condition on a road maintained by the defendant.

ii. That the defendant knew or should have known about the dangerous road condition.

iii. That the defendant, armed with this knowledge, failed to repair or remedy the dangerous condition in a reasonable time.

{¶3} In this claim, the court finds that the plaintiff did prove that her vehicle received damages and that those damages occurred as a result of the plaintiff's vehicle coming into contact with a dangerous condition on a road maintained by the

defendant.

{¶4} The next element that a plaintiff must prove to succeed on a claim such as this is to show that the defendant knew or should have known about this dangerous condition.

{¶5} Based on the evidence presented, the court is unable to find that the defendant had actual knowledge of the dangerous condition. However, the court does find that the defendant should have known about this dangerous condition and thus would have had constructive notice about the highway danger. Constructive notice is defined as "(n)otice arising from the presumption of law from the existence of facts and circumstances that a party has a duty to take notice of…Notice presumed by law to have been acquired by a person and thus imputed to that person." (Black's Law Dictionary at 1090 8th Ed. 2004.)

{¶6} In the investigation report filed August 22, 2014, the department listed four prior accidents that it had received notice of that occurred on Interstate 675 North in the area that was being worked on by Barrett Paving. These notices were received between April 21, 2014 and May 5, 2014. All of these accidents were remarkably similar to the plaintiff's, including two vehicles that had windshield damage as a result of loose rock being kicked up from this roadway. These several incidents were sufficient to place the department on notice that the contractor was not maintaining the work area in a safe and reasonable manner.

{¶7} While it is clear that Barrett's negligent failure to properly maintain the construction area was the proximate cause of plaintiff's damages, however, apart from the issue of negligence, the court must now determine whether ODOT should be held liable for plaintiff's damages.

{¶8} The general rule of law is that an employer is not liable for the negligent acts of an independent contractor. Pusey v. Bator (2002), 94 Ohio St.3d 275, 762 N.E.2d 968. However, "[o]ne who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for

physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Bohme, Inc. v. Sprint Internatl. Communications Corp. (1996), 115 Ohio App.3d 723, 736, 686 N.E.2d 300, citing Restatement of the Law 2d, Torts (1965), Section 427. See, also, Richman Bros. v. Miller (1936), 131 Ohio St. 424, 6 O.O. 119, 3 N.E.2d 360. In Pusey, supra, the Supreme Court of Ohio explained that when work is inherently dangerous, "the employer hiring the independent contractor has a duty to see that the work is done with reasonable care and cannot, by hiring an independent contractor, insulate himself or herself from liability for injuries resulting to others from the negligence of the independent contractor or its employees." Id. at 279-280, 762 N.E.2d 968. In other words, when a certain task is inherently dangerous, an employer becomes liable for the negligence of a subcontractor in "failing to take precautions against the danger involved in the work itself, which the employer should contemplate at the time of his contract." Restatement of the Law 2d, Torts (1965), Section 427, Comment d.

{¶9} In determining whether or not ODOT is negligent in this case, the court must determine whether road construction on an interstate highway is an inherently or intrinsically dangerous activity. "Ohio courts have generally treated the issue of whether employment is inherently dangerous as a question of law to be determined by the court." Tackett v. Columbia Energy Group Serv. Corp. (Nov. 20, 2001), Franklin App. No. 01AP-89, 2001 WL 1463383. See, e.g., Bond v. Howard Corp. (1995), 72 Ohio St.3d 332, 650 N.E.2d 416; Pusey, supra, 94 Ohio St.3d at 275, 762 N.E.2d 968.

{¶10} The Supreme Court defined work as being inherently dangerous when it "creates a peculiar risk of harm to others unless special precautions are taken." Id. at 279, 762 N.E.2d 968. "[I]t is not necessary that the work be such that it cannot be done without a risk of harm to others, or even that it be such that it involves a high risk of such harm. It is sufficient that the work involves a risk, recognizable in advance, of physical harm to others, which is inherent in the work itself." Id. at

280, 762 N.E.2d 968, citing Restatement of the Law 2d, Torts (1965), Section 427, Comment b.

{¶11} Applying this standard to the facts of this case, the court concludes that roadway construction and repaving an interstate highway is an inherently dangerous activity and that, as a matter of law, such activity does create a peculiar risk of harm to others.

{¶12} Thus, the defendant, Ohio Department of Transportation, may be held liable for the negligence of the independent contractor.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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 $140.73, which includes the filing fee. Court costs are assessed against defendant.

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MARK H. REED

Clerk

Entry cc:

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