

[Cite as *Wierciak v. Ohio Dept. of Transp.*, 2005-Ohio-6117.]

IN THE COURT OF CLAIMS OF OHIO

ALICE WIERCIAK :
Plaintiff :
v. : CASE NO. 2005-06732-AD
OHIO DEPARTMENT OF : MEMORANDUM DECISION
TRANSPORTATION :
Defendant :
: : : : : : : : : : : : : : : :

{¶ 1} On June 21, 2004, at approximately 7:00 p.m., plaintiff, Alice Wierciak, was traveling south on Interstate 75 through a construction zone on a roadway that was being repaved. Plaintiff related the southbound lanes of Interstate 75 in this area were uneven presumably due to the ongoing repaving process. Plaintiff explained that at some point between exit 190 to 196 on the roadway in Wood County, her automobile traveled over "a huge gorge across the entire lane." When plaintiff drove over this described hazard the tire and rim of her vehicle were damaged. Plaintiff pointed out this "huge gorge" which damaged her car was present at a point of the roadway where the new asphalt pavement material met a bridge or overpass road lane constructed of concrete. According to plaintiff, in her response filed August 22, 2005, the area where the repaved asphalt roadway abutted the concrete bridge or overpass, "did not seam up together smoothly which did leave a deep gorge across all lanes of traffic."

{¶ 2} Plaintiff contended the damage to her vehicle was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in creating and failing to correct a hazardous roadway condition. Plaintiff filed this

complaint seeking to recover \$885.53, the cost of replacement car parts and associated expenses resulting from the June 21, 2004, incident. The filing fee was paid.

{¶ 3} Defendant acknowledged the area of Interstate 75 where plaintiff's damage occurred was located within a construction area under the control of DOT contractor Strawser, Inc. ("Strawser"). Defendant further acknowledged Strawser was involved with pavement and shoulder sealing operations on Interstate 75 on June 21, 2004.

However, actual pavement work on June 21, 2004, did not commence until 9:00 p.m. due to inclement weather. Defendant asserted Strawser, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, defendant argued Strawser should be considered the proper party defendant in this action. Defendant implied all duties, such as the duty to warn, the duty to inspect the site, the duty to maintain, and the duty to correct defective conditions, were delegated when an independent contractor takes control over a particular section of roadway. Furthermore, defendant contended plaintiff failed to produce sufficient evidence to prove her damage was proximately caused by roadway conditions created by DOT or its contractor.

{¶ 4} Strawser safety director, Mandy Chaffin, related the pavement product, Micro-Surfacing used on the roadway resurfacing, "was laid at a maximum thickness of 1/4" for each of the two separate lifts." Chaffin also noted, "[a]t no time was there a difference greater than 1/4" from one finished lane to another unfinished lane." Neither DOT nor Strawser provided information regarding the height variation between roadway lanes and under-going repavement and abutting concrete bridges or overpasses. Additionally, plaintiff did not submit any demonstrative evidence depicting the repaved roadway area at a point where the roadway surface abutted a bridge or overpass. In other words, plaintiff did not provide supporting evidence to establish any "huge gorge"

was present on the roadway at a point where it met a concrete bridge or overpass.

{¶ 5} 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. 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. *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties 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. No. 00AP-1119. No evidence other than plaintiff's assertion has been produced to show a hazardous condition was maintained on the pavement project regarding height variations between repaved lanes and existing bridge surfaced.

{¶ 6} 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; *Rhodus*, *supra* at 729;

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RDK/laa
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