[Cite as *Foglesong v. Ohio Dept. of Transp.*, 2006-Ohio-7152.]

IN THE COURT OF CLAIMS OF OHIO

DANIELLE FOGLESONG	:	
Plaintiff	:	
v.	:	CASE NO. 2005-10284-AD
DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Danielle Foglesong, asserted she suffered property damage to her automobile on August 3, 2005, while traveling through a roadway construction zone on State Route 252 in Cuyahoga County. Specifically, plaintiff maintained her car was damaged when she drove over a recently repaved roadway area and the paving material ("asphalt coating or tar") adhered to the tire of her car. Plaintiff related her car tire, "picked up loose aggregate and debris from the road surface growing in size untill [sic] it grew the size of the wheel opening and damaged the fender, inner fender, and bumper" of the vehicle.

{¶ 2} Plaintiff, in her complaint, provided a narrative description of how the property damage incident occurred which she stated happened on August 3, 2005, at approximately 2:00 p.m. Plaintiff wrote the following: "I was driving in my Ford Focus leaving home which is located at 25418 Tyndall Falls Dr. Olmsted Falls, Ohio. Proceeding west on Tyndall Falls to Columbia Road. (Rte 252). At the intersection of Tyndall Falls Dr. and Columbia Rd I turned right/north and unknown to me during the previous night during street repairs and re-paving the road crew (Shelly

Construction Co) using AC (asphalt coating or tar) sealed the edge of the new asphalt and also poured it into a crack radiating onto Tyndall Falls Dr. and neglected to use a filler of asphalt mix as a binder. Being a hot day the AC stuck to my right front tire . . ." Plaintiff related she continued to drive her car unaware the paving material adhered to her car tire was picking up roadway debris and consequently damaging the vehicle. Plaintiff specifically located the hot paving material that ultimately damaged her automobile was set at the intersection of State Route 252 (Columbia Road) and Tyndall Falls Drive.

{¶ 3} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear liability for her property damage caused by the roadway paving material. Therefore, plaintiff filed this complaint seeking to recover $658.17, an amount representing her insurance coverage deductible for automotive repair and car rental expenses. Plaintiff submitted photographs depicting the damage to her car. The photographs show a black chunky tar like substance adhered to the tire, wheel well area, inner fender, and coil spring mechanism. The damage-causing substance appears to be roadway paving material. The filing fee was paid.

{¶ 4} Defendant acknowledged the area where plaintiff stated her damage event occurred (Tyndall Falls Drive at State Route 252) was located within a roadway construction zone. Defendant explained this section of State Route 252 was under the control of DOT contractor, The Shelly Company ("Shelly"). Defendant maintained that neither DOT nor Shelly were aware of any problems

with roadway pavement conditions on State Route 252 prior to plaintiff's stated incident. In fact defendant noted DOT, "first learned of plaintiff's alleged incident on October 11, 2005," when plaintiff filed her complaint in this court. Despite the fact over 10,000 vehicles normally travel on the particular portion of State Route 252 in the course of a day, defendant denied receiving any complaints other than plaintiff's complaint concerning roadway conditions on August 3, 2005, at the intersection of Tyndall Falls Drive and Columbia Road (State Route 252).

{¶ 5} 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 8, 2001), Franklin App. 00AP-1119, 2001 Ohio App. LEXIS 2854.

{¶ 6} Alternatively, defendant insisted Shelly did not conduct any repavement operations on August 3, 2005, at the intersection of Tyndall Falls Drive and Columbia Road. A Shelly representative produced information records showing State Route 252 north was, "paved with asphalt concrete surface course, Type I, from Sta (station)127+00 to 260+00," on August 3, 2005. The location of plaintiff's stated incident corresponds to Sta (station) 11+0 on State Route 252 north. Defendant denied any repavement or other road work was performed by Shelly at the stated location of plaintiff's incident on August 3, 2005. Defendant pointed out plaintiff observed the damage causing material she drove over was asphalt coating or tar laid down by Shelly during the early morning hours of August 3, 2005. Defendant countered, noting Shelly did not begin using asphalt coating or pavement sealing on the State Route 252 project until August 24, 2005, three weeks after plaintiff's property damage occurrence. Defendant contended plaintiff failed to prove her damage was caused by any act or omission on the part of DOT or its agents.

{¶ 7} Defendant has insisted neither DOT nor Shelly had notice of any substance left on State Route 252 which could have caused damage to plaintiff's car on August 3, 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. Plaintiff, however, has not produced sufficient evidence to show her damage was proximately caused by roadway repavement activities.

{¶ 8} 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 highway. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶ 9} 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. Consequently, this claim is denied.

IN THE COURT OF CLAIMS OF OHIO

DANIELLE FOGLESONG :

Plaintiff :

v. : CASE NO. 2005-10284-AD

DEPARTMENT OF TRANSPORTATION : ENTRY OF ADMINISTRATIVE DETERMINATION

Defendant :

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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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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Plaintiff, Pro se

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RDK/laa

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