[Cite as *Slagle v. Ohio Dept. of Transp.*, 2004-Ohio-906.]

IN THE COURT OF CLAIMS OF OHIO

DEAN SLAGLE	:	
Plaintiff	:	
v.	:	CASE NO. 2003-10899-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 4	:	MEMORANDUM DECISION
Defendant	:	

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

{¶1} Defendant, Department of Transportation (DOT), entered into a contract with Shelly Company (Shelly), to resurface a section of State Route 8 in Summit County. This resurfacing project was to be performed according to DOT specifications and subject to DOT inspections.

{¶2} On June 9, 2003, Shelly's work crews milled three inches of roadway surface on State Route 8 in preparation for repaving. To permit the safe flow of traffic during the repavement process, the milled roadway was connected to the unmilled roadway by a graded ramp of cold patch material installed by Shelly pursuant to DOT specifications. By June 12, 2003, this improvised ramp of cold patch material had deteriorated, thus creating a hazardous condition. At 10:00 a.m. and again on 11:00 a.m. on June 12, 2003, the DOT Project Manager notified Shelly that the pavement in front of the butt joint at the Graham Road overpass on State Route 8 had deteriorated and needed patching. Shelly was notified of the roadway condition several times later during the day on June 12, 2003. By 7:00 p.m. on June 12, 2003, heavy rains had exposed the butt joint and deteriorated the cold patch application. Shelly was advised to close the affected roadway lanes until the rains let up and repairs could be completed with hot mix material.

{¶3} On July 13, 2003, at approximately 1:00 p.m., plaintiff, Dean Slagle, was traveling on State Route 8 through the roadway resurfacing construction zone when his automobile struck a deteriorated pavement area causing tire and wheel damage to the vehicle. Plaintiff stated his car struck, "the sharp edge of asphalt caused by grinding off the top layer of asphalt."

{¶4} After his automobile was damaged plaintiff was instructed to notify representatives from Shelly to reconcile his damage claim. Plaintiff received a written response from Norm Baur, identified as the Safety Director of the Northern Ohio Paving Co., a Division of the Shelly Company. In this response Baur wrote:

{¶5} "We have received your claim for damages. We have completed our investigation of your claim and have found no fault on the part of The Shelly Company and Subsidiaries (Northern Ohio Paving Co.) for the alleged damages. We have maintained the jobsite according to ODOT specifications, the bump that you hit was not due to our work on the job.

{¶6} "Our crews had milled three inches off of the road the week of June 9, 2003, then they ramped the lip with cold patch. As the week went on a concrete joint under the roadway heaved. We were called and sent people out to try to fix the joint with cold patch but it simply wasn't enough. ODOT then paid us extra under force account to fix the concrete problem since our crews were already going to be out there. This concrete problem while unfortunate was not part of our contract."

{¶7} Since Shelly refused to acknowledge any responsibility for plaintiff's property damage, plaintiff filed this complaint against DOT seeking to recover $1,199.46, the total cost of automotive repair needed. Plaintiff has implied his damages were proximately caused by negligence on the part of defendant's contractor in failing to correct a known dangerous roadway condition.

{¶8} Defendant denied any liability in this matter. Defendant explained plaintiff's property damage incident occurred on a roadway construction area under the control DOT's contractor, Shelly. Defendant asserted Shelly, by contractual agreement, assumed responsibility for maintaining the roadway within the construction zone. Therefore, DOT

argued Shelly is the proper party defendant in this action. Defendant seemingly contended all duties such as the duty to inspect, the duty to warn, and any maintenance duties were delegated when an independent contractor apparently takes control over a particular section of roadway.

{¶9} On January 12, 2004, plaintiff filed a response to defendant's investigation report. Plaintiff asserts the contractual relationship between Shelly and DOT was unclear. Defendant should not be absolved of responsibility.

{¶10} 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. See *Cowell v. Ohio Department of Transportation* (2004), 2003-09343-AD.

{¶11} Although defendant acknowledged DOT personnel were aware of roadway pavement problems caused by the construction activities of Shelly, defendant denied its subsequent reaction and conduct were negligent. Defendant suggested any duty of care owed to plaintiff concerning the roadway condition was discharged when DOT's Project Manager notified Shelly about the exposed pavement condition. 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.

{¶12} However, 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; *Feichtner*, supra, at 354.

{¶13} In the instant claim, plaintiff has submitted sufficient evidence to show a known hazardous condition existed on the roadway and neither DOT nor its agents timely corrected the condition. Plaintiff has proven his damage was caused by negligent acts or omissions on the part of defendant's agents. Therefore, defendant is liable to plaintiff for the damage claimed plus filing fees.

{¶14} 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 $1,224.46, which includes the filing fee. Court costs are assessed against defendant. 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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DRB/RDK/laa
1/23
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