[Cite as *Kirschnick v. Ohio Dept. of Transp.*, 2006-Ohio-7169.]

IN THE COURT OF CLAIMS OF OHIO

JASON F. KIRSCHNICK	:	
Plaintiff	:	
v.	:	CASE NO. 2005-11078-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Jason F. Kirschnick, stated he was traveling north on Interstate 271 through a construction zone on October 25, 2005, at approximately 6:00 a.m., when his automobile was pelted by "many large pieces of road debris and rocks." Plaintiff related this particular area of Interstate 271, "was ripped up for about two miles," and the roadway surface, "was completely stripped to almost a gravel state in both northbound lanes." Plaintiff noted his car windshield, hood, and front fenders were damaged by the roadway debris.

{¶ 2} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear liability for the cost of repairing his vehicle. Consequently, plaintiff filed this complaint seeking to recover $2,274.28, the cost of automotive repair and car rental expenses, plus $25.00 for filing fee reimbursement. Plaintiff recalled he contacted DOT immediately after the October 25, 2005, incident notifying DOT about the roadway conditions and damage to his vehicle. After notifying defendant of his property damage occurrence, plaintiff received multiple e-mail messages from DOT employee, Linda McPherson,

regarding procedures in filing a claim. Plaintiff submitted copies of these messages he received. One message dated November 1, 2005, contained the following: "[o]ur Summit County Manager has indicated that this is the result of maintenance." McPherson then advised plaintiff to file a claim for property damage in this court. An earlier e-mail also dated November 1, 2005, advised plaintiff to, "not proceed with a claim until we clarify who is responsible for the damage." At the time this e-mail was sent it was unclear to defendant who had maintenance responsibility for the portion of Interstate 271 where plaintiff's property damage occurred. Defendant did not know whether DOT or a hired contractor was in control of this particular section of Interstate 271 at the time of plaintiff's incident. McPherson did note to plaintiff in this e-mail that, "[t]his information has been forwarded to you as a public service, and in no way admits liability, nor is this to be considered as an evaluation of your claim."

{¶ 3} Defendant explained the portion of Interstate 271 where plaintiff's property damage occurred was an area where roadway repaving operations were being conducted by the Summit County Outpost. All construction work consisting of milling 1.5 inches of asphalt from the roadway surface and then resurfacing the roadway with 1.5 inches of asphalt was performed by DOT contractor, The Shelly Company ("Shelly"). Traffic control for the resurfacing project, located between mile markers 8.0 to 12.5 on Interstate 271, was maintained by DOT's Summit County Outpost. The operation started on October 18, 2005, and was completed on October 31, 2005. Defendant asserted, DOT

employee, Frank Phillips of the Summit County Outpost observed Shelly personnel sweeping the milled roadway surface, "with a tractor-mounted broom at the end of each day before the road was opened." DOT insisted the milled roadway was regularly swept and appeared visually free from debris. DOT reasoned the construction activity was conducted with due care to protect the motoring public from arising hazardous conditions.

{¶ 4} Among other assertions, 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 28, 2001), Franklin

App. 00AP-1119, 2001 Ohio App. LEXIS 2854.

{¶ 5} Plaintiff, in the instant claim, surmised DOT employee, Linda McPherson, through e-mails, recommended he pursue an action for damages against defendant. Plaintiff, in his response to defendant's investigation report, concluded from the information forwarded by McPherson that DOT assumed responsibility for damages resulting from any maintenance activity on the portion of Interstate 271 scheduled for resurfacing. The trier of fact finds this conclusion erroneous considering an e-mail from McPherson contains the disclaimer that DOT, "in no way admits liability, nor is this to be considered an evaluation of your claim." Furthermore, defendant subsequently denied any responsibility for plaintiff's damage and presented several arguments in defense of any liability for damage sustained.

{¶ 6} In furtherance of its position, defendant denied neither DOT nor Shelly had notice of any milling debris left on Interstate 271 after milling and clean up attempts had been conducted on or about October 24, or 25, 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, as appears to be the situation in the instant matter. 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. A Shelly representative noted the roadway was milled and swept before being opened to traffic. The construction site was maintained in accordance with DOT specifications for milling and sweeping the roadway.

{¶ 7} 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.

{¶ 8} 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 Ap. 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. From evidence produced plaintiff has failed to prove his damage was proximately caused by any negligent act or omission on the part of DOT or its agents.

IN THE COURT OF CLAIMS OF OHIO

JASON F. KIRSCHNICK	:	
Plaintiff	:	
v.	:	CASE NO. 2005-11078-AD
OHIO 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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa

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