[Cite as *Kaihlanen v. Ohio Dept. of Transp.*, 2006-Ohio-364.]

IN THE COURT OF CLAIMS OF OHIO

DARREN KAIHLANEN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09332-AD
OHIO DEPT. OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Darren Kaihlanen, asserted he suffered property damage to the windshield of his van while driving through a roadway construction area on August 9, 2005. Plaintiff related he was traveling on Interstate 90 in Lake County on a roadway area that had been "milled in preparation for re-paving." Plaintiff further related this milling of the existing roadway pavement created various potholes and pavement particulate debris on the roadway. According to plaintiff, as he was traveling "in the vicinity of milepost (MP) 205.9-206.1," passing traffic propelled pavement debris, left on the roadway by the milling process, into the path of his vehicle. Plaintiff noted a piece of airborne debris struck and damaged his van windshield.

{¶ 2} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear liability for the cost of repairing his windshield. Consequently, plaintiff filed this complaint seeking to recover $79.82, the cost of vehicle repair. Plaintiff submitted photographs of the milled roadway area where his August 9, 2005, incident occurred. The photographs taken August 10, 2005, depict a roadway surface area relatively clean of particulate matter. A pothole with pavement debris is depicted on the roadway berm area, off the highway area intended for travel.

Plaintiff was excused from paying a filing fee.

{¶ 3} Defendant acknowledged the area where plaintiff's damage event occurred was located within a construction zone where the roadway had recently been milled in preparation for resurfacing. Defendant explained this roadway construction zone was under the control of DOT contractor, The Shelly Company ("Shelly"). Defendant asserted DOT's Project Engineer, Kevin King, was not aware of any particular problem with roadway debris created by Shelly's milling of the roadway surface. Defendant maintained King, "would have addressed any problem on the Daily Diary Report for this project if he had noticed pervasive debris or was notified by either the public or inspectors of its existence." Defendant observed the milled roadway was swept by Shelly before being opened to traffic. Shelly utilized a mechanical sweeping device during the early morning hours of August 9, 2005. DOT insisted the milling operation itself along with the removal of the milled particulate was conducted with due care to protect the motoring public from arising hazardous conditions.

{¶ 4} 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 28, 2001), Franklin App. 00AP-1119.

{¶ 5} Alternatively, defendant denied neither DOT nor Shelly had notice of any milling debris left on Interstate 90 after milling and clean up attempts had been conducted on August 9, 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. In his response to defendant's investigation report, plaintiff contended the photographs he submitted clearly show debris material on the berm and yellow edgeline area of Interstate 90. The photographs also depict an orange traffic control barrel positioned on the roadway berm. Plaintiff suggested the photographic evidence constitutes proof of notice regarding the milling debris. The photographs constitute proof of notice of debris off the traveled portion of the roadway on August 10, 2005, a day after plaintiff's incident.

{¶ 6} 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.

{¶ 7} 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. Evidence available seems to point out plaintiff's damage was proximately caused by the negligent driving of an unidentified third party who drove off the traveled portion of the roadway and propelled debris into the path of plaintiff's vehicle. Plaintiff 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

DARREN KAIHLANEN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09332-AD
OHIO DEPT. 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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Plaintiff, Pro se

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RDK/laa
1/10
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