

{¶3} 2) On May 16, 2002, defendant filed a motion to dismiss;

{¶4} 3) In support of the motion to dismiss, defendant stated in pertinent part:

{¶5} "Interstate Route 670 in the vicinity of plaintiff's incident falls under the maintenance jurisdiction of the City of Columbus. On December 26, 2002, the Ohio Department of Transportation entered into a Interstate Lane Mile and Maintenance Agreement, ODOT Agreement Number 11104, with the City of Columbus for maintenance services. Defendant asserts that pursuant to the agreement between the Ohio Department of Transportation and the City of Columbus, the City of Columbus, and not the defendant, is responsible for maintaining the roadway upon which plaintiff's incident occurred, that being Interstate 670 within the City of Columbus. This agreement states in pertinent part:

{¶6} 'WHEREAS, in the interest of public safety and convenience, it is the desire of the parties hereto that the CITY shall perform maintenance on and repairs to I-71, I-70, and I-670 ("the Interstate Highways") using its own labor forces, equipment and materials, or by contracting for these items, with reimbursement from the STATE . . .'

{¶7} "Maintenance includes pothole patching operations under this agreement. The City of Columbus also agreed to hold defendant harmless for any damage to property arising out to the City's performance of routine maintenance (See Exhibit A). Defendant asserts that the City of Columbus assumed the responsibility to maintain and repair the interstate system within its corporate limits, which includes Interstate Route 670 in the vicinity of plaintiff's incident.";

{¶8} 4) On May 31, 2002, plaintiff filed a motion for extension of time to respond to defendant's motion to dismiss;

{¶9} 5) On June 17, 2002, plaintiff filed a memorandum contra defendant's motion to dismiss;

{¶10} 6) In support of the memorandum contra, plaintiff stated in pertinent part:

{¶11} "As to the merits of Plaintiff's claim, the State has not disclaimed the responsibility of the State to maintain its highways in a reasonably safe condition, but rather, it seeks a procedural predicate for disclaiming liability in this particular instance. In fact, the Agreement embraces the concept that the State has ultimate authority, as per statute, for the maintenance of its highways and thoroughfares. Further, the State has conceded that it has a duty to maintain Ohio's highways in a reasonably safe condition. *Nevins v. Ohio Department of Transportation* (1998), 132 Ohio App. 3d 6, 23.

{¶12} "The only question for consideration at this juncture is whether the Agreement has any applicability to the issues herein. Plaintiff asserts that it does not . . .

{¶13} "First, the Agreement is defective on its face. The Agreement itself was not even entered into by the State and the City until December 26, 2001, some two (2) months after Plaintiff's vehicle was damaged. Assuming *arguendo* that the State can disclaim its liability, which Plaintiff specifically denies, the Agreement was not effectuated until well after Plaintiff's damages were sustained. The Agreement, as between the State and the City, has retroactive applicability to July 1, 2001, however, that fact has no bearing on Plaintiff's claims inasmuch as the actual agreement was not entered into until December 26, 2001. Plaintiff should not

be barred from pursuing a claim against the State by an agreement with retroactive application as between the parties to it that was not effective at the time of the incident herein.

{¶14} "Second, and as briefly discussed above, the Ohio Revised Code requires that the State maintain its highways. R.C. §5535.01 and R.C. §5535.08. The Courts of the State of Ohio have repeatedly held that the State has the general duty to maintain and repair state highways. *White v. Ohio Dept. of Transportation* (1990), 56 Ohio St. 3d 39, 42; *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App. 2d 335. In past cases, the State has conceded this responsibility. *Nevins*, Id. At 23. Now the State claims that notwithstanding its recognized obligations to maintain its highways, it is not responsible for its failure to maintain the state highway the subject of this action as a result of the Agreement with the City. This argument is without merit.

{¶15} "While the State likely has the right to contract with others to perform the mandated maintenance duties, it cannot contract away its primary statutory obligations. The delagation of responsibilities of the State authorities to its citizens is the responsibility of the legislature, not the respective governmental authorities . . ."

{¶16} THE COURT CONCLUDES THAT:

{¶17} 1) R.C. 5511.01 states in pertinent part:

{¶18} "Except as provided in sections 5501.49 and 5517.04 of the Revised Code, no duty of constructing, reconstructing, maintaining, and repairing such state highways within municipal corporations shall attach to or rest upon the director. The director may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain,

and repair them, provided the municipal corporation first consents thereto by resolution of its legislative authority, except that the director need not obtain the consent of the municipal corporation if the existing highway being changed or the location of an additional highway being established was not within the corporate limits of the municipal corporation at the time such establishment or change is approved by the director, or if the director is acting pursuant to section 5501.49 of the Revised Code . . .

{¶19} "With the exception of the authority conferred upon the director by this section, to erect state highway route markers and signs directing traffic, and by section 5501.49 of the Revised Code, Chapters 5501., 5503., 5511., 5513., 5515., 5516., 5517., 5519., 5521., 5523., 5525., 5527., 5528., 5529., 5531., 5533., and 5535. of the Revised Code, shall not in any way modify, limit, or restrict the authority conferred by section 723.01 of the Revised Code upon municipal corporations to regulate the use of streets and to have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporations and to keep them, subject to division (B)(3) of section 2744.02 of the Revised Code, open, in repair, and free from nuisance.";

{¶20} 2) R.C. 723.01 states

{¶21} "Municipal corporations shall have special power to regulate the use of the streets, Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be

kept open, in repair, and free from nuisance.”;

{¶22} 3) R.C. 5501.31 in pertinent part states:

{¶23} “Except in the case of maintaining, repairing, erecting traffic signs on, or pavement marking of state highways within villages, which is mandatory as required by section 5521,01 of the Revised Code, and except as provided in section 5501.49 of the Revised Code, no duty of constructing, reconstructing, widening, resurfacing, maintaining, or repairing state highways within municipal corporations, or the bridges and culverts thereon, shall attach to or rest upon the director, but the director may construct, reconstruct, widen, resurface, maintain, and repair the same with or without the cooperation of any municipal corporation, or with or without the cooperation of boards of county commissioners upon each municipal corporation consenting thereto.”;

{¶24} 4) In December of 2001, the defendant entered into an agreement with the City of Columbus for the maintenance and repair of I-71, I-70, and I-670 located within the boundaries of the municipal corporation. This agreement was one of a series of agreements defendant and the City of Columbus had entered into in the past. The agreement in relevant part stated:

{¶25} “WHEREAS, in the interest of public safety and convenience, it is the desire of the parties hereto that the CITY shall perform maintenance on, and make repairs to, I-71, I-70, and I-670 (‘the Interstate Highways’) using its own labor forces, equipment and materials, or by contracting for these items, with reimbursement from the STATE, and;

{¶26} “WHEREAS, it is agreed by the parties that this Agreement supersedes all previous agreements between the STATE and the CITY for Interstate Highway lane mile reimbursement and

maintenance . . .

{¶27} "Routine Maintenance- the act of preserving and keeping each type of roadway, roadside, structure, or facility, within the right-of-way as nearly as possible in its original condition as constructed or as subsequently improved, to provide satisfactory and safe highway transportation. Routine maintenance shall include, but shall not be limited to: crack sealing, pothole patching, pavement repairs to include partial and limited full depth repair, pavement markings, sign replacement and repair, mowing, herbicidal spraying, on-going landscape maintenance, street sweeping, litter pickup, snow and ice control, minor drainage repairs as determined by ODOT, catch basin cleaning, guardrail repair, and fence repair . . .

{¶28} "To the extent permitted by the Charter and Ordinances of the City of Columbus and the laws and constitution of the State of Ohio, the CITY shall hold the STATE harmless, and the STATE shall not be liable, for injury to person or damage to property arising out of the CITY's performance of routine, extraordinary, or pump station maintenance which are the subject of this Agreement.

{¶29} "This section does not obligate the STATE to provide or pay for any legal representation, to pay attorney's fees, or to pay any litigation costs associated with any claims asserted by third parties. . . .";

{¶30} 5) On the date of the incident, the maintenance responsibility for the site of the incident in question was under the authority of the City of Columbus;

{¶31} 6) Accordingly, the court concludes that the defendant did not breach any duty owed to plaintiff.

{¶32} IT IS ORDERED THAT:

- {¶33} 1) Defendant's motion to dismiss is GRANTED;
- {¶34} 2) Plaintiff's case is DISMISSED;
- {¶35} 3) Court costs are assessed against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

DRB/laa
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