

IN THE COURT OF CLAIMS OF OHIO

DR. ANDREA PORTNICK-FREEDMAN :
125 Orange Tree Drive :
Orange Village, Ohio 44022 : Case No. 2002-07649-AD

Plaintiff : MEMORANDUM DECISION

v. :

DEPARTMENT OF TRANSPORTATION :

Defendant :

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

For Defendant: Gordon Proctor, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

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

FINDINGS OF FACT

{¶1} 1) On May 2, 2002, plaintiff, Andrea Portnick-Freedman, was traveling on Harvard Road in Northeast Ohio through a roadway construction zone when her automobile struck a sharp object laying on the roadway. The object plaintiff's car struck caused damage to both right side tires of the vehicle.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$380.71, the cost of replacement tires. Plaintiff has asserted she sustained these damages as a proximate cause of negligence on the part of defendant, Department of Transportation, in maintaining the roadway. Plaintiff submitted the filing fee with the complaint.

{¶3} 3) Plaintiff has suggested the object on the roadway emanated from a nearby construction site.

{¶4} 4) Defendant acknowledged plaintiff's property damage

event occurred on a roadway area under construction within a construction zone maintained by defendant's contractor. However, defendant denied the object plaintiff's automobile struck was construction material.

{¶5} 5) Defendant denied having any knowledge of damage causing debris on the roadway.

{¶6} 6) Plaintiff has failed to produce evidence showing the length of time the material existed on the roadway prior to her incident.

CONCLUSIONS OF LAW

{¶7} Defendant has the duty to maintain its highways 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 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} Further, defendant must exercise due diligence in the maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶9} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. Plaintiff has the burden of proving, by a preponderance of the evidence, that she suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his

claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶10} Ordinarily, in a claim involving roadway debris plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD.

{¶11} Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Ohio Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1.

{¶12} Plaintiff has not produced any evidence to indicate the length of time the damage causing material was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of debris on the roadway. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the defective condition developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the debris condition. Finally, plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶13} Plaintiff's case fails because plaintiff has failed to show, by a preponderance of the evidence, that defendant failed to discharge a duty owed to plaintiff, or that plaintiff's injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing object was connected to any conduct under

the control of defendant, defendant was negligent in maintaining the construction area, or any negligence on the part of defendant.

Taylor v. Transportation Dept. (1998), 97-10898-AD, *Weininger v. Department of Transportation* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transportation* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

{¶14} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶15} IT IS ORDERED THAT:

{¶16} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶17} 2) The court shall absorb the court costs of this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

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