

[Cite as *Fischer v. Ohio Dept. of Transp.*, 2003-Ohio-5295.]

IN THE COURT OF CLAIMS OF OHIO

JOE FISCHER	:	
Plaintiff	:	
v.	:	CASE NO. 2003-05917-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
	:	

FINDINGS OF FACT

{¶1} 1) On February 12, 2003, plaintiff, Joe Fischer, was traveling on State Route 2 near milepost 7.90 in Lucas County when his truck struck an uprooted road reflector laying on the roadway. The reflector plaintiff's truck struck caused tire damage.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$150.87, the cost of a replacement tire, plus \$25.00 for filing fee reimbursement. Plaintiff asserted he sustained these damages as a result of negligence on the part of defendant, Department of Transportation, in maintaining the roadway.

{¶3} 3) Plaintiff has asserted the reflector was uprooted by snow plowing activities conducted by defendant.

{¶4} 4) Defendant denied the roadway reflector was uprooted by snow plowing operation. However, defendant suggested it has a statutory duty to do whatever is necessary to remove snow from roadways and is somehow immune from liability for any damages which may be proximately caused from these operations.

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

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

CONCLUSIONS OF LAW

{¶7} Defendant has the duty to keep the roads 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 the 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 maintenance 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, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. Plaintiff has the burden of proving, by a preponderance of the evidence, that he 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 damages caused by broken road reflectors, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition (broken reflector) 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 reflector 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 the reflector's condition. 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 (reflector) appeared. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had constructive notice of the reflector's 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 (reflector). *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 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, 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:

Joe Fischer
3710 Co. Rd. 5
Metamora, Ohio 43540

Plaintiff, Pro se

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

For Defendant

RDK/laa
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Filed 9/10/03
Sent to S.C. reporter 10/3/03