[Cite as *Lavigne v. Ohio Dept. of Transp.*, 2004-Ohio-2291.]

IN THE COURT OF CLAIMS OF OHIO

KURT LAVIGNE	:	
Plaintiff	:	
v.	:	CASE NO. 2004-01206-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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FINDINGS OF FACT

{¶1} On December 2, 2003, employees of defendant, Department of Transportation (DOT), were performing roadway maintenance work at the intersection of U.S. Route 6 and State Route 109 in Henry County. This maintenance work, according to DOT employee, Rick Riebesel, "left the shoulder of the road soft from wet stone, so we left a few traffic cones outlining the radius." The traffic cones were positioned on the roadway berm at sometime on December 2, 2003.

{¶2} On December 4, 2003, at approximately 7:40 a.m., plaintiff, Kurt Lavigne, was traveling on State Route 109 near County Road 2 when his truck ran over an orange traffic cone laying in the traveled portion of the roadway. After striking the cone, plaintiff stopped his truck and had to remove the cone from the undercarriage of the vehicle. Upon examination, plaintiff discovered the cone was DOT property, presumably from the row of cones placed on the berm area of State Route 109 on December 2,

2003, by the DOT maintenance crew. Plaintiff's truck was lightly damaged from running over defendant's property. However, plaintiff has asserted defendant should bear responsibility for the damage to

{¶3} his vehicle. Consequently, plaintiff filed this complaint seeking to recover $171.57 for repair costs associated with the December 4, 2003 incident, plus $25 for filing fee reimbursement.

{¶4} Defendant denied any liability in this matter. Defendant denied plaintiff's property damage was caused by any negligent act or omission on the part of DOT personnel. Defendant seemingly acknowledged the traffic cone which caused plaintiff's damage was DOT property. However, defendant denied the cones as originally positioned presented a hazard to motorists. Additionally, defendant denied having any prior knowledge of the position of the cone on the roadway at approximately 7:40 a.m. on December 4, 2003, the time and date of plaintiff's property damage occurrence.

{¶5} Defendant proposed the traffic cone plaintiff's truck ran over was carried from the roadway berm area onto the traveled portion of the roadway by a passing semi-truck. Defendant explained when semi-trucks turn at the intersection of U.S. Route 6 and State Route 9, the trucks make sharp turns and, therefore, may have dragged cones down the road from the original position along the roadway berm area. DOT employee, Rick Riebesel, stated that a few days after the December 2, 2003, work was done at the U.S. Route 6 and State Route 109 intersection, a DOT employee found a traffic cone "about 3 to 4 miles south of this intersection." Riebesel also speculated the cone "may have been dragged or carried there by a semi-truck." Essentially defendant has argued the damage causing traffic cone was carried onto the roadway by an unidentified third party and no negligent conduct on the part of DOT personnel resulted in plaintiff's injury.

{¶6} Additionally, defendant has asserted it did not have any

knowledge about the misplaced cone which damaged plaintiff's truck. Defendant contended plaintiff failed to present any evidence showing the length of time the cone was laying on the traveled portion of the roadway prior to his property damage incident.

{¶7} On March 3, 2004, plaintiff submitted a response to defendant's investigation report. Plaintiff insisted his property damage was proximately caused by negligence on the part of DOT personnel. Plaintiff related he measured the distance from the intersection of State Route 109 and U.S. Route 6 to the point where his truck ran over DOT's traffic cone at, "roughly 0.6 miles." Therefore, plaintiff proposed, "the defendant's argument that a semi-truck dragged the ODOT cone that entire distance is ridiculous." Plaintiff reasoned, "[i]f a semi-truck were to hit a road cone at the intersection, it would have knocked the cone off the side of the road." Seemingly, plaintiff contended DOT employees were negligent when they originally positioned the cones on the roadway berm or DOT employees were negligent by depositing the cone on the traveled portion of the roadway. Plaintiff has not produced any evidence to establish either contention.

CONCLUSIONS OF LAW

{¶8} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Somerford Twp.* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723. Further, defendant must exercise due diligence in the maintenance and repair of the

{¶9} highways. *Hennessey v. Ohio Hwy. Dept.* (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 Transp. (1992), 91-07526-AD. When conducting construction projects, defendant's personnel must operate equipment in a safe manner. *State Farm Mut. Ins. v. Dept. of Transp.* (1998), 97-11011-AD.

{¶10}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 Univ.* (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.

{¶11}Plaintiff has failed to provide sufficient evidence to prove defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's construction activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his truck. *Hall v. Ohio Dept. of Transp.* (2000), 99-12863-AD.

{¶12}Alternatively, in a claim involving roadway debris in order to recover, plaintiff must prove either: (1) defendant had actual or constructive notice of the debris 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. Dept. of Transp.* (1976), 75-0287-AD. Plaintiff has failed to prove defendant had knowledge of the debris. Plaintiff has failed to prove the debris condition evolved from negligent maintenance. Plaintiff failed to show the damage-causing object was connected to any negligence on the part of defendant, defendant was negligent in maintaining the area, or any negligence on the part of defendant. *Brzuszkiewicz v. Dept. of Transp.* (1998), 97-12106-AD; *Taylor v. Transp. Dept.* (1998) 97-10898-AD; *Weininger v. Dept. of Transp.* (1999), 99-10909-AD; *Witherell v. Ohio Dept. of Transp.* (2000), 2000-04758-AD. Consequently, plaintiff's claim is denied.

{¶13} 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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