

[Cite as *Samways v. Ohio Dept. of Transp.*, 2004-Ohio-3496.]

IN THE COURT OF CLAIMS OF OHIO

ALEXANDER SAMWAYS	:	
Plaintiff	:	
v.	:	CASE NO. 2004-01702-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	<u>MEMORANDUM DECISION</u>
Defendant	:	
	:	

FINDINGS OF FACT

{¶1} 1) On January 12, 2004, at approximately 6:45 a.m, plaintiff, Alexander Samways, was traveling west on Interstate 275 through a construction zone, when his automobile struck an orange traffic control barrel causing substantial damage to the vehicle. Plaintiff related the traffic control barrel was laying on its side in the middle of the road. Plaintiff located the incident at "right before the Reed Heartman Highway exit" on Interstate 275 in Hamilton County.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$1,713.02, the cost of automotive repair related to the January 12, 2004 property damage event. Plaintiff also seeks recovery of the \$25.00 filing fee. Plaintiff asserted the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation (DOT) or its agents.

{¶3} 3) Defendant denied liability for this matter based on the contention that none of defendant's agents was aware of the

displaced traffic barrel which ultimately caused plaintiff's property damage. Defendant stated it is unknown to defendant or its contractor, John R. Jurgensen Company (Jurgensen), the circumstances involved in how the traffic control barrel became displaced. DOT explained Jurgensen was not working on Interstate 275 at the time of plaintiff's property damage occurrence. Additionally, defendant denied the barrel plaintiff's vehicle struck was owned by either DOT or Jurgensen. Defendant denied DOT or Jurgensen personnel positioned the damage-causing barrel in the middle of the traveled portion of Interstate 275. Defendant denied the roadway construction zone was negligently maintained.

{¶4} 4) On April 30, 2004, plaintiff filed a response to defendant's investigation report. Plaintiff asserts defendant should be responsible for the damage to his vehicle regardless of who owned or controlled the traffic barrel or how it came to rest in the traveled portion of the roadway.

CONCLUSIONS OF LAW

{¶5} 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 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.

{¶6} 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 construction activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶7} 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 fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm* (1945), 145 Ohio St. 198, approved and followed.

{¶8} Ordinarily, in a claim involving roadway debris which includes out of position traffic control devices, 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.

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

{¶10} Plaintiff has not produced any evidence to indicate the length of time the traffic barrel 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 a misplaced barrel. 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 traffic barrel appeared in the traveled portion of the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had

constructive notice of the barrel's location. 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 traffic barrel to be in the traveled portion of the roadway. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶11} 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 barrel was connected to any negligence on the part 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.

{¶12} 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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DRB/RDK/laa

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