

[Cite as *Roush v. Ohio Dept. of Transp., Dist. 6, 2004-Ohio-7323.*]

IN THE COURT OF CLAIMS OF OHIO

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|---|---|---------------------------|
| DONALD ROUSH | : | |
| Plaintiff | : | |
| v. | : | CASE NO. 2004-09673-AD |
| THE OHIO DEPT. OF TRANSPORTATION, DISTRICT 6 | : | <u>ENTRY OF DISMISSAL</u> |
| Defendant | : | |
| : : : : : : : : : : : : : : : : | | |

{¶ 1} On October 21, 2004, plaintiff filed a complaint against defendant, Department of Transportation. Plaintiff alleges defendant's personnel assisted him in changing a flat tire on his vehicle. During the process of changing the tire, the lug nut "broke off." Plaintiff seeks damages in the amount of \$48.04 for replacement of the broken lug nut. Plaintiff submitted the filing fee with the complaint and also seeks reimbursement for this expense.

{¶ 2} On November 16, 2004, defendant filed a motion to dismiss. In support of the motion to dismiss, defendant stated in pertinent part:

{¶ 3} "Defendant's investigation reveals that a Release Agreement was signed by plaintiff and it states that ODOT's FIRST Team member shall not be liable for any loss of property or injury or death of any person resulting from or arising out of the activity (See Exhibit A).

{¶ 4} "In sum, defendant contends that plaintiff's case should be dismissed because of plaintiff's signature on the Release Agreement."

{¶ 5} Defendant included the release agreement as exhibit A

which in pertinent part stated:

{¶ 2} "In Consideration of accepting emergency roadside aid from the Ohio Department of Transportation 'FIRST' Team member, specifically changed flat tire broke/stud (Hereinafter referred to collectively as 'activity') Releasor, being of lawful age, agrees that The State of Ohio Department of Transportation, it's officials, employees, and/or agent (Hereinafter referred to collectively as the 'State') shall not be liable for, and Releasor's agree's to indemnify and hold the State harmless against any loss, claim, cause of action, damages, liability (including, without limitation, counsel fees to the extent permitted by law) for any loss or property or injury or death of any person resulting from or arising out of the activity."

{¶ 3} Plaintiff signed the release statement at the time the damage to his vehicle occurred.

{¶ 4} In construing a complaint upon a motion to dismiss for failure to state a claim, the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3d 190. Then, before the court may dismiss the complaint it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St. 2d 242.

{¶ 5} In the case at bar, defendant has presented a release signed by plaintiff absolving defendant on any liability in this mater. Plaintiff has not responded to defendant's motion to dismiss.

{¶ 6} Having considered all the evidence in the claim file and, for the reasons set forth above, defendant's motion to dismiss is

GRANTED. Plaintiff's case is DISMISSED. The court shall absorb the court costs of this case. The clerk shall serve upon all parties notice of this entry of dismissal and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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12/2
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