

[Cite as *Elston v. Ohio Dept. of Transp.*, 2005-Ohio-836.]

IN THE COURT OF CLAIMS OF OHIO

[illegible]

{¶ 1} Plaintiff, David Elston, stated he was driving his truck north on State Route 637 in Paulding County on August 31, 2004, at approximately 11:30 a.m. when he noticed a mower operating along the side of the roadway. Plaintiff asserted the mower was owned by defendant, Department of Transportation ("DOT") and operated by a DOT employee. Plaintiff related that just as he passed by the mower along State Route 637 about .25 of a mile north of State Route 613, the mower kicked up some stones which struck plaintiff's vehicle and hit the vehicle's passenger in the arm. Plaintiff filed this complaint seeking to recover the cost of body repair to his truck which was allegedly damaged as a proximate cause of DOT conducting mowing operations on August 31, 2004. The filing fee was paid.

{¶ 2} Defendant asserted no DOT personnel were performing mowing along State Route 637 in the area designated by plaintiff during late August, 2004. Defendant located the area of plaintiff's stated damage occurrence at milepost 7.06 on State Route 637. Defendant related DOT "maintenance records indicate that mowing operations . . . were last performed on SR 637 at milepost 7.06 on July 14, 2004." Therefore, defendant denied plaintiff's property

damage was related to any roadway maintenance activity under the control of DOT. Defendant contended plaintiff failed to produce sufficient evidence to establish his property damage was caused by DOT operations.

{¶ 3} 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.

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

{¶ 5} 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 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.

David Elston
12057 SR 637
Paulding, Ohio 45879

Plaintiff, Pro se

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

For Defendant

RDK/laa
1/26
Filed 2/4/05
Sent to S.C. reporter 2/28/05