[Cite as *Windland v. Ohio Dept. of Transp., Dist. 10*, 2005-Ohio-839.]

IN THE COURT OF CLAIMS OF OHIO

LUKE WINDLAND	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09754-AD
OHIO DEPARTMENT OF TRANSPORTATION, DIST. 10	:	MEMORANDUM DECISION
Defendant	:	

: : : : : : : : : : : : : : : : :

{¶ 1} On September 8, 2004, at approximately 5:00 p.m., plaintiff, Luke Windland, was traveling north on State Route 7 out of Marietta in Washington County, when his truck ran over a rock laying in the traveled portion of the roadway. The rock plaintiff's vehicle struck had fallen from a hillside cliff, adjacent to the south lane of the roadway. Plaintiff related "rocks came tumbling off a hillside and onto the highway." As a result of striking the rock debris on the roadway, plaintiff suffered damage to his truck tire, rim, and hubcap. Plaintiff stated the section of roadway where his damage incident happened had fully reopened in August, 2004, after being restricted for several months to correct conditions causing rock slide occurrences on the highway. Construction under the direction of defendant, Department of Transportation ("DOT"), had been performed for several months prior to September 8, 2004, to stabilize the rock face on the hillside adjacent to State Route 7 near Marietta. Plaintiff asserted the roadway was prematurely reopened while an unstable condition existed on the hillside with the strong probability of rock fall events from the overhanging cliff.

{¶ 2} Plaintiff maintained the property damage to his truck was proximately caused by negligence on the part of DOT in opening a roadway to traffic where known hazardous conditions existed. Additionally, plaintiff claimed defendant failed to adequately correct the hillside cliff area where rock falls were likely to occur. Therefore, plaintiff asserted defendant should bear liability for all his vehicle repair costs. Plaintiff filed this claim seeking to recover $196.54, the total repair costs resulting from the September 8, 2004, incident. The filing fee was paid. Plaintiff submitted evidence in the form of a newspaper article in which a DOT employee acknowledged the rock fall problems were limited to a 150-200 foot section of the cliffside adjacent to the south lane of State Route 7.

{¶ 3} Defendant professed regular inspections were conducted by DOT personnel on State Route 7 to look for problems associated with falling rocks. Defendant located plaintiff's damage-occurrence at milepost 19.50 on State Route 7. Defendant related, DOT employee, Doug Clifton, "had patrolled this area at 5:30 p.m. on September 8, 2004, and did not find any fallen rocks or landslides between milepost 18.0 and 20.0." Defendant denied having any notice of rock falls at milepost 19.50 on State Route 7 in Washington County on September 8, 2004, prior to plaintiff's incident. Defendant submitted a statement from Doug Clifton concerning his recollection and knowledge of the pertinent events on September 8, 2004. Clifton stated he was traveling State Route 7 checking for fallen rocks and landslides when he received a call about 5:43 p.m. from the Ohio State Highway Patrol, "that a vehicle had ran over rocks on SR 7 Bramblewood area." Clifton noted he arrived at the location within minutes after receiving the call (5:48 p.m.) and "removed 3 rocks about 7 to 8 inches in diameter from the traffic lanes." According to Clifton, he saw plaintiff's vehicle parked on

the roadway shoulder. Plaintiff was sitting in the vehicle and the vehicle had a flat tire. Based on available information, defendant denied having any knowledge of rock debris on State Route 7 at the site of plaintiff's damage before 5:43 p.m. on September 8, 2004.

{¶ 4} Defendant admitted experiencing problems with fallen rocks and landslides on State Route 7 in Washington County. Defendant contracted with an excavating company in January, 2004 to remedy the problems involved with slips and falling rocks from the hillside cliff near the roadway. However, defendant insisted the hillside area where excavation work was performed was located at State Route 7 milepost 18.10, a mile from the location of plaintiff's damage occurrence. Defendant denied having any knowledge regarding problems with fallen rock or rock face deterioration at State Roue 7 milepost 19.50, the professed location of plaintiff's incident.

{¶ 5} Conversely, plaintiff argued his damage incident, "occurred precisely in the construction zone," where excavation had been conducted from January, 2004 to August, 2004. Plaintiff pointed out the September 8, 2004, incident occurred in the Bramblewood area which is the area within the excavation zone. Additionally, plaintiff referenced Doug Clifton's statement, who depicted plaintiff's damage event occurring on "SR 7 Bramblewood area."

{¶ 6} Furthermore, plaintiff contended the efforts to remedy the problem of falling rocks and rock slides which were undertaken from January, 2004 to August, 2004 only made the problem worse. Plaintiff asserted rock slide incidents have occurred with more frequency after original excavations were completed. Plaintiff did not offer any corroboration of this assertion. Plaintiff argued defendant knew or should have known original remedial work to curtail rock falls was insufficient. Plaintiff professed DOT knew

on September 8, 2004, that the particular section of hillside adjacent to State Route 7 in the Bramblewood area was "an unstable unsafe condition."

{¶ 7} 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.

{¶ 8} In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the defect (rock 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. Department of Transportation* (1976), 75-0287-AD. A breach of the duty to maintain the highways must be proven, by a preponderance of the evidence, showing defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247. In the instant claim, plaintiff has failed to prove defendant had requisite notice of the rock debris his vehicle struck. However, evidence has established DOT knew the hillside rock face in the Bramblewood area posed a particular danger prior to excavation construction work being initiated. Evidence has not been presented to prove defendant knew the hillside rock face was dangerous after remedial excavation work was completed and before plaintiff's incident. In fact, DOT inspection of the rock face on the day of plaintiff's damage occurrence did not reveal any defective condition present. Defendant did not receive any other complaints regarding falling rocks or rock slides on State Route 7 in Washington County from August to September 8, 2004. Insufficient

evidence exists to indicate defendant knew or should have known the hillside rock face was unstable after August 2004. Additionally, although the rock fall that proximately caused plaintiff's damage may be some evidence of substandard maintenance regarding the previous excavation work, the fact alone that a subsequent rock fall occurred is not enough to establish liability based on negligent maintenance.

{¶ 9} Both plaintiff and DOT in a general sense, had notice of rock falls occurring on the portion of State Route 7 in question. However, plaintiff has failed to prove, by a preponderance of the evidence, that defendant knew or should have known the particular rockslide which resulted in plaintiff's property damage was likely to occur on September 8, 2004. Plaintiff has failed to prove the particular rock face from which the roadway debris originated showed any signs of instability after original excavation work was completed and before September 8, 2004. The precautionary, inhibiting, and inspecting measures taken by defendant were adequate and did not fall below the standard of care owed to the traveling public. Consequently, plaintiff has failed to present any set of facts to invoke ensuing liability on DOT. See *Mosby v. Dept. of Transportation* (1999), 99-01047-AD.

IN THE COURT OF CLAIMS OF OHIO

LUKE WINDHAM	:	
Plaintiff	:	
v.	:	CASE NO. 2004-09754-AD
OHIO DEPARTMENT OF TRANSPORTATION, DIST. 10	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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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
1/26
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