[Cite as *Colbert v. Ohio Dept. of Transp.*, 2006-Ohio-189.]

IN THE COURT OF CLAIMS OF OHIO

JAMES COLBERT	:	
Plaintiff	:	
v.	:	CASE NO. 2005-08654-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 4	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, James Colbert, stated he was traveling on Interstate 76, "by the Wolfsledge and Grant exits on March 31, 2005," at about 3:05 p.m., when his automobile was struck by a large construction sign that had dislodged from its mountings on a roadway divider wall. Plaintiff related March 31, 2005, was "a very windy day" and the dislodged construction sign was blown into the path of his vehicle by high winds. On April 1, 2005, plaintiff filed an accident report with the City of Akron Police Department, regarding the March 31, 2005, incident on Interstate 76. In this report, it was noted, plaintiff stated "a large orange construction sign came loose in the wind and struck the driver's side of his auto."

{¶ 2} Plaintiff has suggested the damage to his automobile was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in maintaining a sign in a construction zone on Interstate 76 in Summit County. The damage to plaintiff's car was so severe that plaintiff's insurer totaled the vehicle and paid the vehicle lien holder directly an amount equaling the value of the car minus a $500.00 deductible.

{¶ 3} Plaintiff filed this complaint seeking to recover his $500.00 deductible, $76.25 for out-of-pocket car rental expenses,

and $782.39, the balance owned the vehicle's lien holder after payment of insurance proceeds. Plaintiff also seeks reimbursement of the $25.00 filing fee. Although plaintiff's stated damages represent $1,383.64, the total damage amount in this claim shall be limited to $525.00, the insurance coverage deductible, plus filing fee reimbursement. Plaintiff's claims for amounts owed on a car loan and car rental expenses are not compensable in this instance. The rule of law in Ohio regarding recoverable damages regarding automotive loss provides the owner of a damaged vehicle may recover the difference between its market value immediately before and immediately after the accident. The owner of the damaged vehicle may recover the cost of automotive repairs as long as such recovery does not exceed the market value of the vehicle before the damage-causing incident. *Falter v. Toledo* (1959), 169 Ohio St. 238; *Allstate Ins. Co. v. Reep* (1982), 7 Ohio App. 3d 90. In the instant claim, insurance proceeds paid all but $500.00 of the total market value of plaintiff's vehicle. Plaintiff's claim for his property damage is limited to that $500.00 amount. Additionally, plaintiff is not entitled to recover any car rental expense he may have incurred. This expense corresponds to loss of use of the vehicle damaged and is not recoverable in an instance where the vehicle in issue is a total loss.

{¶ 4} Defendant confirmed the area where plaintiff's alleged incident occurred (between mileposts 10.76 and 10.85 on Interstate 76 in Summit County) was located within a construction area under the control of DOT contractor, A.P. O'Horo Company ("O'Horo"). DOT further acknowledged O'Horo personnel were engaged to replace decks on two bridges on Interstate 76 between mileposts 10.76 and 11.03. Defendant denied neither DOT nor O'Horo had any knowledge of any loose signs within the construction area prior to March 31, 2005. Defendant related neither DOT nor O'Horo received any calls or

complaints regarding loose signs on Interstate 76 before plaintiff's described incident. Although O'Horo placed signs at the construction site on March 30, and March 31, 2005, "there is not a notation that any of them blew off and hit a citizen's vehicle," according to defendant. Despite the fact plaintiff filed a report of the sign incident with Akron Police on April 1, 2005, he did not report any sign damage incident to either DOT or O'Horo. No O'Horo personnel who were working at the construction site on March 31, 2005, witnessed any type of occurrence as described in plaintiff's complaint.

{¶ 5} Defendant pointed out March 31, 2005, was an extremely windy day. Defendant submitted records showing wind speed in the Akron area on March 31, 2005, at approximately 3:00 p.m. was approximately 35 mph with gusts approaching 43 mph. Defendant suggested if a wind blown sign did damage plaintiff's car the incident would be attributable to an "Act of God" with no consequential liability. Defendant pointed out that this court has previously held in *Wright v. Ohio Dept. of Natural Resources* , 2003-11755-AD, 2004-Ohio-3581, a defendant cannot be held liable for damage resulting from healthy fallen trees toppled by a rain storm with accompanying winds between 50 and 80 mph. In *Wright*, id., this court determined the property damage claimed was caused solely by an "Act of God" with no evidence of any negligent act or omission on the part of defendant. Defendant proposed the "Act of God" explanation should apply to the instant claim regarding construction signs installed by O'Horo personnel along a roadway on a clear windy day with wind gust speeds maximizing at near 43 mph.

{¶ 6} Furthermore, defendant contended O'Horo and not DOT should be the defendant in this action. Defendant stated O'Horo, by contractual agreement, was responsible for maintaining the roadway within the construction area. Therefore, DOT argued O'Horo is the

proper party defendant in this action. Defendant implied all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects were delegated when an independent contractor takes control over a particular section of roadway. Furthermore, defendant contended plaintiff failed to introduce sufficient evidence to prove his damage was proximately caused by roadway conditions created by ODT or its contractor.

{¶ 7} Defendant has the duty to maintain its highway 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. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. See *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, 2004-Ohio-151, affirmed jud.

{¶ 8} Further, defendant must exercise due diligence in the maintenance and repair of the highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. This duty encompasses a duty to exercise reasonable care in conducting its roadside maintenance activities to protect personal property from the hazards arising out of these activities. *Rush v. Ohio Dept. of Transportation* (1992), 91-07526-AD.

{¶ 9} 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. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding*

Products, Inc. (1984), 15 Ohio St. 3d 75, 77. 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.

{¶ 10} This court, as the trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51. In the instant claim, plaintiff failed to produce sufficient evidence to determine his property damage was caused by a sign that was negligently installed or inspected by defendant or its agents.

{¶ 11} Plaintiff has not shown, 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 that his damage was connected to any conduct under the control of defendant or that there was any negligence on the part of defendant or its agents. *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.

IN THE COURT OF CLAIMS OF OHIO

JAMES COLBERT	:	
Plaintiff	:	
v.	:	CASE NO. 2005-08654-AD
OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 4	:	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
12/2
Filed 1/5/06
Sent to S.C. reporter 1/20/06