[Cite as *Alabaugh v. Ohio Dept. of Transp.*, 2009-Ohio-5314.]

Court of Claims of Ohio
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ANN MARIE ALABAUGH, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant
Case No. 2006-02781

Judge Joseph T. Clark

JUDGMENT ENTRY

{¶ 1} Plaintiffs brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} This case arises out of an accident involving a tractor-trailer that was operated by plaintiff Eugene Alabaugh and owned by his employer, Arctic Express, Inc. Plaintiff Ann Marie Alabaugh, Eugene's wife, was a passenger in the truck at the time of the accident.[1] The accident occurred at approximately 7:00 p.m. on April 1, 2004, near the 201 milepost on Interstate 70 in Kirkwood, Ohio. Plaintiffs were traveling eastbound when they heard a broadcast over the citizens band radio warning that rocks had fallen onto the highway. Eugene testified that the broadcast was made from another eastbound truck that was traveling approximately one-quarter mile ahead of plaintiffs. Soon after the broadcast, Eugene observed a rock "coming off the hill" that was adjacent to the highway. Eugene testified that he attempted to avoid the rolling rock by maneuvering into the left lane where he encountered another rock which struck the truck's "steering axle." The impact caused Eugene to lose control of the vehicle and

the truck skidded, rolled over, and came to rest in the median between the eastbound and westbound lanes of the highway.

{¶ 3} Plaintiffs assert that defendant was negligent in the maintenance of the highway and that it had constructive notice of the defective condition of the hillside at or near milepost 201. Defendant argues that plaintiffs have offered no evidence that defendant had notice of rock slides in the area where the accident occurred.

{¶ 4} In order to prevail upon a claim of negligence, plaintiffs must prove by a preponderance of the evidence that defendant owed them a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused their 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. Although the state is not an insurer of the safety of its highways, it has a duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Dept. of Transp.* (1976), 49 Ohio App.2d 335, 339; *Rhodus v. Ohio Dept. of Transp*. (1990), 67 Ohio App.3d 723.

{¶ 5} Plaintiffs cannot prevail on their claim of negligent roadway maintenance absent proof of actual or constructive notice of the condition or defect alleged to have caused the accident. *McClellan v. Ohio Dept. of Transp.* (1986), 34 Ohio App.3d 247. The distinction between actual and constructive notice is in the manner in which notice is obtained rather than in the amount of information obtained. Whenever the trier of fact is entitled to find from competent evidence that information was personally communicated to or received by the party, the notice is actual. Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197. Proof of constructive notice depends upon whether the alleged defect existed for such a length of time as to impute knowledge or notice. *McClellan*, supra, at 250 citing *Bello v.*

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[1]Eugene Alabaugh has asserted a claim of loss of consortium.

Cleveland (1922), 106 Ohio St. 94; *McCave v. Canton* (1942), 140 Ohio St. 150. ODOT is liable only for roadway conditions of which it has notice but fails to correct within a reasonable time or manner. *Bussard v. Ohio Dept. of Transp*. (1986), 31 Ohio Misc.2d 1.

{¶ 6} Plaintiffs have provided no evidence that ODOT had actual notice of the alleged hazard. Thus, the question becomes whether ODOT had constructive notice. The trier of fact is precluded from making an inference of constructive notice unless evidence is presented with respect to the time that the defective condition developed. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc.2d 262. Moreover, the size of a defect or hazard on a highway is insufficient to show notice or duration of existence. *O'Neil v. Ohio Dept. of Transp.* (1988), 61 Ohio Misc.2d 287.

{¶ 7} Both Eugene and Ann Marie Alabaugh testified that they returned to the scene of the accident the following day and that they observed rocks and debris along the side of the highway. On that day, Eugene took photographs that included a view of the hill and a drainage ditch that ran alongside the berm of the highway in the vicinity of the hill. (Plaintiff's Exhibits 2-7.) Eugene testified that the rocks that impacted the truck fell from the hill that is depicted in the photographs. He estimated that the slope of the hill extended to within ten feet of the highway. Ann Marie testified that the grade of the hill is steep and that she observed rocks at the base of the hill that were within one foot of the roadway.

{¶ 8} Plaintiffs also presented the testimony of Richard Durst, the president and chief executive officer of Arctic Express, Inc., as to the condition of the hill from which they allege the rocks fell. Durst testified that he was familiar with the area that borders the highway near the scene of the accident. Durst corroborated the Alabaughs' testimony that the hill was steep and that dirt and rocks had accumulated at the bottom of the hill, near the berm of the road. Durst was not aware of whether there was a fence between the hill and the highway or a sign warning of falling rocks.

{¶ 9} Based upon the totality of the evidence presented, the court concludes that plaintiffs failed to prove by a preponderance that the hazardous condition existed for a sufficient period of time that ODOT knew or should have known of its existence. Thus, plaintiffs have failed to demonstrate that ODOT had either actual or constructive notice of the debris that fell onto the roadway and caused the accident.

{¶ 10} Finally, plaintiff Eugene Alabaugh is precluded from recovering on his loss of consortium claim in that such claims are derivative and "dependent upon the defendant's having committed a legally cognizable tort upon the [individual] who suffers bodily injury." *Bowen v. Kil-Kare, Inc*. (1992), 63 Ohio St.3d 84, 93. Inasmuch as plaintiffs have failed to prove their claim of negligence, the loss of consortium claim must also fail. Accordingly, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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JOSEPH T. CLARK
Judge

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AMR/cmd
Filed September 8, 2009
To S.C. reporter October 6, 2009