

[Cite as *Marcum v. Ohio Dept. of Transp.*, 2005-Ohio-2038.]

IN THE COURT OF CLAIMS OF OHIO

MINDY L. MARCUM :  
Plaintiff :  
v. : CASE NO. 2004-10507-AD  
OHIO DEPT. OF TRANSPORTATION : MEMORANDUM DECISION  
Defendant :

.....

FINDINGS OF FACT

{¶1} On July 6, 2004, at approximately 1:00 a.m., plaintiff, Mindy L. Marcum, was traveling south on Interstate 71 through a construction zone, when her automobile struck an orange traffic control barrel causing substantial damage to the vehicle. Plaintiff related the traffic control barrel was laying on its side in the middle of the road. Plaintiff located the incident "north of exit #198, the Congress/West Salem exit," on Interstate 71 in Wayne County.

{¶2} Plaintiff filed this complaint seeking to recover \$653.98, the cost of automotive repair and expenses related to the July 6, 2004, property damage event. Plaintiff paid the \$25.00 filing fee. Plaintiff asserted the damage to her automobile was proximately caused by negligence on the part of defendant, Department of Transportation (DOT) or its agents in failing to maintain proper positioning of the traffic control barrels and failing to adequately light the roadway.

{¶3} Defendant denied liability for this matter based on the contention that none of defendant's agents was aware of the

displaced traffic barrel which ultimately caused plaintiff's property damage. Defendant stated it is unknown to defendant or its contractor, The Shelly Company ("Shelly"), the circumstances involved in how the traffic control barrel became displaced. DOT explained Shelly was not working on Interstate 71 at the time of plaintiff's property damage occurrence. Additionally, defendant asserted plaintiff has not proven the barrel her vehicle struck was owned by either DOT or Shelly. Defendant denied DOT or Shelly personnel positioned the damage-causing barrel in the middle of the traveled portion of Interstate 71. Defendant denied the roadway construction zone was negligently maintained.

#### CONCLUSIONS OF LAW

{¶4} 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 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.

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

{¶6} For plaintiff to prevail on a claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d

282,285. Plaintiff has the burden of proving, by a preponderance of the evidence, that she 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.

{¶7} Ordinarily, in a claim involving roadway debris which includes out of position traffic control devices, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition 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.

{¶8} Defendant is only liable for roadway conditions of which it has notice, but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1.

{¶9} Plaintiff has not produced any evidence to indicate the length of time the traffic barrel was present on the roadway prior to the incident forming the basis of this claim. No evidence has been submitted to show defendant had actual notice of a misplaced barrel. Additionally, the trier of fact is precluded from making an inference of defendant's constructive notice, unless evidence is presented in respect to the time the traffic barrel appeared in the traveled portion of the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication defendant had

constructive notice of the barrel's location. Finally, plaintiff has not produced any evidence to infer defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the traffic barrel to be in the traveled portion of the roadway. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶10} Plaintiff's case fails because plaintiff has failed to show, 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 the damage-causing barrel was connected to any negligence on the part of defendant, defendant was negligent in maintaining the construction area, or any negligence on the part of defendant. *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.

[Cite as *Marcum v. Ohio Dept. of Transp.*, 2005-Ohio-2038.]

IN THE COURT OF CLAIMS OF OHIO

MINDY L. MARCUM :

Plaintiff :

v. :

CASE NO. 2004-10507-AD

OHIO DEPT. OF TRANSPORTATION :

ENTRY OF ADMINISTRATIVE  
DETERMINATION

Defendant :

.....

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:

Mindy L. Marcum  
3271 Avalon Cove Lane NW  
Rochester, Minnesota 55901

Plaintiff, Pro se

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

For Defendant

Sent to S.C. reporter 4/29/05