[Cite as *Tretock v. Ohio Dept. of Transp.*, 2005-Ohio-2897.]

IN THE COURT OF CLAIMS OF OHIO

FRANK G. TRETOCK	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02826-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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

FINDINGS OF FACT

{¶ 1} On December 28, 2004, at approximately 5:15 p.m., plaintiff, Frank G. Tretock, was traveling west on Interstate 480 near the W. 150th Street exit in Cleveland, when his van struck ice debris laying in the roadway. The impact of striking the ice debris caused substantial body damage to plaintiff's vehicle. Plaintiff described the damage-causing debris material as an ,"ice ball, 2 ft. in diameter." Plaintiff related this ice ball rolled onto the roadway from a concrete divider wall adjacent to the left lane of Interstate 480 West. Two passengers in plaintiff's van, Zeedock Long and Nick Roshetsky, wrote statements regarding their recollections of the December 28, 2004, incident. Both Long and Roshetsky noted the ice ball which plaintiff's van struck rolled from the concrete divider wall adjacent to the left lane of Interstate 480 West. It is unclear from the statements introduced, whether or not plaintiff, Long, and Roshetsky actually saw ice debris fall from a concrete divider onto the left lane of Interstate 480.

{¶ 2} Plaintiff contended defendant, Department of

Transportation ("DOT"), should bear liability for the damage to his van from colliding with ice debris on the roadway. Therefore, plaintiff filed this complaint seeking to recover $1,216.45, the cost of vehicle repair resulting from the December 28, 2004, incident. The filing fee was paid. Plaintiff submitted photographs depicting the body damage to his van.

{¶ 3} Defendant denied any liability in this matter based on the contention that no DOT personnel were aware of the ice debris condition prior to plaintiff's property damage occurrence. Defendant related no calls or complaints were received regarding ice or other debris on Interstate 480 around the time period of plaintiff's incident. Defendant suggested the debris condition, "existed in that location for only a relatively short period of time before plaintiff's incident."

{¶ 4} Defendant asserted plaintiff did not offer sufficient evidence to establish his property damage was proximately caused by any negligent act or omission on the part of DOT. Defendant surmised the damage-causing ice debris was displaced by an unidentified third party motorist and had no connection to DOT roadway maintenance activity. Defendant argued DOT cannot be held liable for damage caused by third party motorists. Furthermore, defendant explained DOT work crews conducted frequent maintenance operations on Interstate 480 including removing noticed roadway debris. Therefore, defendant insisted any known debris condition would have been immediately removed from the traveled roadway.

{¶ 5} Plaintiff responded to defendant's assertions. Plaintiff stated the ice debris constituted a hazardous condition and, "[t]his condition had to be caused by defendant's improper maintenance of the roadway because they or their agents are the exclusive maintainers of this roadway." It appears plaintiff is contending DOT created the ice debris condition during some roadway

maintenance activity. Plaintiff reiterated the ice ball rolled from the center median wall into the path of his moving vehicle. Plaintiff professed, "defendant should have reasonably known that this condition was a hazard and taken steps to protect the motoring public."

CONCLUSIONS OF LAW

{¶ 6} 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.

{¶ 7} In order to prove a breach of duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that 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. 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.

{¶ 8} 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 defective condition developed. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262. However, proof of notice of a dangerous condition is not necessary when defendant's own agents actively cause such condition. See *Bello v. City of Cleveland* (1922), 106 Ohio St. 94, at paragraph one of the syllabus; *Sexton v. Ohio Department of Transportation* (1996), 94-13861.

{¶ 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. *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 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 failed to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, approved and followed.

{¶ 10} Plaintiff has not proven, by a preponderance of the evidence, that defendant failed to discharge a duty owed to him or that his injury was proximately caused by defendant's negligence. Plaintiff failed to show the damage-causing object was connected to any conduct under the control of defendant, 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. Plaintiff has failed to provide sufficient evidence to prove defendant maintained a hazardous condition on the roadway which was the substantial or sole cause of plaintiff's property damage. Plaintiff has failed to prove, by a preponderance of the evidence, that defendant's roadway maintenance activity created a nuisance. Plaintiff has not submitted conclusive evidence to prove a negligent act or omission on the part of defendant caused the damage to his car. *Hall v. Ohio Department of Transportation* (2000), 99-12863-AD.

IN THE COURT OF CLAIMS OF OHIO

FRANK G. TRETOCK	:	
Plaintiff	:	
v.	:	CASE NO. 2005-02826-AD
OHIO DEPARTMENT 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:

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Plaintiff, Pro se

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For Defendant

RDK/laa
4/26
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