[Cite as *Arbogast v. Ohio Dept. of Transp.*, 2006-Ohio-369.]

IN THE COURT OF CLAIMS OF OHIO

TERRY A. ARBOGAST	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09839-AD
DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Terry A. Arbogast, stated he was traveling south on Interstate 71 in Columbus on May 3, 2005, "when a rock (about the size of a hand) bounced off the pavement and struck the hood of my car and then smashed into my front windshield." Plaintiff pointed out he had just driven under an overpass (Weber Road) spanning Interstate 71 when the rock struck his car. Plaintiff filed a report of this incident with the Columbus Police Department. This report noted plaintiff was unaware about the origin of the rock which damaged his vehicle. Apparently plaintiff did not know if the rock fell from a passing vehicle or was thrown onto the roadway by an unidentified individual.

{¶ 2} Plaintiff contended defendant, Department of Transportation ("DOT"), should bear liability for the property damage to his car resulting from the May 3, 2005, incident. Plaintiff filed this complaint seeking to recover $288.18, his cost of automotive repair caused by the bouncing rock. The filing fee was paid.

{¶ 3} Defendant denied liability for plaintiff's damage based on the contention DOT had no knowledge of the debris condition prior to plaintiff's property damage event. Furthermore defendant denied having any connection to the damage-causing rock. Defendant denied

{¶ 4} receiving any prior calls or complaints regarding a rock on the roadway at milepost 113 on Interstate 71 in Franklin County. Defendant asserted plaintiff has failed to produce sufficient evidence to prove any conduct of DOT was the cause of his property damage.

{¶ 5} Defendant denied the object which caused plaintiff's property damage fell from a structure maintained by DOT. Defendant denied the damage-causing object fell from a truck owned by DOT. Defendant contended the damage-causing object originated from an unidentified third party not affiliated with DOT. Defendant argued it cannot be held liable for acts attributable to an unknown third party.

{¶ 6} Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessy v. State of Ohio Highway Department* (1985), 85-02071-AD. 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.

{¶ 7} 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.

{¶ 8} Evidence in the instant action tends to show plaintiff's damage was caused by an act of an unidentified third party, not DOT. Defendant has denied liability based on the particular premise it had no duty to control the conduct of a third person except in cases where a special relationship exists between defendant and either plaintiff or the person whose conduct needs to be controlled. *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St. 3d 171. However, defendant may still bear liability if it can be established if some act or omission on the part of DOT was the proximate cause of plaintiff's injury. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St. 3d 51.

{¶ 9} "If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, at 160 quoting *Mudrich v. Std. Oil Co.* (1985), 153 Ohio St. 31.

{¶ 10} Plaintiff has failed to establish his damage was proximately caused by any negligent act or omission on the part of DOT. In fact, the sole cause of plaintiff's injury was the act of

an unknown third party which did not involve DOT. Plaintiff has failed to prove, 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 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. Consequently, plaintiff's claim is denied.

IN THE COURT OF CLAIMS OF OHIO

TERRY A. ARBOGAST	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09839-AD
DEPARTMENT OF TRANSPORTATION	:	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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Terry A. Arbogast 8101 Oxbow Road Westerville, Ohio 43082 — Plaintiff, Pro se

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