[Cite as *Mosholder v. Ohio Dept. of Transp.*, 2006-Ohio-1020.]

IN THE COURT OF CLAIMS OF OHIO

KRISTINA L. MOSHOLDER	:	
Plaintiff	:	
v.	:	CASE NO. 2005-10462-AD
OHIO DEPARTMENT OF TRANSPORTATION	:	MEMORANDUM DECISION
Defendant	:	

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

{¶ 1} Plaintiff, Kristina L. Mosholder, stated she was traveling north on Interstate 75 about 5:30 a.m., on August 23, 2005, when her van struck an orange traffic control cone lying in the middle lane of the divided highway. Plaintiff related the orange cone, "shattered the drivers side lower bumper of my 2002 Oldsmobile van." According to plaintiff, there were several other traffic control cones lying on the traveled portion of Interstate 75 North between exit 63 and exit 69. Plaintiff located her particular incident "between exits 63 and 64" on Interstate 75 in Montgomery County. Plaintiff noted it did not appear she was driving through a construction area at the location where her property damage occurred.

{¶ 2} Plaintiff filed this complaint seeking to recover $818.81, the complete cost of replacing a bumper cover. Plaintiff asserted defendant, Department of Transportation ("DOT"), should bear liability for her property damage. The filing fee was paid.

{¶ 3} Defendant denied liability based on the contention no DOT personnel had any knowledge of orange cones on Interstate 75 prior to plaintiff's August 23, 2005, incident. Defendant explained

plaintiff filed an incident report with DOT on August 26, 2005, and in response DOT administrator, Rossman viewed the roadway area discovering orange cones strewn over a few miles of Interstate 75. Defendant denied placing the cones on the roadway and suggested the cones were deposited on the highway by an unidentified third party at some undetermined time prior to plaintiff's damage occurrence. Plaintiff did not submit any evidence to establish how long the orange cones had been deposited on the roadway before 5:30 a.m. on August 23, 2005.

{¶ 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} 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. *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 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. 198l, approved and followed.

{¶ 6} 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. 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.

{¶ 7} Plaintiff has not produced any evidence to indicate the length of time the orange cone 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 cone. 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 orange cone 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 cone'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 orange cone to be in the traveled portion of the roadway. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD.

{¶ 8} 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 cone was connected to any negligence on the part of defendant or defendant was negligent in maintaining the roadway. *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

KRISTINA L. MOSHOLDER	:	
Plaintiff	:	
v.	:	CASE NO. 2005-10462-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:

Kristina L. Mosholder
2617 Huntington Drive
Troy, Ohio 45373

Plaintiff, Pro se

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

For Defendant

RDK/laa
1/20
Filed 2/14/06
Sent to S.C. reporter 3/3/06