[Cite as *Lee v. Ohio Dept. of Transp.*, 2009-Ohio-5612.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

WILLIAM A. LEE

Plaintiff

v.

OHIO DEPT. OF TRANSPORTATION

Defendant

Case No. 2009-03207-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, William A. Lee, asserted his 2002 Pontiac Aztek was damaged on February 1, 2009, when the vehicle struck rock debris laying on US Route 33 in Athens County. Plaintiff stated "I was driving between Athens and Pomeroy, Ohio on 33 when a rock slide occurred which I could not avoid." Apparently rocks had fallen onto US Route 33 from the cut back hillside face adjacent to the roadway. Plaintiff pointed out the rock debris on the roadway caused "a baseball size hole" in the right front tire of the vehicle along with minor electronic ignition problems. Plaintiff implied the damage to his 2002 Pontiac Aztek was proximately caused by negligence on the part of defendant, Department of Transportation ("DOT"), in failing to maintain the hillside area adjacent to US Route 33 in Athens County. Consequently, plaintiff filed this complaint seeking to recover damages in the amount of $262.02 for repair costs and related expenses. Plaintiff submitted the $25.00 filing fee and requested reimbursement of that cost along with his damage claim.

{¶ 2} Defendant denied liability based on the contention that no DOT personnel

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had any knowledge of rock debris on the roadway prior to plaintiff's February 1, 2009 property damage event. Defendant has no record of receiving any calls or complaints regarding rock debris in an area which DOT located "between mileposts 18.50 to 26.71 on US 33 in Athens County." Defendant explained DOT work crews conducted frequent litter pick up operations in the specific vicinity of plaintiff's incident with the last operation performed prior to February 1, 2009, occurring on January 2, 2009. Defendant also explained the area between mileposts 18.50 to 26.71 on US Route 33 "had been inspected on a regular basis and did not look like a litter problem." Defendant suggested the rock debris plaintiff's vehicle struck "existed in that location for only a relatively short amount of time before plaintiff's incident." Defendant stated DOT does not believe "that it was negligent in respect to maintenance of the area in question (or) that it breached its duty of care to the traveling public."

{¶ 3} Plaintiff filed a response again asserting the rock that damaged his vehicle fell onto the roadway from the cutback hillside face adjacent to US Route 33. Plaintiff submitted a photograph depicting one of the rocks that had fallen onto the roadway. Plaintiff submitted an e-mail from the individual who towed his vehicle on February 1, 2009, Eric Gryszka. Gryszka noted the rock that damaged plaintiff's Pontiac Aztek "had

fallen into the roadway from the adjoining hillside." Plaintiff offered the following information stating "there were two geologists in that same area (Athens County) where the rock slide occurred, who were inspecting for such areas on February 2, 2009. They were hired by the State of Ohio. We had met them at the same hotel we were staying at in Athens, Ohio on the eve of February 2, 2009." Neither plaintiff nor defendant provided any statement from the two described geologists in reference to hillside conditions adjacent to US Route 33 in Athens County.

{¶ 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, 3 O.O. 3d 413, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864. The facts of the instant claim do not establish defendant breached any duty in respect to roadway maintenance.

{¶ 5} Therefore, in order for plaintiff to recover under a negligence theory he must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the rocky debris and failed to respond in a reasonable time or responded in a negligent manner. *Denis v. Department of Transportation* (1976), 75-0287-AD. A breach of the duty to maintain the highways must be proven, by a preponderance of the evidence, showing 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, 517 N.E. 2d 1388. In the instant claim, plaintiff has failed to prove defendant had requisite notice of the rock debris his vehicle struck. No

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facts have shown that defendant had actual or constructive notice of the rock fall which proximately caused plaintiff's damages. *See Hanlin v. Ohio Dept. of Transp*., Ct. of Cl. No. 2004-10582-AD, 2005-Ohio-2040; *Clarke v. Ohio Dept. of Transp.*, Ct. of Cl. NO. 2005-02168-AD, 2005-Ohio-3240.

{¶ 6} In a general sense, both plaintiff and DOT had notice of rock falls occurring on the portion of US Route 33 in question. However, plaintiff has failed to prove, by a preponderance of the evidence, that defendant knew or should have known the particular rockslide which resulted in plaintiff's property damage was likely to occur on February 1, 2009. Plaintiff has failed to prove that the particular rock face from which the roadway debris originated showed any signs of instability before February 1, 2009. Any precautionary and inhibiting measures taken by defendant were adequate and did not fall below the standard of care owed to the traveling public. Consequently, plaintiff has failed to present any set of facts to invoke ensuing liability on DOT. See *Mosby v. Dept. of Transportation* (1999), 99-01047-AD; also *Rupert v. Ohio Dept. of Transp., Dist. 11*, Ct. of Cl. No. 2008-01294-AD, 2008-Ohio-4192.

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ENTRY OF ADMINISTRATIVE DETERMINATION

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.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

William A. Lee
2864 Rudy's Trail
Frankfort, Michigan 49635

Jolene M. Molitoris, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
5/29
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