

[Cite as *Ulery v. Ohio Dept. of Transp.*, 2002-Ohio-4629.]

IN THE COURT OF CLAIMS OF OHIO

BONNIE JEAN ULERY	:	
4823 Bailey Road	:	
North Olmsted, Ohio 44070	:	Case No. 2002-03988-AD
Plaintiff	:	MEMORANDUM DECISION
v.	:	
DEPT. OF TRANSPORTATION	:	
Defendant	:	

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

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

FINDINGS OF FACT

{¶1} 1) On April 8, 2002, plaintiff, Bonnie Jean Ulery, was traveling north on Interstate 71 near the 130th Street exit in Cuyahoga County when her van struck an orange traffic control cone in the traveled portion of the roadway. Plaintiff asserted her vehicle's fuel line and gas tank were damaged as a result of striking the orange cone.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$435.33, the cost of automotive repair and towing expenses. Plaintiff contended her property damage was proximately caused by negligence on the part of defendant, Department of Transportation, in maintaining the roadway. On April 24, 2002, plaintiff submitted the filing fee.

{¶3} 3) Defendant denied liability based on the fact it did not have any knowledge of the orange cone laying on the roadway

surface. Defendant indicated there was no construction activity proceeding in the area of plaintiff's property damage occurrence at the time of plaintiff's incident. Defendant denied owning the damage-causing cone.

{¶4} 4) Plaintiff filed a response alleging the cone her van struck was owned by defendant. Plaintiff did not submit any evidence establishing the actual owner of the orange cone. Plaintiff failed to produce any evidence showing the length of time the cone was positioned on the roadway prior to her property damage event.

CONCLUSIONS OF LAW

{¶5} 1) Defendant has the duty to keep roads in a safe, drivable condition. *Amica Mutual v. Dept. of Transportation* (1982), 81-02289-AD.

{¶6} 2) 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.

{¶7} 3) In order to recover on a claim of this type, plaintiff must prove either: 1) defendant had actual or constructive notice of the orange cone 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} 4) There is no evidence that defendant had actual notice of the cone in the traveled portion of the roadway;

{¶9} 5) 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 cone appeared in the traveled portion of the roadway. *Spires v. Highway Department* (1988), 61 Ohio Misc. 2d 262.

{¶10} 6) In order for there to be constructive notice, plaintiff must show sufficient time has elapsed after the cone

appears, so that under the circumstances, defendant should have acquired knowledge of its existence. *Guiher v. Jackson* (1978), 78-0126-AD.

{¶11} 7) No evidence has shown defendant had constructive notice of the cone in the traveled portion of the roadway.

{¶12} 8) Furthermore, plaintiff has failed to show defendant negligently maintained its highways.

{¶13} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶14} IT IS ORDERED THAT:

{¶15} 1) Plaintiff's claim is DENIED and judgment is rendered in favor of defendant;

{¶16} 2) The court shall absorb the court costs in this case in excess of the filing fee.

DANIEL R. BORCHERT
Deputy Clerk

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