

[Cite as *Sherwood v. Ohio Dept. of Transp.*, 2003-Ohio-4438.]

IN THE COURT OF CLAIMS OF OHIO

FRANK W. SHERWOOD, et al. :
Plaintiffs : CASE NO. 2001-11235
v. : MAGISTRATE DECISION
DEPARTMENT OF : Holly True Shaver, Magistrate
TRANSPORTATION, et al. :
Defendants :
: :

{¶1} Plaintiff¹ brought this action against defendants alleging claims of negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} On June 6, 2001, at approximately 8:45 p.m., plaintiff was involved in a single vehicle accident on State Route (SR) 122 in Warren County, Ohio on his way home from a golf outing. SR 122 is a two-lane road with a speed limit of 55 miles per hour (mph). Heavy downpours had occurred intermittently throughout the day leaving the pavement wet, but at the time of the accident it had stopped raining and visibility was good. Plaintiff estimated that he was driving at a speed of 45 to 50 mph eastbound on SR 122 when his vehicle struck a large pothole filled with water. He lost control of his vehicle, crossed over the westbound lane and struck trees on the north side of SR 122. Plaintiff testified that he did

¹"Plaintiff" shall be used to refer to Frank Sherwood throughout this decision.

not see the pothole before driving over it. Plaintiff sustained injuries as a result of the accident.

{¶3} Earlier in the day, at approximately 6:31 p.m., defendant² received a telephone call from Dispatcher Debra Griffith of the Ohio State Highway Patrol (OSHP) who reported that part of the roadway had washed away on SR 122. Griffith had received this information at 6:30 p.m. from Trooper Sidney Steele who stated that he had driven over a "huge pothole" that needed to be repaired. Griffith called defendant and spoke to an operator. She testified that the operator asked if the pothole repair could wait until morning and that she answered that it could not.

{¶4} John Sand, a radio operator for defendant, took the call from Griffith. Due to the heavy rainfall that had occurred throughout the day, defendant's employees were busy placing "high water" signs around the area. Sand testified that he asked Griffith if the pothole could wait until morning and that she said that it could wait.

{¶5} Notwithstanding his contention that Griffith told him that it could wait until morning, Sand contacted an employee of defendant, Gary Langdon, about the pothole. Langdon had worked the 7:00 a.m. to 3:30 p.m. shift and had been called back to work another shift at 5:20 p.m. Langdon was placing high water signs at another location when he received a call about the pothole at approximately 6:34 p.m.

{¶6} When Langdon arrived at the scene, he observed a pothole that was located approximately eight inches into the roadway from the painted edge line. According to Langdon, the pothole measured

²"Defendant" shall be used to refer to the Department of Transportation (ODOT) throughout this decision.

approximately one to two feet long by one foot wide, and one to two inches deep. He also observed some gravel and water that had washed onto the roadway from a nearby driveway. He swept the gravel away with a broom and used a shovel to cut about a dozen trenches along the berm to facilitate the flow of water off the roadway. After working on the pothole, Langdon returned to defendant's garage and then went home. When he left the scene, the sun was shining, there was no standing water on the road, and he did not believe that the pothole posed a danger to the motoring public.

{¶7} Some time after Langdon went home, another heavy downpour occurred, causing a greater washout of the roadway. Sand testified that he received a call from the Clear Creek Township Police Department at approximately 7:58 p.m. regarding a "washout" on SR 122. When Sand told the caller that it had already been reported the caller stated that more of the roadway had washed away and that it needed immediate attention.

{¶8} At 8:06 p.m., Sand reported the problem to County Manager Bob Craig. At 8:08 p.m., Craig reported back to Sand that he had contacted defendant's road foreman, Russ Mantcz, and instructed him to handle the situation. Mantcz was at his home when he was called; he arrived at defendant's garage at 8:20 p.m., whereupon he proceeded to the area where the pothole was located. When Mantcz arrived at the scene, plaintiff's accident had already occurred.

{¶9} Trooper Steele was called to investigate the accident. He arrived at 9:03 p.m., after plaintiff had been taken to the hospital. Steele measured the pothole and determined that it was 4 feet long by 2 feet wide and 4 inches deep, and that it was located 2 feet into the roadway. He had not previously measured the

pothole when he reported it and was unsure whether the pothole had increased in size.

{¶10} At 9:30 p.m., Langdon was called back to work again. When he arrived, Russ Mantcz and Bob Craig were already at the scene. Langdon testified that the pothole had grown in size; it was wider, deeper, and longer than when he had first worked on it. They then repaired the pothole.

{¶11} Ronald Pandorff testified that he had attended the same golf outing that plaintiff had attended; that he and plaintiff had finished dinner at approximately 7:30 p.m.; that it had been raining on and off all day and that it was "raining cats and dogs" at dinner time; that they had left the outing at approximately the same time in separate vehicles; and that when they left, it was bright and clear and the road was damp. Pandorff testified that he followed behind plaintiff on SR 122 and that he never exceeded 50 mph. Pandorff did not witness the accident but saw plaintiff's vehicle in the trees. Pandorff's vehicle also struck the pothole as he drove over it.

{¶12} Megan Karnes was a witness to the accident. She was driving towards plaintiff in the opposite lane. She did not see plaintiff strike the pothole but saw him lose control of his vehicle.

{¶13} In order for plaintiff to prevail upon his 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. Although the state is not an insurer of the safety of its highways, the state has a duty to maintain its highways in a reasonably safe condition. *Knickel v.*

Dept. of Transp. (1976), 49 Ohio App.2d 335, 339. ODOT has the duty to maintain the system of highways free from unreasonable risk of harm by exercising ordinary reasonable care. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 42. The state cannot be charged with neglect unless it is demonstrated that the state had knowledge, either constructive or actual, of the roadway defect complained of, and within sufficient time to remedy it. *Danko v. Dept. of Transp.* (July 29, 1992), Court of Claims No. 90-05881, aff'd Franklin App. No. 92AP-1183; see, also, *Ruwe v. Bd. of Commrs. of Hamilton Cty.* (1986), 21 Ohio St.3d 80; *In re Fahle's Estate* (1950), 90 Ohio App. 195. ODOT must be given a reasonable amount of time to mobilize its resources for the repair of highway defects and also to prioritize among competing repair needs of the state's highways. *Danko*, supra at p. 3.

{¶14} As defendant's expert witness, Tim Tuttle testified that he had worked for OSHP for 18 years and that he has since that time conducted reconstruction of traffic accidents. He opined that plaintiff's vehicle was traveling at 67 mph at the time it hit the pothole and that the proximate cause of the crash was excessive speed for the road conditions.

{¶15} Based upon the evidence presented in this case, the court finds that defendant exercised ordinary reasonable care regarding the pothole. Once defendant was aware that the pothole existed, it sent Langdon to evaluate it. Langdon swept gravel away from the pothole, dug trenches to facilitate water flow, and left the pothole in a condition that was safe for the motoring public. Thereafter, when defendant was notified that the pothole had increased in size, it acted reasonably by calling Mantcz to make

repairs. The court further finds defendant acted in a timely manner after being notified of the larger pothole.

{¶16} In conclusion, plaintiff has failed to prove by a preponderance of the evidence that defendant failed to exercise ordinary reasonable care regarding the pothole. Judgment is recommended in favor of defendants.

{¶17} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

HOLLY TRUE SHAVER
Magistrate

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HTS/cmd
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