[Cite as *Wilburn v. Ohio Dept. of Transp.*, 2016-Ohio-796.]

ANDREW WILBURN Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2015-00752-AD Clerk Mark H. Reed MEMORANDUM DECISION

{¶1} Plaintiff Andrew Wilburn (hereinafter "plaintiff") filed this claim on August 25, 2015 to recover damages which occurred when his 2006 Ford Fusion struck a pothole on August 8, 2015 while he was traveling on US 23 in Delaware County, Ohio. The pothole struck by plaintiff was actually located on the berm or shoulder of US 23 at approximately mile marker 15.0. This road is a public road maintained by the Ohio Department of Transportation (hereinafter "ODOT"). Plaintiff's vehicle sustained damages in the amount of $529.47. Plaintiff maintains a collision insurance deductible of $500.00.

{¶2} In order to recover on a claim for roadway damages against ODOT, Ohio law requires that a motorist/plaintiff prove ***all*** of the following:

{¶3} That the plaintiff's motor vehicle received damages as a result of coming into contact with a dangerous condition on a road maintained by ODOT.

{¶4} That ODOT knew or should have known about the dangerous road condition.

{¶5} That ODOT, armed with this knowledge, failed to repair or remedy the dangerous condition in a reasonable time.

{¶6} In this claim, the Court finds that the plaintiff did prove that his vehicle received damages and that those damages occurred as a result of the plaintiff's vehicle coming into contact with a dangerous condition on a road maintained by ODOT.

{¶7} The next element that a plaintiff must prove to succeed on a claim such as this is to show that ODOT knew or should have known about this dangerous condition. Based on the evidence presented, the Court is unable to find that ODOT had actual knowledge of the dangerous condition.

{¶8} In the Investigation Report filed November 20, 2015, ODOT indicated that the location of the incident was on US 23, at mile marker 15.00 in Delaware County. This section of the roadway on US 23 has an average daily traffic count of between 21,240 and 27,530 vehicles. Despite this volume of traffic, ODOT had received no notice of a pothole on this section of the roadway prior to plaintiff's incident. Thus, the Court is unable to find that ODOT knew about the pothole.

{¶9} However, what is critical in this matter is that the pothole struck by the plaintiff was located on the berm and not on the traveled portion of US 23.

{¶10} The Supreme Court of Ohio has consistently held that ODOT is not liable when a driver encounters a hazard off the traveled portion of the road. See *Turner v. Ohio Bell*, 118 Ohio St. 3d 215, 2008-Ohio-2010. ODOT may only be liable for a hazard off the traveled portion of the roadway, when the condition creates a hazard on the traveled portion of the roadway. See *Steele v. Ohio Dept. of Transp*., 162 Ohio App. 3d 30, 2005-Ohio-3276, *Harris v. Ohio Dept. of Transp*., 83 Ohio App. 3d 125, 614 N.E. 2d 779 (10th Dist. 1992). Therefore, even if ODOT failed to repair a hazard on the shoulder of US 23, plaintiff's vehicle would not have been damaged had he stayed on the traveled portion of the road. Thus the Court need not determine whether or not ODOT knew or should have known about the road conditions existing on the shoulder of US 23 on August 8, 2015.

{¶11} Based on the facts of the case and prevailing law in Ohio as set out by the Ohio Supreme Court, plaintiff's claim must fail.

ANDREW WILBURN	Case No. 2015-00752-AD
Plaintiff	Clerk Mark H. Reed

v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	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 the defendant. Court costs shall be absorbed by the Court.

MARK H. REED
Clerk

Entry cc:

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