JOSEPH J. ELIAS, et al	)	CASE NO. 2020 0450
Plaintiffs-Appellees		
	)	ON APPEAL FROM SUMMIT COUNTY
v.	)	COURT OF APPEALS
CITY OF AKRON	)	NINTH DISTRICT COURT OF APPEALS
Defendant-Appellant	)	CASE NO. 29107

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES JOSEPH AND CLAIR ELIAS

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THIS APPEAL SHOULD BE LIMITED TO THE QUESTION OF IMMUNITY.

Proposed Proposition of Law No. 1: A Defendant political subdivision who files a Motion for Summary Judgment has the burden of proof in that summary judgment proceeding to establish that it's road was in repair or that its state of disrepair was not caused by its negligence.

Proposed Proposition of Law No.2: A political subdivision cannot use a defense of judgment or discretion for failing to repair, warn , or protect the public from a sink hole in a road such as existed here.

Facts: The Defendant discovered what they thought might be and which was a sink hole in North Howard Street. They drilled a hole, inserted a basin and may have put up a cone and then left it for the next week. If there was a cone it disappeared. Photographs contained in the file are helpful. We would like to arrange for you to see them.

Plaintiffs-Appellees respectfully submit that it is their belief that the party who seeks a summary judgment has the burden of proof.

It is respectfully submitted that the Defendant' negligent failure to repair the subject sinkhole was the cause of Mrs. Elias's injuries.

They were caused by a sinkhole on North Howard Street or to protect or warn the street's users is and since the beginning of this case has been the main issue. And this hole has been known to the Defendant since at least March 19, 2012 (which was two days before the Plaintiff-Appellee Clair Elias was injured on March 21, 2012).

The Akron Police Department investigated this event and issued a police report.

The Defendant-Appellant is liable for violating 2744.02(B)(3) and thereby lost its immunity when it negligently failed to keep the subject public road in repair or protect or warn the users of the known hazard on this road.

And the Defendant was aware of most of the facts of this case before this case was filed (and before Appellant's Motion for Summary Judgment was filed), the Appellant had taken a deposition of the Appellee, Clare Elias.

And the Appellant and/or Defendant also had talked with Clare Elias's husband, the Appellee, Joseph Elias, and had been provided with the pictures taken by him, had the police report, talked with some (if not all) of its' relevant employees, received and provided tangible material, sat with and represented its employees who have been deposed in this case, and were involved in the various matters involving this case. The depositions included but were not limited to questions and documents regarding the subject road and its condition before, at the time of, and after the Appellee Mrs. Clare Elias's injury, the Defendant's knowledge of the condition of the road, the actions of the witnesses and the Defendant regarding the road.

John Nutter was Public Works Supervisor (which included roads) at the time of Clare Elias' injury). He received a call and went to the scene. He says that he or someone else ordered the lane shut down ; that the City did not have the qualified people to do road work in March; and that he only had a tree trimmer and probably a stone mason (Nutter deposition, p. 10-15).

Defendant claims that were the other defenses that the Defendant wished to use were issues that were not permitted prior to trial and therefore were not given the right to be raised in the scope of the appeal. The appeal involved an immunity defense and they involved elements that

might be used to win such as alternative affirmative defenses, the public duty defense, or but had nothing to do with the Court's denial of immunity.

RC Chapter 2744.02 (B)(3) provides that ..." (3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, ..."

In the case sub judice, at trial the Plaintiffs-Appellees will have the burden to prove that the Defendant-Appellant's negligence caused their injuries. But Appellees respectfully submit that the Appellant has the burden of proof regarding its Motion for Summary Judgment.

And if there is a duty for the Plaintiffs-Appellees to come forward with evidence in connection with this Motion for Summary Judgment brought by the Defendant-Appellee City of Akron, it is respectfully submitted that they have done so.

The deposition of John Green indicates on page 10 that on the morning of March 19 his foreman called him and asked him to go to North Howard Street... he went and saw a small depression ("looked like a dye test hole (page 17)) that seemed to be in line with the sewer .He testified that he didn't think It wasn't much of a depression at that point. He told his foreman, who said he'd have sewer maintenance check it out. (Mrs. Elias was hurt on March 21.) On page 17-19. he looked at exhibit Straus 5.8 and said that the hole looked much worse in Straus 5.8 than it did when he was out there and it had rings around it and that if it had looked that bad when he was there he would have blocked the street and have had some one come out and look at it and fix it. Otherwise, the street would cave. (Green page 25). It looks to him like Haslam drilled a test hole and put out a barrel or a cone (Green pages 29) Straus Ex 5.)..., you need to get someone out to

work on it because if you don't it will wind up looking like the one in Straus 5.8. (Green Depo referring to Straus 5.8.) He said that normally if they are going to test a hole, they will block off the street. (Pages 18-19)

Akron was negligent for not repairing or blocking off that street while or immediately after Haslam was there. At best he indicates that he left a cone and that locality was known for having cones disappear.))

The deposition of John Puglia indicates that he was a construction engineer with a college degree in engineering (his deposition, page 5). He got a phone call (apparently from John Green) and went to the scene and the lane was being shut down and he called HM Miller to go to the subject location and either fix the road or cap the hole in the road with concrete ASAP (page 29). He wanted to have it checked to see if the hole and water leak a short distance above (and further up the hill) this sink hole was a cause of it occurring (his deposition, page 29) . He did not know whether the City kept a log of where cones were and he did not have an opinion as to whether or not it was a good idea to keep one. (his deposition, page 33). There has been no known evidence that there is a systematic check to see if cones or barrels are staying up.

The condition of the road was sufficiently impaired so as to cause the handle bars to fall from the Plaintiff's hands and cause her to fall and injure herself. (Clare Elias's deposition, pages 91 and 92). The deposition of Clare Louise Elias… states… on pages 91 and 92: "…all I remember happened is we're riding up the road and the next thing I know my hands are no longer on the handle bars , I swore, and I was on the ground. That was it"… "right on my face."… "I must have impacted the hole…"

And the hole was serious enough to cause the City of Akron to shut down the road and repair the road (John Nutter deposition pages 21 and 22).

The Defendant argues that the court of Appeals has omitted "negligence" from its analysis Appellee respectfully submits that it has not.

(((The Court of Appeals on April 14, 2020, on page 3 denied Appellant's Motion to Certify a Conflict. And the Court stated on page 3 that "...the trial court's judgment entry did not place the burden to demonstrate the inapplicability of any exception to immunity under R.C. 2744.02(B) on the City. Rather, it stated that it found that a material dispute of fact existed concerning whether an exception under R.C. 2744.02(B)(3) applied."

The Defendant-Appellant cites Koeppen v. Columbus, 2015 Ohio 4463. But in the case sub judice, the Plaintiffs have presented credible evidence that there was a significant hole in the road, that the Defendant knew of this hole, that the Defendant drilled a hole and inserted a basin into it, negligently failed to repair it or warn or protect the public from it until at least the next week and left it. Clair Elias was injured when her motorcycle went into that basin and hole. The

The Trial Court held that the moving party had the burden of proof to prove that it had I sovereign immunity and the non. Moving party must prove that there is an exception to sovereign immunity.

There had been a water leak on Howard street a short distance above the subject sink hole. Two days before this event, the Defendant drilled a hole and inserted a basin into that pre-existing and subject sink hole. . (Please see exhibits .... taken by Mr. Elias on the same day that Mrs. Elias was injured (Please see Exhibit ...)) the City of Akron had negligently and knowingly permitted (and probably aggravated) the photographs show the The subject significant and dangerous sink

hole to exist upon North Howard Street for at least two days after its discovery (with more in sight) and thereby negligently permitted it to remain in disrepair and the Appellant negligently failed to properly repair, warn, or protect the sinkhole or the users of the subject North Howard Street of this significant hole. The Appellant thereby negligently, directly, and proximately caused injury and damage to the Appellees. And the Appellant is not and was not entitled to obtain a summary judgment in this case.

Plaintiffs-Appellees respectfully submit that Defendant-Appellant's Request for Jurisdiction should be denied and that they be given the opportunity to rebut its upcoming brief.

Respectfully submitted,

/s/ Russell Smith

Attorney for Appellees.

Certificate of Service

I hereby certify that a copy of this Response has been mailed to Attorney Chris Reece, counsel for the Appellant, this 27th day of April, 2020.

/s/ Russell Smith

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