[Cite as *Wilson v. Ohio Dept. of Transp.*, 2023-Ohio-2056.]

IN THE COURT OF CLAIMS OF OHIO

RICARDO WILSON Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2022-00872AD Deputy Clerk Daniel R. Borchert MEMORANDUM DECISION

{¶1} Ricardo Wilson ("plaintiff") filed this claim against the defendant, Ohio Department of Transportation ("ODOT"), to recover damages which occurred when his 2015 Chevrolet Impala struck a pothole on November 11, 2022, while he was traveling southbound on the Brice Road overpass, over Interstate Route ("IR") 70, near mile marker 110 in Franklin County, Ohio. This road is a public road maintained by ODOT. Plaintiff's vehicle sustained damages in the amount of $1,386.19. Plaintiff has insurance with Allstate and the policy has a $500.00 deductible. Plaintiff submitted the $25.00 filing fee.

{¶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} Plaintiff must also prove that ODOT knew or should have known about the dangerous condition to succeed on this claim. See *Denis v. Department of Transportation*, 75-0287-AD (1976).

{¶8} In the Investigation Report, ODOT indicated that the location of the incident was on IR 70 at county mile marker 23.9 (state mile marker 109.927) in Franklin County. This section of the roadway on IR 70 has an average daily traffic count of 5,234 vehicles. Despite this volume of traffic, ODOT claimed they had received no notice of potholes on this section of the roadway prior to plaintiff's incident. Thus, the court is unable to find that ODOT knew about this particular pothole through citizen reporting.

{¶9} Within the past six months, ODOT conducted one hundred forty-four (144) maintenance operations on IR 70 in Franklin County where this incident occurred. If any pothole was present for any appreciable length of time, it is probable that it would have been discovered by ODOT work crews. Defendant argues that because ODOT work crews did not report the pothole that it must have developed only shortly before plaintiff struck it with his vehicle.

{¶10} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The court is free to believe, or disbelieve, all or any part of each witness's testimony. *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548 (1964). The court finds defendant's statement not particularly persuasive.

{¶11} A review of the Maintenance History by route provided by ODOT with the Investigation Report revealed pavement patching operations occurred less than 0.1 miles away from the damage-causing location on November 10, 2022, one (1) day prior to plaintiff's incident. Additionally, pavement patching operations also occurred on October 20, 2022 and October 27, 2022, in the area of the damage-causing location.

{¶12} On November 2, 2022, defendant's employees conducted General Maintenance duties in the area of the incident location.

{¶13} On November 2, 2022, defendant conducted fence repairs 0.3 miles from the incident location.

{¶14} On November 9, 2022, defendant's employees conducted a litter patrol in the area of the incident location.

{¶15} Plaintiff did submit a response to defendant's Investigation Report. Wherein, he reasserted his claim that defendant should be held liable for the damage to his vehicle and provided multiple photographs of the incident location. The photographs, dated November 22, 2022, show an area of the roadway with multiple patched potholes among other signs of necessary maintenance work.

{¶16} Defendant has a duty to maintain its highways in a reasonable safe condition for the motoring public. *Knickel v. Ohio Department of Transportation*, 49 Ohio App.2d 335, 361 N.E.2d 486 (10th Dist. 1976). However, defendant is not an absolute insurer of the safety of its highways. See *Kniskern v. Township of Somerford*, 112 Ohio App.3d 189, 678 N.E.2d 273 (10th Dist. 1996); *Rhodus v. Ohio Dept. of Transp*., 67 Ohio App.3d 723, 588 N.E.2d 864 (10th Dist. 1990). Generally, a defendant is only liable for roadway conditions of which it has notice of but fails to correct. *Bussard v. Dept. of Transp*., 31 Ohio Misc.2d 1, 507 N.E.2d 1179 (Ct. of Cl. 1986).

{¶17} For constructive notice to exist, a plaintiff must prove that sufficient time has passed after the dangerous condition first appears, so that under the circumstances ODOT should have gained knowledge of its existence. *Guiher v. Dept. of Transportation*, 78-0126-AD (1978); *Gelarden v. Ohio Dept. of Transp., Dist. 4*, Ct. of Cl. No. 2007-02521-AD, 2007-Ohio-3047.

{¶18} *Gore v. Ohio Department of Transportation*, 10th Dist. No. 02AP-996, 2003-Ohio-1648 states, "Work is inherently dangerous when it creates a peculiar risk of harm to others unless special precautions are taken." See *Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick,* 61 Ohio St. 215, 55 N.E. 618, (1899) paragraph one of the syllabus; *2 Restatement of the Law 2d, Torts,* Section 427; *Prosser & Keeton* at 512-513, Section 71. The employer has a duty to see that the work is done with reasonable care and cannot, insulate himself or herself from liability for injuries resulting to others from the negligence of the independent contractor or its employees. *Covington* at paragraph one of the syllabus.

{¶19} In order for the plaintiff to prevail on a claim for damage to motor vehicles while traveling in an ODOT maintenance jurisdiction, the court may only pass judgment on whether the plaintiff has shown that ODOT breached its duty to the public in managing its employees and ensuring the safety of the public within the maintenance zones. ODOT could be found negligent in this type of case only if it failed to properly manage its employees through reasonable reporting practices and the work performed by the employees, or if the agency knew or should have known about the condition that damaged plaintiff's vehicle.

{¶20} It should be noted that the damage-causing incident occurred in an area that underwent active maintenance work, where employees were present. Judge Sheeran in *Floyd v. Ohio Department of Transportation*, 2021-00156-AD (7-27-21) reversed jud (10-27-21) determined since members of the construction crew were present in the construction zone, "where the road hazard was located, they knew or should have known of its presence in the roadway. As a result, the Ruhlin Company/Shelly & Sands Inc. had constructive notice of the defect in the roadway, and because ODOT cannot delegate its duty to maintain roadways in a drivable condition, it was likewise on constructive notice…"

{¶21} In the case at bar, while it was not an active construction zone, ODOT employees were present where the road hazard was located, they knew or should have known of the presence of potholes in the roadway. Therefore, the court finds that ODOT did not have actual notice but had constructive notice of the pothole because of the presence of defendant's employees on site of an active maintenance zone where the pothole was located. See *Floyd*.

{¶22} Judge Sheeran in reversing the deputy clerk decision in *Baker v. Ohio Department of Transportatio*n, 2022-00386AD (December 27, 2022), stated in pertinent part:

> "For a plaintiff to prevail on a claim of negligence, they must prove, by a preponderance of the evidence, that the defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries.

Armstrong v. Best Buy Co., *Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8. Defendant has the duty to keep the roads in a safe, drivable condition. *Amica Mutual v. Dept. of Transp*., Ct. of Cl. No. 81-02289-AD (1982). Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Dept.,* Ct. of Cl. No. 85-2071-AD (1985). To prove a breach of duty by defendant to maintain the highways, plaintiff must establish, by a preponderance of the evidence, that either defendant had actual or constructive notice of the defect and failed to respond in a reasonable time or responded in a negligent manner, or defendant, in a general sense, maintains its highways negligently. *Denis v. Dept. of Transp.,* Ct. of Cl. No. 75-0287-AD (1976).

"Whether an intervening act breaks the casual connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the one who was guilty of the negligence. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. *Cascone v. Herb Kay* Co., 6 Ohio St. 3d 155, 159-160, 451 N.E. 2d 815 (1983)."

{¶23} In *Mihora v. Ohio Department of Transportation*, 2022-00390AD (December 28, 2022), the judge reversed the deputy clerk based on the same reasoning as in *Baker*. In *Mihora*, the barrels were placed by ODOT's contractor and the judge held it was foreseeable that the unweighted barrels would enter the traveled portion of the roadway. The judge found, "ODOT placed the barrels, surely knew that it had done so, and failed to take effective measures to ensure that the barrels did not constitute a driving hazard. Therefore, the court finds ODOT failed to keep the construction area safe."

{¶24} In the present case, ODOT noted in their Investigation Report multiple instances where their employees were working directly in the area of the damage causing pothole. As in *Mihora*, here, ODOT work crews would have noticed the potholes and

failed to take effective measures to ensure that they did not constitute a driving hazard. It is readily foreseeable that potholes pose an active risk to drivers.

{¶25} In accordance with the judicial holdings in *Floyd*, *Baker*, and *Mihora*, the court finds ODOT had notice of the pothole in question since it was in the area which had received active road maintenance. Moreover, ODOT retains the duty to maintain this section of the roadway in a reasonable safe manner, which includes properly recording defects, scheduling maintenance, and repairing the roadway. Failure by defendant's employees to report potholes in the performance of their duties does not release defendant from obtaining knowledge of the problem. It is foreseeable that motorists will strike potholes located on the roadway causing damage to their vehicles. ODOT worked in the area of the potholes, surely knew that they existed, and failed to take effective measures to ensure that the potholes did not constitute a driving hazard. This is conclusive evidence of negligent maintenance and reporting practices. Accordingly, ODOT is liable for plaintiff's damages to his vehicle.

{¶26} R.C. 2743.02(D) in pertinent part states:

> "Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery that the claimant receives or is entitled to."

{¶27} Therefore, judgment is rendered in favor of plaintiff in the amount of $500.00, plus $25.00 for reimbursement of the filing fee pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction*, 62 Ohio Misc.2d 19, 587 N.E.2d 990 (Ct. of Cl. 1990).

{¶28} 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 plaintiff in the amount of $525.00, which includes reimbursement of the $25.00 filing fee. Court costs are assessed against the defendant.

RICARDO WILSON Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2022-00872AD Deputy Clerk Daniel R. Borchert ENTRY OF ADMINISTRATIVE DETERMINATION

DANIEL R. BORCHERT
Deputy Clerk

Filed 4/19/23
Sent to S.C. Reporter 6/21/23