**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **PATRICK K. BELL,** | : | |
| | : | **Case No. 2:11-CV-00884** |
| **Plaintiff,** | : | |
| | : | **JUDGE ALGENON L. MARBLEY** |
| **v.** | : | |
| | : | |
| **UNITED STATES OF AMERICA** | : | **Magistrate Judge Kemp** |
| | : | |
| **Defendant.** | : | |

**OPINION & ORDER**

This matter is before the Court on Defendant United States of America's Motion to Reconsider (Doc. 34). The United States takes issue with the Court's Opinion and Order of March 17, 2014 (Doc. 33) denying its Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim under Ohio law. It now asks the Court to reconsider that decision, and renews its request that the Court dismiss this case for lack of subject matter jurisdiction, based on the applicability of the "discretionary function exception." Plaintiff opposes. (Doc. 38).

For the reasons stated herein, Defendant's Motion is **DENIED**.

## I. BACKGROUND

The factual background of this matter is described in detail in the Court's Opinion and Order of March 17, 2014 (Doc. 33). In short, this case involves an all-terrain vehicle ("ATV") crash that took place on federal land near Athens, Ohio. On October 8, 2009, Plaintiff Patrick Bell lawfully visited Wayne National Forest ("the Forest") with a friend, in order to ride on one of the Forest's ATV trails. Plaintiff crashed while driving on a trail, his ATV having struck a partially-concealed metal pipe that ran parallel to, and at one point across, the trail. Plaintiff brings this suit for negligence, under the Federal Tort Claims Act ("FTCA"), for recovery for his injuries.

On July 31, 2013, the United States moved to dismiss, for lack of subject matter jurisdiction and for failure to state a claim under Ohio law (Doc. 25). The United States argued in particular that Plaintiff had impermissibly attacked a discretionary function for an agency or employee of the United States, running afoul of the FTCA's blanket jurisdictional bar against "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion is abused." 28 U.S.C. § 2680(a). The United States insisted that concerns regarding safety and maintenance of federal land, including how best to allocate limited funds and employee resources, and choices related to warning signs, precautionary measures, and other steps that might have prevented Plaintiff's injury, are precisely the sort of discretionary decisions that the FTCA's bar is intended to shield. (Doc. 25 at 11-12).

Plaintiff responded that this analysis ignored the realities of the case, including the evidence that demonstrated that the federal employee tasked with overseeing the land had never actually made any decision with regard to removing or otherwise changing the pipe, since he believed that he was not authorized to alter it whatsoever. (Doc. 28 at 7-8). Thus, according to Plaintiff, a discretionary decision was never rendered, and the discretionary function exception was unavailable. (*Id.* at 9).

The Court's Opinion and Order concluded that the discretionary function exception was unavailable. The Court noted the two-prong test for invoking this exception: whether (1) the acts complained of are "discretionary in nature," meaning they involved "an element of judgment or choice"; and (2) the decision "is of the kind that the discretionary function exception was designed to shield," meaning it is a governmental action or decision "based on considerations of public policy." *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991) (quotations omitted).

The Court concluded that the first prong had been met, since no statute or regulation prescribed the "precise manner" in which the United States Forest Service (the "Forest Service") must act. (Doc. 33 at 7-8).

On the second prong, however, the Court reasoned that the actions described here were not the sort of conduct which the discretionary function was designed to shield. (*Id.* at 8). The Court emphasized that it is the "nature of the conduct, rather than the status of the actor," that governs whether the discretionary function exception applies. (*Id.*) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984)). In particular, the Court followed the Supreme Court's admonishment that, to survive a motion to dismiss for lack of jurisdiction, a complaint must allege facts that "would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," with a focus "not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 324-25.

Although a decision that is "susceptible" to policy analysis carries with it a "presum[ption] that the agent's actions [were] grounded in policy when exercising [his] discretion," *Gaubert*, 499 U.S. at 324, the Court explained that, where a Complaint alleges facts rebutting that presumption, dismissal is inappropriate. (Doc. 33 at 10); *compare Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000) (It is "not enough to establish that an activity is not mandated by statute and involves some element of judgment or choice"; to obtain dismissal of the suit, "the United States must also establish that the decision in question was grounded in considerations of public policy."); *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (discretionary function exception does not apply to conduct that "involves no element of choice

or judgment grounded in public policy considerations."). Accordingly, the Court denied the United States' Motion to Dismiss on this basis.

## II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 59(e), a district court will reconsider a prior decision "if the moving party demonstrates: (1) a clear error of law; (2) newly discovered evidence that was not previously available to the parties; or (3) an intervening change in controlling law." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 288 F. Supp. 2d 895, 900 (S.D. Ohio 2003); s*ee also Gen. Corp., Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (a judgment may also be altered or amended when necessary "to prevent manifest injustice"). A motion under Rule 59(e), however, is "not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engle*r, 146 F.3d 367, 374 (6th Cir. 1998). Rule 59(e) may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n. 5 (2008) (quotation omitted). Generally, a manifest injustice or a clear error of law requires "unique circumstances," such as complete failure to address an issue or claim. *McWhorter v. ELSEA, Inc.*, No. 2:00-CV-473, 2006 WL 3483964, at *2 (S.D. Ohio Nov. 30, 2006) (citing *Collison v. Int'l Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994)).

The grant or denial of a Rule 59(e) motion "is within the informed discretion of the district court." *Huff v. Metro. Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). Significantly, "justice does not require that the district court [grant reconsideration] on an issue that would not alter the district court's prior decision." *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F. App'x 949, 959-60 (6th Cir. 2004).

## III. ANALYSIS

The United States argues that the Court should reconsider its decision because it has committed "clear legal error" in its rejection of the discretionary function exception. (Doc. 34 at 4). According to the United States, the presumption that a government employee's conduct is grounded in policy when that conduct is susceptible to policy analysis, established in *United States v. Gaubert*, 499 U.S. 315 (1991), "refers to the objective grant of discretion conferred by the agency," not a review of the actor's subjective decision-making process. (*Id*. at 4-5). The *Gaubert* presumption is only rebuttable, Defendant maintain, when "the discretion conferred by agency policy does not authorize policy considerations for the conduct." (Doc. 40 at 5). The United States argues that the discretionary function applies if the conduct at issue – including both acts and omissions – is susceptible to a policy-driven analysis," regardless of whether the conduct was actually "the end product of a policy driven analysis." (*Id*. at 9-10). This Court's Opinion and Order improperly focused on the federal actor's "decision-making process or the failure to make a conscious, explicit decision" instead of considering the actor's "nature of the conduct." (*Id*.).

The United States also claims the Court committed "clear factual error" in finding that the Forest Service employee did not actually make any decisions or exercise discretion regarding the placement of the pipes that ran by an across the trail. (*Id*. at 3, 9-10). Defendant insists that Trail Manager William Scripp ("Scripp") testified that he inspected and maintained the trail "with an eye toward safety and within the Forest Service's meager trail resources" and that he would not bury pipeline running across the trail because he was concerned about widening the trail and he did not consider the parallel pipeline to be a safety concern. (Doc. 40 at 3-4). Similarly, Defendant argues that Scripp did not put up warning signs or paint the pipeline

because of "policy-based concerns" about "warning signs and bright colors in the woods." (*Id*. at 4).

Plaintiff responds that Defendant mischaracterizes facts by suggesting that the Forest Service did not consider portions of the pipeline that ran parallel to the trail to be a safety concern. In fact, Plaintiff insists, Scripp admitted that the Forest Service "never considered doing anything with the piping that was protruding along the dirt bike trail" when he stated, "[t]o my knowledge, we've never gone anywhere with discussing a plan to remove [the pipes] or anything." (Doc. 38 at 1-2). Further, Plaintiff argues that reconsideration is inappropriate because no changes in applicable law have been identified. According to Plaintiff, Defendant's Motion to Reconsider merely rehashes "discredited arguments but with greater fervor," offering nothing new to the Court. (*Id*. at 3).

In response to Defendant's specific legal arguments, Plaintiff insists that he has not argued that Scripp subjectively considered, and then decided against, making a decision about the pipeline. Instead, Plaintiff contends that Scripp's subjective recollections establish as objective fact that no decision grounded in policy considerations was ever made. (*Id*. at 4). Additionally, Plaintiff maintains that a government actor's "mere status in possessing discretion" is not enough to warrant immediate dismissal; instead, "it is the nature of the conduct, rather than the status of the actor, that governs whether discretionary function applies in a given case." (*Id*. at 5, quoting *United States v. S.A. Impresa De Viacao Aerea Rio Grandenese (Varig Airlines),* 467 U.S. 797, 813, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984)). Finally, Plaintiff argues that *Gaubert*'s second prong requires that the judgment is of the kind that the discretionary function exception was designed to shield and does not warrant dismissal when no "judgment" or "decision" has been made. (*Id*. at 5).

### A. Discretionary Function Exception

The FTCA provides that the United States waives its sovereign immunity and may be liable for tort claims under state law caused by its employees' negligent or wrongful acts or omissions, while acting within the scope of their employment, to the same extent that a private individual under like circumstances would be liable. 28 U.S.C. §§ 346(b)(1), 2674.

The FTCA's waiver is not unlimited, however. The FTCA prohibits claims challenging discretionary functions of agencies or employees of the United States. This provision bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion is abused." 28 U.S.C. § 2680(a). Limitations and conditions upon which the United States consents to be sued "must be strictly observed, and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

The discretionary exception applies when two conditions are met: (1) that the acts complained of are "discretionary in nature," meaning they involved "an element of judgment or choice"; and (2) that the decision "is of the kind that the discretionary function exception was designed to shield," meaning it is a governmental action or decision "based on considerations of public policy." *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991) (quotations omitted).

In the Court's March 17, 2014 Opinion and Order, this Court concluded that Plaintiff's allegations of Defendant's failure to inspect the trail, place warning signs, and maintain the trail constitute actions "discretionary in nature" and thus sufficient for the first prong of the discretionary exception. Plaintiff acknowledged as much in his briefing on the original motion. (*See* Doc. 28 at 6-9). Defendants essentially request that the Court reconsider its analysis of the

second prong of the exception: "whether the Forest Service's conduct . . . is the sort of conduct which the discretionary function exception was designed to shield." *Rosebush*, 119 F.3d at 443.

*1. "Susceptible to Policy Analysis"*

As the Supreme Court has explained, when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. Thus, for a complaint to survive a motion to dismiss, it must allege facts which

> would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

*Id.* at 324-25 (footnote omitted).

The Sixth Circuit has explained that the following types of decisions "are generally shielded from tort liability by the discretionary function exception: (1) 'the proper response to hazards,' (2) 'whether and how to make federal lands safe for visitors,' and (3) 'whether to warn of potential danger.'" *Edwards v. Tennessee Valley Auth.*, 255 F.3d 318, 324 (6th Cir. 2001) (quoting *Rosebush*, 119 F.3d at 443). In short, where a federal agency "must balance competing needs when deciding how to run a federal facility," the discretionary function exception to the FTCA applies. *Rich v. United States*, 119 F.3d 447, 451 (6th Cir. 1997).

The United States insists that this Court and the Plaintiff misunderstand the law: because the decisions relating to the Forest, its trails, and the pipe were "*susceptible* to policy analysis," it "is irrelevant whether that conduct was the result of a policy analysis, whether policy concerns were the basis for the conduct, whether the agency considered all relevant aspects of the subject

matter, or whether the agency abused its discretion." (Doc. 31 at 5) (emphasis in original) (citing *Rosebush*, 119 F.3d at 444). When a function is discretionary, Defendant maintains, there is a "presumption" that the acts were grounded in policy when exercising that discretion. (*Id.* at 6) (citing *Irving v. United States*, 162 F.3d 154, 168 (1st Cir. 1998) (*en banc*)).

As both the Supreme Court's decision in *Gaubert* and the *en banc* decision by the First Circuit in *Irving* make clear, when government policy allows for the exercise of discretion, there is a "presum[ption] that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324; *Irving*, 162 F.3d at 168. But where a complaint alleges facts showing that "the challenged actions are not the kind of conduct that can be said to be *grounded in the policy of the regulatory regime*," with a focus on the "the nature of the actions taken," the discretionary function exception is inapplicable. *Gaubert*, 499 U.S. at 325 (emphasis added).

Plaintiff rightly notes that *no action* was actually taken, in the sense that no policy judgment was made regarding the presence of the pipes, their removal, or their covering up, because Scripp mistakenly believed he was without authority to alter or remove them. While the Court will normally afford Defendant the "presumption" that its agent's acts are grounded in policy, when it has *evidence* that, in fact, the acts were not so grounded, that presumption has been rebutted. This Court did not commit a clear error of law when it determined that the mere fact that, theoretically, Scripp *could have* exercised discretion does not meet the test the Supreme Court established in *Gaubert*; indeed, "the law does not provide that all discretionary acts of federal officers undertaken within the scope of their employment will be subject to the discretionary function exception." *Fitzmaurice v. United States*, No. 1:10-CV-2262, 2013 WL 4781709, at *9 (M.D. Pa. Sept. 5, 2013) (Carlson, M.J.).[1]

[1] It is "not enough to establish that an activity is not mandated by statute and involves some element of judgment or choice"; to obtain dismissal of the suit, "the United States must also establish that the decision in question was

Defendants now claim that, regardless of whether Scripp believed he had authority to move the pipe, he never considered the pipe a safety concern, which is why he took no action. That decision was within his discretion, Defendants insist. Scripp's deposition testimony, however, does not indicate that he actually assessed whether the pipe was a safety concern at the time of the relevant acts or omissions in question. And in fact, it is unlikely that he made any such assessment if he subjectively believed that he had no authority or ability to move or remove the pipe. (*See* Doc. 28-3 at 18-19). The Court recognizes that the second prong of the inquiry requires assessing whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis. *See Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997). But, while "[vi]rtually any government action can be traced back to a policy decision of some kind....an attenuated tie is not enough to show that conduct is grounded in policy." *Shansky v. United States*, 164 F.3d 688, 692-93 (1st Cir. 1999) (citing *Cope v. Scott*, 45 F.3d 445, 448–49 (D.C.Cir.1995). Here, it appears that Scripp's conduct here was not "based on purposes the regulatory regime seeks to accomplish; instead, it was based on his belief that he had no authority to act. This is, at best, an attenuated tie to a policy decision.

In this case, where the actions or omissions at issue were not the kind of conduct that can be said to be grounded in policy – because no action was actually taken – Plaintiffs allegations are sufficient to rebut the presumption that the relevant conduct was grounded in policy, and thus sufficient to survive dismissal.

This Court recognizes that the case-by-case analyses that the discretionary exception requires has led to some disarray in the case law interpreting the exception. *Compare George v.*

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grounded in considerations of public policy." *Coulthurst v. United States*, 214 F.3d 106, 110 (2d Cir. 2000); *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (discretionary function exception does not apply to conduct that "involves no element of choice or judgment grounded in public policy considerations.").

*United States*, 735 F.Supp. 1524, 1533–34 (M.D.Ala.1990) (holding that a government agency's failure to warn about submerged alligators has no policy basis) with *Tippett*, 108 F.3d at 1197–99 (holding that a failure to warn or otherwise abate the dangers associated with a charging moose is grounded in policy); compare also *Cope*, 45 F.3d at 451–52 (concluding that the discretionary function defense did not vitiate an alleged failure to warn about hazardous road conditions) with *Rich v. United States*, 119 F.3d 447, 451–52 (6th Cir.1997) (concluding that the discretionary function defense trumped an alleged failure to warn about hazardous road conditions), cert. denied, 523 U.S. 1047, 118 S.Ct. 1364, 140 L.Ed.2d 513 (1998). "Withal, the determination as to where one draws the line between a justification that is too far removed, or too ethereal, or both, and one that is not, is case-specific, and not subject to resolution by the application of mathematically precise formulae…A case-by-case approach is required." *Id*. at 449.[2]

Notwithstanding the apparent disarray in the case law, the Defendant has not made an adequate showing that this Court committed a clear error of law, offered new evidence that was

[2] This Court also recognizes, and is concerned by, the potential for the application of the second prong of the discretionary function exception test to swallow the entire Tort Claims Act, as recognized by the dissent in *Rosebush v. United States*:

> If we are not careful in our application of the second prong of the test, the discretionary function exception to the Tort Claims Act could potentially swallow the entire Act. As a result of the *Gaubert* decision, courts have given considerable deference to government assertions of policy discretion. Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 Me. L.Rev. 365, 382 (1995). "The Court ought not to use one phrase in one sub-section of the FTCA [Federal Tort Claims Act] to emasculate the rest of the statute." William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to The Federal Tort Claims Act*, 7 Admin. L.J. Am. U. 1, 31 (1993). In fact, the Supreme Court did not intend for the *Gaubert* decision to free the government from all liability under the Federal Tort Claims Act. As part of its discussion, the Court specifically stated that there are discretionary acts that are within the scope of a government agent's employment "but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, at 325, n. 7.

*Rosebush*, 119 F.3d at 445, (Merritt, J., dissenting).

previously unavailable, or presented intervening law, such that reconsideration of the Court's Opinion and Order is warranted here. The "unique circumstances" generally required to find manifest injustice or a clear error of law requires are absent. *McWhorter v. ELSEA, Inc.*, No. 2:00-CV-473, 2006 WL 3483964, at *2 (S.D. Ohio Nov. 30, 2006) (citing *Collison v. Int'l Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994)). Defendants' disagreement with the Court's interpretation of the law is not sufficient reason for this Court to reverse its own findings.

## IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Alter or Amend Judgment (Doc. 38) is hereby **DENIED**.

**IT IS SO ORDERED.**

**/s/ Algenon L. Marbley**
**ALGENON L. MARBLEY**
**UNITED STATES DISTRICT JUDGE**

**DATED: March 18, 2015**