[Cite as *Christman v. Ohio Dept. of Transp.*, 2006-Ohio-7132.]

IN THE COURT OF CLAIMS OF OHIO

BRIAN S. CHRISTMAN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09065-AD
OHIO DEPARTMENT OF **TRANSPORTATION**	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} On July 29, 2005, between 7:00 a.m. and 5:00 p.m., employees of defendant, Department of Transportation ("DOT"), conducted mowing maintenance operations along the right-of-way adjacent to State Route 513 in Noble County. This maintenance operation involved tree trimming with a side-boom bush hog to remove perceived roadway sight obstructions from the right-of-way area. Plaintiff, Brian S. Christman, is the owner of fenced pasture land adjacent to State Route 513 that he uses to graze cattle. Plaintiff related DOT personnel cut limbs from a wild cherry tree growing on the State Route 513 right-of-way and the cut limbs fell into plaintiff's fenced pasture field. The cut tree limbs had multiple leaves attached. Submitted documentary evidence establishes wild cherry trees are potentially highly toxic to cattle with damaged leaves posing the greatest health risk to the animals. Signs of poisoning include anxiety, breathing difficulties, staggering, convulsions, collapse, and sudden death. An antidote is available, but to be effective, it needs to be administered intravenously within minutes after the onset of signs in the affected animal. DOT employees made no attempt to remove the cut cherry tree limbs from plaintiff's pasture when the mowing

operation was completed. The tree limbs with attached highly toxic leaves were left in the pasture providing plaintiff's cattle easy access to the vegetation.

{¶ 2} Plaintiff stated he visually examined his cattle about 6:00 p.m. on July 31, 2005, and all the livestock appeared normal. At some time after this examination, the cattle grazed along the fence where the felled cherry tree limbs were left. Plaintiff further stated he was informed on August 1, 2005, that there was a dead calf in his pasture. Later plaintiff went to the pasture to verify his animal's death. Plaintiff noted, "I checked and the calf was dead and swollen up from eating wild cherry leaves." Furthermore, plaintiff related, "I checked fence and found wild cherry limb in pasture."

{¶ 3} Plaintiff has contended the act of defendant was the proximate cause of the death of his calf. Plaintiff asserted DOT's negligence in leaving poisonous vegetation within easy reach of his animals resulted in the loss of his calf and, consequently, defendant should bear liability for this loss. Plaintiff filed this complaint seeking to recover $750.00, the estimated value of a five hundred fifty pound calf from a registered Black Angus cow. The filing fee was paid.

{¶ 4} Defendant stated DOT personnel trimmed tree branches along State Route 513 on July 29, 2005. Defendant explained tree branches were trimmed on the roadway right of way and the cut branches, "fell directly below onto the right of way." Defendant acknowledged branches from a wild cherry tree were trimmed on the right of way near the fence of plaintiff's pasture allowing plaintiff's cattle to have grazing access to the cut branch. Defendant noted plaintiff's pasture fence, "protrudes into the

right of way." Defendant acknowledged plaintiff's calf ingested some part of the fallen cherry tree branch and subsequently died.

{¶ 5} Defendant submitted evidence establishing the cherry tree and plaintiff's pasture fence line are located well within the State Route 513 right of way. The minimum right of way on State Route 513 in the area of plaintiff's pasture is sixty feet. Submitted photographs depicting vegetation growing along State Route 513, including the cherry tree that was trimmed, and plaintiff's fence line, clearly show all are located within the roadway right of way. Furthermore, defendant filed a written statement from DOT employee, James Wharton, who was part of the mowing crew working on July 29, 2005. Wharton wrote: "[a]t Mr. Christman land we mowed some wild cherry trees that was growing toward the road. These trees are in his fence row that is only 18 to 21 feet from the center of the road."

{¶ 6} Defendant asserted DOT has statutory authority under R.C. 5501.42[1] to cut or trim vegetation within a roadway right of way in order to remove perceived obstructions to promote safety for the motoring public. Defendant contended when DOT exercises this statutory authority, it is immune from liability for any damages

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[1] The director of DOT is vested, pursuant to R.C. 5501.42, with:

"[The] supervision and control of all trees and shrubs within the limits of a state highway. The department of agriculture or other proper department may, with the consent of the director of transportation, take charge of the care of such trees, and such department, in the event it takes charge of such trees, may, with the consent of the director of transportation, plant additional trees within the limits of a state highway. The cost and expense of caring for or planting such trees may be paid out of any funds available to the director or for the development of forestry of the state.

"The director may cut, trim, or remove any grass, shrubs, trees, or weeds growing or being within the limits of a state highway.

"The powers conferred by this section upon the director shall be exercised only when made necessary by the construction or maintenance of the highway or for the safety of the traveling public."

caused by the decision to act upon that authority. Defendant cited the case of *Garland v. Ohio Dept. of Transp.* (1990), 48 Ohio St. 3d 10, for the proposition that DOT is immune from liability in tort when it makes policy decisions necessitating independent judgment. *Garland*, id., involved a situation where DOT was immune from liability for making a decision regarding what type of traffic signal to install at a roadway intersection. The facts of *Garland* concerned choices about installation of a traffic control device and a subsequent motor vehicle collision at the intersection where the traffic control device was installed. Defendant also cited *Winwood v. Dayton* (1998), 37 Ohio St. 3d 282, which held a city is immune from tort liability for making a discretionary decision to install or forgo traffic devices at a municipal roadway intersection. More pertinent, defendant offered *Lewis V. Ohio Dept. of Transp.*, 1995 Ohio App. Lexis 4792, where the Tenth District Court of Appeals held DOT was immune from liability for making a decision to not remove a tree from a roadway right of way which may or may not present a safety hazard to motorists.

{¶ 7} Despite defendant's contentions of immunity from liability for damages caused by DOT tree trimming operations, the court in the instant claim finds defendant is not subject to immunity for its acts. In *Reynolds v. State* (1984), 14 Ohio St. 3d 68, the Ohio Supreme Court stated as follows, at paragraph one of the syllabus:

{¶ 8} "The language of R.C. 2743.02 that 'the state' shall 'have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the

exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities."

{¶ 9} The present claim is an action based on allegations of negligence in the performance of activities assigned to DOT employees. In these circumstances, defendant can be held liable for negligently implementing its decision to trim vegetation on the roadway right of way.

{¶ 10} Defendant argued that it should not bear any liability in this action because plaintiff's property loss, the death of his calf, was not a foreseeable consequence of DOT's tree trimming activity. Defendant stated, "[i]t is not known to many outside occupations of veterinary medicine or agriculture that wild cherry tree branches and leaves become poisonous to cows when they begin to decay." Therefore, defendant asserted, since the DOT tree trimming crew did not know they were depositing poisonous vegetation near a pasture where livestock graze, it was not foreseeable any livestock would die from consuming the poisonous substance deposited near the grazing area.

{¶ 11} "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.* (1983), 6 Ohio St. 3d 155, at 160 quoting *Mudrich v. Std. Ohio Co.* (1950), 153 Ohio St. 31. A

particular defendant need not foresee the specific harm caused by its negligence if the particular harm would have been foreseen by a reasonably prudent person. *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.* (1995), 73 Ohio St. 3d 609. An injury is foreseeable if a defendant knew or should have known its act was likely to result in harm. *Simmers v. Bentley Constr.* (1992), 64 Ohio St. 3d 642. DOT has been involved in tree trimming maintenance along highways in rural areas for decades. Due to years of acquired experiences and instances of maintenance, DOT personnel should have known about the potential poison hazard when dealing with trimming cherry trees around areas frequented by livestock. It was foreseeable that plaintiff's ruminant animal would eat vegetation left upon the ground near a pasture fence line. Defendant should have known the particular vegetation was poisonous to grazing animals. Knowledge and foreseeability are not issues in this claim.

{¶ 12} Defendant pointed out that plaintiff's property loss (the death of his calf), occurred on land owned by and under the control of the state. The cherry tree trimmed by DOT personnel and the fence line of plaintiff's pasture were located within the state's right of way land. Defendant explained plaintiff receives a benefit from being permitted to use additional grazing land on the state's right of way and DOT receives nothing in return for this permitted use. Therefore, under the common law plaintiff has the legal status of a licensee and consequently, defendant is generally liable for injuries proximately resulting from willful and wanton misconduct. See *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St. 3d 265. The possessor of land owes a duty of ordinary care to invitees, who are persons whom are invited onto

the land for some purposes beneficial to the possessor. To invitees a duty is owed to keep the premises in a reasonably safe condition and give warnings of latent or concealed perils of which the possessor has, or should have, knowledge. *Westwood v. Thrifty Boy Super Markets, Inc.* (1972), 29 Ohio St. 2d 84. However, a possessor owes no duty of ordinary care to those persons who enter land not on the possessor's invitation, but through permission and acquiescence for their own benefit. Such persons are licensees, who enter on their own license and are subject to the perils and risks on the land. Plaintiff, in the instant claim, would be classified as a licensee on defendant's right of way, and defendant would generally be liable for injuries caused by willful and wanton misconduct, not ordinary negligence. No evidence has been presented to establish DOT desired plaintiff and his animals to enter the state right of way. At most, DOT's conduct constituted a willingness to permit entry on the right of way for plaintiff's livestock. There is no evidence DOT specifically intended or acted recklessly in providing access to poisonous vegetation to plaintiff's cattle. Defendant pointed out plaintiff used the right of way land subject to known perils and risks, including the presence of vegetation deleterious to his livestock.

{¶ 13} Without countering any argument concerning his status on the state's right of way, plaintiff contended DOT was negligent when conducting tree trimming and this negligence resulted in his property loss. Plaintiff suggested DOT should have known wild cherry trees posed a potential poison hazard and therefore, DOT should have taken reasonable precautions when conducting tree trimming activities in rural areas where exposure of poisonous material to livestock was enhanced. Plaintiff, in his response to

defendant's investigation report, related, "I expect the State of Ohio to have a moral responsibility to be a good neighbor." Plaintiff noted the roadway right of way land was a gift to the state and stated, "I find it hard to believe (right of way) was intended for the State to use it as a weapon to hide from their responsibilities." Plaintiff reasserted his claim for damages for the loss of his calf resulting from the ingestion of poisonous vegetation.

{¶ 14} Plaintiff, as has been observed, was classified under the law as a licensee. Defendant, as the entity in control of the roadway right of way, "is not liable to a licensee for injury caused to the licensee by ordinary negligence of the landowner. *Light v. Ohio University* (1986), 28 Ohio St. 3d 66. Rather:

{¶ 15} "A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, *** (a) the possessor knows or has reason to know of the condition and should realize that it involved an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and *** (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and *** (c) the licensees do not know or have reason to know of the condition and the risk involved. 2 Restatement of the Law 2d, Torts (1965), Section 342."

{¶ 16} Under existing case law, a licensor does not owe a licensee any duty except to refrain from wilfully injuring him and not to expose him to any hidden danger, pitfall, or obstruction. If the licensor knows such a danger is present, the licensor must warn the licensee of this danger which the licensee cannot

reasonably be expected to discover. *Salemi v. Duffy Construction Corporation* (1965), 3 Ohio St. 2d 169, at paragraph two of the syllabus; *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, at paragraph four of the syllabus. In the present claim, the facts show plaintiff could have reasonably been expected to discover the presence of the trimmed cherry tree and the potential danger this trimmed vegetation posed to his livestock. The danger should have been apparent enough to plaintiff that he could have protected his property from the dangers posed by defendant's actions. Defendant cannot be held liable for its negligence in creating the dangerous condition. Consequently, plaintiff's claim is denied.

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IN THE COURT OF CLAIMS OF OHIO

BRIAN S. CHRISTMAN	:	
Plaintiff	:	
v.	:	CASE NO. 2005-09065-AD
OHIO DEPARTMENT OF **TRANSPORTATION**	:	ENTRY OF ADMINISTRATIVE **DETERMINATION**
Defendant	:	

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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 defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT
Deputy Clerk

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RDK/laa
2/3
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