[Cite as *Bertram v. Ohio Dept. of Transp.*, 2003-Ohio-2608.]

IN THE COURT OF CLAIMS OF OHIO

JOHNNY C. BERTRAM, et al. :

Plaintiffs :

v. : CASE NO. 2002-07924-AD

OHIO DEPT. OF TRANSPORTATION : MEMORANDUM DECISION

Defendant :

: : : : : : : : : : : : : : : : :

{¶1} On August 2, 2002, at approximately 10:20 p.m., plaintiff, Johnny C. Bertram, was traveling south on State Route 247 near milepost 6.30 in Adams County when a tree limb from a tree planted adjacent to the roadway fell upon the automobile he was driving. The impact of the falling tree limb caused extensive body damage to plaintiff's vehicle. Plaintiff, Norma K. Bertram, the owner of the damaged automobile and the wife of Johnny C. Bertram, was a passenger in the car at the time of the incident. According to plaintiff, Johnny C. Bertram, his wife Norma K. Bertram experienced chest pains and an anxiety attack as a result of the tree limb falling on the car. Plaintiff filed this complaint seeking to recover $2,371.54, the cost of repairing the automobile, a 1987 Plymouth Sundance. Plaintiffs suggested they sustained these damages as a proximate cause of negligence on the part of defendant, Department of Transportation, in maintaining a dead tree on the roadway right-of-way area.

{¶2} Plaintiffs indicated that after the vehicle was damaged, Johnny C. Bertram examined the tree from which the limb fell. Johnny C. Bertram stated he observed two trees which had been grown near each other. One tree had been chopped down and was laying on the ground. The second tree which bore the limb that fell upon plaintiffs' car, "was dry rotted about halfway up and the top was green." Johnny C. Bertram suggested the deteriorated moribund condition of this tree is what caused the tree's limb to fall and

the consequential property damage.

{¶3} Defendant denied any liability in this matter. Defendant indicated the falling tree limb which damaged plaintiff's car was the result of an "Act of God" and was not attributable to any negligent maintenance. Defendant contended rain storms in the region caused the tree to fall over into the traveled portion of the roadway and strike plaintiffs' car. Defendant related its employee, Adams County Administrator, Robert Osman, was called to the scene of plaintiffs' incident at 10:00 p.m. on August 2, 2002. Defendant acknowledged Osman observed the fallen tree and discovered "the top of the tree was green and was rotten about half way up the trunk." Although defendant admitted this damage-causing tree was essentially dead, defendant professed the tree was not negligently maintained. Defendant explained periodic maintenance inspections were conducted along State Route 247 and the inspections did not reveal any trees in such condition to necessitate removal. Defendant stated tree cutting was conducted in the area of plaintiff's incident on July 17, 2002. Defendant denied any negligent act or omission on the part of its personnel proximately caused plaintiff's property damage.

{¶4} Defendant has the duty to keep the roads in a safe, drivable condition. *Amica Mutual v. Dept. of Transportation* (1982), 81-02289-AD. Defendant must exercise due care and diligence in the proper maintenance and repair of highways. *Hennessey v. State of Ohio Highway Department* (1985), 85-02071-AD. The duty of care owed by defendant, encompasses a duty to remove dangerous conditions which present a known risk to the motoring public.

{¶5} However, in order for plaintiff to recover damages arising from a fallen tree, the evidence must establish defendant had actual or constructive notice of a patent danger that the tree would fall. *Heckert v. Patrick* (1984), 15 Ohio St. 3d 402, 405. Notwithstanding defendant's assertions, evidence has shown defendant either knew or should have known through inspections the dead tree constituted a hazardous condition which should have been rectified. Evidence has shown defendant should have known the tree which caused property damage presented an imminent danger and was likely to fall. Evidence has established the tree was, in effect, a dangerous condition existing for such a length of time that, defendant by exercising care ought to have discovered the danger and removed it before it damaged plaintiffs' car. See *Taylor v. City of Cincinnati* (1944), 143

Ohio St. 426.

{¶6} Furthermore, defendant has failed to offer sufficient proof to show the tree fell solely as a result of a rain storm or an "Act of God." It is well settled Ohio law that if an "Act of God" is so unusual and overwhelming as to do damage by its own power, without reference to and independently of any negligence by defendant, there is no liability. *City of Piqua v. Morris* (1918), 98 Ohio St. 42, 49. "The term 'Act of God', in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods." Id. at 47-48.

{¶7} However, if proper care and diligence on the part of defendant would have avoided the act, it is not excusable as an "Act of God." *Bier v. City of New Philadelphia* (1984), 11 Ohio St. 3d 134. In the instant case, plaintiffs have demonstrated the tree was in need of maintenance before the August 2, 2002 incident occurred. Defendant failed to exercise proper care in removing the dead tree. The court concludes defendant's negligence in failing to exercise ordinary care in respect to a dangerous condition along the roadway caused plaintiffs' damage. Consequently, defendant is liable to plaintiff for the damages claimed based on defendant's negligence in failing to remove a dangerous tree condition.

{¶8} Having considered all the evidence in the claim file and adopting the memorandum decision concurrently herewith;

{¶9} IT IS ORDERED THAT:

{¶10} 1) Plaintiff's claim is GRANTED and judgment is rendered in favor of the plaintiff;

{¶11} 2) Defendant (Department of Transportation) pay plaintiffs (Johnny C. Bertram and Norma K. Bertram) $2,396.54 and such interest as is allowed by law;

{¶12} 3) Court costs are assessed against defendant.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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Norma K. Bertram

Plaintiffs, Pro se

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RDK/laa
4/17
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