

[Cite as *Fisher v. Ohio Dept. of Transp.*, 2007-Ohio-5288.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JAMES R. FISHER

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-04869-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On April 13, 2007, at approximately 2:00 p.m., plaintiff, James K. Fisher, was traveling south on Interstate 71, “just pass exit 209,” in Medina County, when his automobile struck a large pothole in the roadway causing tire damage to the vehicle. The roadway area where the incident occurred was located within a construction zone.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$703.40 for automotive repair and replacement part expense resulting from the April 13, 2007, property damage event. Plaintiff implied he incurred these damages as a proximate cause of negligence on the part of defendant, Department of Transportation (“DOT”), in maintaining the roadway in a construction zone on Interstate 71 in Medina County. The filing fee was paid.

{¶3} 3) Plaintiff submitted a written statement from Marianne Fisher, a passenger in the James K. Fisher vehicle and a witness to the April 13, 2007, incident. Marianne Fisher recalled that after plaintiff’s vehicle struck the pothole and pulled to the side of the roadway, they waited three to four hours for roadside assistance for the damaged car. Marianne Fisher noted during this waiting period, two people stopped and told them that vehicle damage from the pothole had been ongoing all day on April 13, 2007. Marianne Fisher also remembered one stopped motorist told her, “that he had reported it (the pothole) at 12:00 that afternoon.” No evidence was submitted to indicate who or what entity received a report regarding a pothole on Interstate 71. Furthermore, Marianne Fisher related that when the roadside assistance person arrived at the scene another man who owns a towing service stopped by to offer assistance and told her, “he had been out there changing tires all day long.”

{¶4} 4) Plaintiff also submitted a written statement from his daughter, Catherine M. Morgan, a passenger in plaintiff’s car and a witness to the events of April 13, 2007. Catherine Morgan recorded she also heard the owner of the towing service mention, “that he had been out there all day fixing flat tires.”

{¶5} 5) Defendant observed the area where plaintiff’s damage occurred was located within a construction zone under the control of DOT contractor, The Ruhlin Company (“Ruhlin”). Additionally, defendant denied liability in this matter based on the allegation that neither DOT nor Ruhlin had any prior knowledge of the roadway defect plaintiff’s car struck. Defendant contended no calls or complaints were received regarding this particular pothole prior to plaintiff’s incident. DOT related several prior complaints

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regarding potholes on Interstate 71 were logged, but not in the particular area of plaintiff's damage occurrence. Defendant located the particular damage-causing defective roadway condition in the construction zone between state mileposts 208.60 to 213.77 on Interstate 71 in Medina County.

{¶6} 6) Defendant asserted Ruhlin by contractual agreement was responsible for maintaining the roadway within the construction area. Therefore, DOT argued that Ruhlin is the proper party defendant in this action. Defendant implied that all duties, such as the duty to inspect, the duty to warn, the duty to maintain, and the duty to repair defects were delegated when an independent contractor takes control over a particular section of roadway. All construction was to be performed to DOT requirements and specifications.

{¶7} 7) Defendant submitted a letter from Ruhlin employee, Brian J. Miller, who wrote Ruhlin received direction from DOT personnel on April 12, 2007, to conduct pothole repairs on Interstate 71 south, including the pothole plaintiff's vehicle struck. Ruhlin repaired the potholes with cold patch material. Miller recorded DOT personnel again directed repairs for the pothole plaintiff's car struck on April 13, 2007, between 4:00 and 5:00 p.m. This pothole was repatched around 11:00 p.m. on April 13, 2007.

{¶8} 8) Defendant submitted a statement from DOT Project Engineer, Luke T. Wysocki, regarding the damage-causing pothole relevant to this claim. Wysocki stated he was notified by DOT Medina County Garage staff on April 12, 2007, concerning the pothole on Interstate 71 and instructed Ruhlin to patch this roadway defect. Wysocki recorded that, "[s]ometime during the day on April 13 the hole opened up again, but I was not informed until sometime between 3:00-3:30 p.m. at which time the contractor filled the hole again.

{¶9} 9) Plaintiff filed a response asserting he should be entitled to his damages based on the position the damage-causing pothole was negligently repaired with the repair patch deteriorating within a short time period. Plaintiff stated he observed the pothole at 2:00 a.m. on April 14, 2007, and it had not been repaired.

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CONCLUSIONS OF LAW

{¶10} Defendant has the duty to maintain its highway in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335, 361 N.E. 2d 486. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189, 678 N.E. 2d 273; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723, 588 N.E. 2d 864. The duty of DOT to maintain the roadway in a safe drivable condition is not delegable to an independent contractor involved in roadway construction. DOT may bear liability for the negligent acts of an independent contractor charged with roadway construction. *Cowell v. Ohio Department of Transportation*, 2003-09343-AD, jud, 2004-Ohio-151. Despite defendant's contentions that DOT did not owe any duty in regard to the construction project, defendant was charged with duties to inspect the construction site and correct any known deficiencies in connection with particular construction work. See *Roadway Express, Inc. v. Ohio Dept. of Transp.* (June 28, 2001), Franklin App. No. 00AP-1119, 2001 Ohio App. LEXIS 2854.

{¶11} In order to find liability for a damage claim occurring in a construction area, the court must look at the totality of the circumstances to determine whether DOT acted in a manner to render the highway free from an unreasonable risk of harm for the traveling public. *Feichtner v. Ohio Dept. of Transp.* (1995), 114 Ohio App. 3d 346, 683 N.E. 2d 112. In fact, the duty to render the highway free from unreasonable risk of harm is the precise duty owed by DOT to the traveling public under both normal traffic conditions and during highway construction projects. See, e.g. *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St. 3d 39, 42, 564 N.E. 2d 462, 465.

{¶12} For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 81, 2003-Ohio-2573, ¶8, 788 N.E. 2d 1088, 1090 citing *Menifee v. Ohio*

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Welding Products, Inc. (1984), 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710. Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 61 N.E. 2d 198, approved and followed.

{¶13} Ordinarily in a claim involving roadway potholes, plaintiff must prove either: 1) defendant had actual or constructive notice of the defective condition and failed to respond in a reasonable time or responded in a negligent manner, or 2) that defendant, in a general sense, maintains its highways negligently. *Denis v. Department of Transportation* (1976), 75-0287-AD. A pothole patch which deteriorates in less than ten days is prima facie evidence of negligent maintenance. See *Matala v. Ohio Department of Transportation*, 2003-01270-AD, 2003-Ohio-2618; *Schrock v. Ohio Dept. of Transp.*, 2005-02460-AD, 2005-Ohio-2479.

{¶14} The fact the pothole plaintiff's car struck deteriorated in a time from of less than one day warrants application of the standard expressed in *Matala*, supra.

{¶15} Negligence in this action has been proven and defendant is liable for the damage claimed, plus filing fee costs.

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OHIO DEPARTMENT OF
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ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant

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 plaintiff in the amount of \$728.40, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

James R. Fisher
4936 Determine Lane
Louisville, Kentucky 40216

James G. Beasley, Director
Department of Transportation
1980 West Broad Street
Columbus, Ohio 43223

RDK/laa
7/24
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