[Cite as *Kemer v. Ohio Dept. of Transp.*, 2009-Ohio-5714.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert Kemer et al.,	:	
Plaintiffs-Appellants,	:	
		No. 09AP-248
v.	:	(C.C. No. 2006-04563)
Ohio Department of Transportation,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 29, 2009

Paul V. Wolf and *Libert Pinto,* for appellants.

Richard Cordray, Attorney General, *Stephanie D. Pestello-Sharf* and *Velda K. Hofacker-Carr,* for appellee.

APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶1} Plaintiffs-appellants, Robert Kemer (individually, "plaintiff") and Amy Kemer, appeal from a judgment of the Court of Claims of Ohio finding defendant-appellee, the Ohio Department of Transportation ("ODOT"), is not liable to plaintiffs for injuries plaintiff sustained when he fell into an open catch basin in the grassy area next to the berm of

Interstate 71 ("I-71") in Cleveland. Because the court's judgment is not against the manifest weight of the evidence, we affirm.

I. Procedural History

{¶2} On July 18, 2004, plaintiff was working as a patrol officer and canine handler for the Cleveland Police Department. During a late evening traffic stop involving a tractor-trailer suspected of transporting contraband, Lieutenant Patrick Stevens summoned plaintiff and his canine to the scene for assistance. Plaintiff reported to the location of the tractor-trailer on the berm of northbound I-71 near the West 130th Street entrance ramp. Plaintiff and his dog began their search at the front end of the driver's side of the tractor and moved counterclockwise around the vehicle toward the rear of the trailer. As he walked, plaintiff held his dog's leash in his left hand and guided the dog around the tractor-trailer to see if the dog would "alert" to the scent of narcotics. Making his way around the tractor-trailer to the passenger side, plaintiff moved northbound on the passenger's side of the vehicle where he fell into an open catch basin located between the paved berm and the grassy area next to the entrance ramp.

{¶3} On July 13, 2006, plaintiffs filed a complaint in the Ohio Court of Claims to recover damages arising from the injuries plaintiff sustained as a result of his fall, including a claim for loss of consortium. Plaintiffs named as defendants ODOT, an unknown private contractor, and an unknown municipality charged with upkeep of that section of highway. After the court dismissed the other parties as improper defendants, ODOT answered on August 16, 2006, denying any negligence and asserting plaintiff's own negligence was an intervening, proximate cause of his injuries. The Court of Claims

bifurcated the issues of liability and damages, scheduling the liability issue for a bench trial on September 17, 2007.

{¶4} At the liability trial, plaintiff testified he was "sidestepping and going backwards" as he presented the dog to the tractor-trailer. (Tr. 145.) He stated he was inspecting the passenger side of the vehicle when he started to slip and somehow fell into the catch basin. He testified he was not sure how it happened, but at the time he wondered if a car "ran [him] over." (Tr. 146.) Still holding the dog's leash, plaintiff suspended himself on the rim of the catch basin with his elbows while a piece of exposed rebar snagged his belt. Although he admitted he did not look where he was walking, plaintiff stated he needed to keep his eyes on the dog at all times so he would not miss the dog's alert to any scents coming from the vehicle.

{¶5} Lieutenant Stevens procured the assistance of Officer Michael Moher at the scene of plaintiff's fall, and Officer Moher took pictures of both the inside and the outside of the catch basin. Lieutenant Stevens later notified ODOT of the uncovered catch basin, and ODOT supervisor Robert Wisniewski responded to the scene. Everyone at the scene that night observed a manhole cover in the grass next to the open catch basin.

{¶6} Wisniewski testified ODOT contracts with a private company to provide mowing services for the grassy areas adjacent to the highways in Cuyahoga County. Under normal procedures, the private company mowed any given grassy area once a month. If any noticeable problems or obstructions prevented mowing within the area, the private company reported those to ODOT. On some occasions, an ODOT inspector accompanied the private contractors to supervise their work. In the six months before

plaintiff's fall, ODOT did not receive any documented complaints about an uncovered catch basin in the section of the highway at issue.

{¶7} Wisniewski further testified regarding ODOT's maintenance logs. The logs reveal that on July 13, 2004, five days before plaintiff's accident at the catch basin located at mile marker 242.2, ODOT crews cleaned catch basins and underdrains between mile markers 242.4 to 241.8 on I-71. Wisniewski explained the descending numbers in the maintenance logs meant the cleaning occurred on the southbound side of I-71, not the northbound where plaintiff fell. Although additional evidence demonstrated the litter patrol was on the northbound side of I-71 between mile markers 238.6 and 247.7 on July 16, two days before plaintiff's fall, litter patrol worked in the driving lanes of the freeway rather than in the berm.

{¶8} Several witnesses testified the concrete surrounding the open catch basin was crumbling and some of the rebar used for support was exposed. All agreed such deterioration would have occurred over a period of time longer than a few weeks. No testimony addressed either when the basin became uncovered or how and under what circumstances the reverse bevel meant to support the manhole cover broke away from the structure.

{¶9} In a decision and separate judgment entry filed February 9, 2009, the trial court entered judgment for ODOT. The trial court found both that ODOT did not breach its duty to maintain the roadway in a reasonably safe condition and that the uncovered catch basin did not constitute a nuisance. Underlying the decision, in part, was the court's further conclusion that plaintiffs failed to prove ODOT had either actual or constructive

notice of the uncovered catch basin, without which ODOT could not be liable for failure to correct a hazardous road condition. Because the loss of consortium claim was derivative to plaintiff's negligence claims, the court determined it also failed. While not necessary to its decision, the court found plaintiff's failure to exercise reasonable care for his safety was the proximate cause of his injuries. Concluding plaintiffs failed to prove any of their claims by a preponderance of the evidence, the court entered judgment for ODOT.

II. Assignments of Error

{¶10} Plaintiffs appeal, assigning three errors:

> **Assignment of Error No. 1:**
>
> The Trial Court erred to the prejudice of Plaintiffs Appellants in ruling that Defendant-Appellee did not breach its duty to maintain its roadway in a reasonably safe condition.
>
> **Assignment of Error No. 2:**
>
> The Trial Court erred to the prejudice of Appellants in ruling that the Appellant failed to prove that Appellee had either actual or constructive notice of the defective condition of its roadway as such ruling was against the manifest weight of the evidence.
>
> **Assignment of Error No. 3:**
>
> The Trial Court erred to the prejudice of Appellant in ruling that he failed to use reasonable care for his own safety and that such failure was the proximate cause of Appellant's own injuries because such judgment was against the manifest weight of the evidence.

Plaintiffs' three assignments of error are interrelated in that together they assert the judgment of the Court of Claims is against the manifest weight of the evidence.

{¶11} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279, syllabus. When reviewing whether a civil judgment is against the manifest weight of the evidence, there is a presumption guiding the appellate court that the trial court's findings are correct. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 79-80.

{¶12} "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id. at 80. Thus, the relative weight given to witness testimony and the credibility afforded to each witness is a question for the trier of fact. *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶36.

III. First Assignment of Error – Breach of Duty

{¶13} Plaintiffs' first assignment of error contends the trial court erred in concluding ODOT did not breach its duty of care regarding the catch basin where plaintiff fell.

{¶14} In order to prove his negligence claim, plaintiff needed to prove (1) ODOT owed him a duty, (2) ODOT breached that duty, and (3) the breach proximately caused his injuries. *Strother v. Hutchison* (1981), 67 Ohio St.2d 282, 285; *Dunlap v. W.L. Logan Trucking Co.*, 161 Ohio App.3d 51, 2005-Ohio-2386, ¶25. In general, ODOT has a duty to

maintain its highways in a reasonably safe condition for the motoring public, but ODOT does not insure the safety of its highways. See *Steele v. Ohio Dept. of Transp.*, 162 Ohio App.3d 30, 2005-Ohio-3276, ¶8; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App.3d 723, 729-30; *Knickel v. Dept. of Transp.* (1976), 49 Ohio App.2d 335, 339.

{¶15} The duty derives from R.C. 5501.11, which requires ODOT to "construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon." R.C. 5501.11(A)(1); *Rhodus* at 729-30. ODOT is not expected to protect the users of its highways from every potential or conceivable injury; rather, the duty ODOT owes to travelers of the highways is one of reasonable care. *Feichtner v. Ohio Dept. of Transp*. (1995), 114 Ohio App.3d 346, 355 (noting that ODOT "must maintain and construct the highways in a safe and reasonable manner" and has a duty to conduct highway repairs "in a reasonably safe manner").

{¶16} "Whether a duty exists in a negligence action is a question of law." *Benton v. Cracker Barrel Old Country Store, Inc.*, 10th Dist. No. 02AP-1211, 2003-Ohio-2890, ¶11, citing *Mussivand v. David* (1989), 45 Ohio St.3d 314. Here, plaintiffs do not challenge the trial court's conclusions about whether a duty exists; the trial court found ODOT owed a duty of care and properly articulated it. The issue is whether ODOT breached its duty of care. "Whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact to be decided by the jury, or by the court in a bench trial." *Pacher v. Invisible Fence of Dayton*, 154 Ohio App.3d 744, 2003-Ohio-5333, ¶41, citing *Miller v. Paulson* (1994), 97 Ohio App.3d 217, 221; *Mussivand* at 318.

{¶17} Whether ODOT breached the duty it owes to passengers on its highways depends upon where the injury occurs. "Cases addressing state or political subdivision liability for injuries to motorists caused by off-road obstructions typically have focused upon whether the offending structure directly jeopardizes the safety of the ordinary traffic on the roadway." *Steele* at ¶11; see also *Harris v. Ohio Dept. of Transp.* (1992), 83 Ohio App.3d 125, 129.

{¶18} Here, the parties dispute whether the catch basin into which plaintiff fell was on the regularly traveled portion of the roadway. Plaintiffs urge the paved berm or shoulder is within ODOT's duty of care. See *Dickerhoof v. Canton* (1983), 6 Ohio St.3d 128, 131 (holding a political subdivision "may be liable for injuries resulting from its failure to keep the shoulder of a highway in repair and free from nuisance where such defect renders the highway unsafe for normal travel"). ODOT, on the other hand, argues the catch basin is too far removed from the highway to make ODOT liable. See, e.g., *Harris* at 130 (concluding ODOT can only be liable for conditions "in the right-of-way which directly jeopardized the safety of the usual and ordinary traffic on the roadway").

{¶19} The Court of Claims found that, pursuant to *Harris*, the location of the uncovered catch basin did not render the roadway unreasonably dangerous for the usual and ordinary traffic on the roadway. Photographs from the record depict that the catch basin at mile marker 242.2 sat on the edge of the grassy area separating the traveling lanes of northbound I-71 and the entrance ramp from West 130th Street. Grass surrounded the catch basin on three of its four sides, with the fourth side abutting the paved berm. Even if, as plaintiffs contend, ODOT can be liable for failure to keep the

highway shoulder in repair, the evidence here demonstrates the catch basin was not part of the shoulder. Under the facts here, some competent, credible evidence in the record supports the trial court's finding that the catch basin, surrounded on three sides with grass and only abutting the paved shoulder, did not jeopardize the safety of the ordinary traffic using the state highways.

IV. Second Assignment of Error – Notice

{¶20} Even if the catch basin's location were on the regularly traveled portion of the roadway, ODOT may be liable for defects or dangerous conditions on state highways only when it has either actual or constructive notice of the condition. *McClellan v. Ohio Dept. of Transp*. (1986), 34 Ohio App.3d 247, paragraph one of the syllabus. See also *State Farm Auto Ins. Co. v. Ohio Dept. of Transp.* (June 8, 1999), 10th Dist. No. 98AP-936 (stating that to find a breach of the duty to maintain the highways, "ODOT must have had either actual notice or constructive notice of the [defect]"). The Court of Claims found ODOT had neither actual nor constructive notice of the uncovered catch basin at mile marker 242.2.

A. Actual Notice

{¶21} Actual notice exists where, from competent evidence, the trier of fact can conclude the pertinent information was personally communicated to, or received by, the party. *In re Fahle's Estate* (1950), 90 Ohio App. 195, 197. As applicable here, actual notice means express or direct information. Id. at 198.

{¶22} The evidence here revealed no documented reports to ODOT regarding an open, unguarded catch basin at mile marker 242.2. Further, ODOT crews were in the

immediate area of the catch basin in the days before plaintiff's fall, performing litter removal and other functions on the traveled part of the highway; no one observed an open catch basin. Plaintiffs nonetheless argue that items in the bottom of the open catch basin establish ODOT's actual knowledge, noting the catch basin contained two orange traffic cones and a second manhole cover. ODOT's bringing any of the items to the scene, plaintiffs argue, suggests actual notice of a defect with the catch basin and, in particular, the absence of the lid to the catch basin.

{¶23} The testimony, however, was disputed concerning the cones and whether they were the same kind ODOT used. Moreover, witnesses for plaintiffs and ODOT disputed whether the other item in the bottom of the catch basin was actually a second manhole cover; Wisniewski testified the object could have been anything. The trial court weighed the disputed evidence and had the discretion to find Wisniewski's testimony more credible than plaintiff's contention that the object necessarily was a second manhole cover. As a result, some competent, credible evidence, albeit disputed, supports the trial court's finding that ODOT did not have actual notice of the open catch basin.

B. Constructive Notice

{¶24} Even if ODOT had no actual notice, plaintiffs contend ODOT at least had constructive notice of the open, unguarded catch basin. Constructive notice is that which the law regards sufficient to give notice to a party; it is a substitute for actual notice. Id. at 197-98. "In order for there to be constructive notice of a nuisance or defect in the highway, it must have existed for such length of time as to impute knowledge or notice." *McClellan* at 250, citing *Bello v. Cleveland* (1922), 106 Ohio St. 94; *McCave v. Canton*

(1942), 140 Ohio St. 150. Constructive notice of a defective condition can be imputed to a defendant when the plaintiff presents evidence establishing that the defect could or should have been discovered. See, e.g., *Nanak v. Columbus* (1997), 121 Ohio App.3d 83, 86, citing *Beebe v. Toledo* (1958), 168 Ohio St. 203.

{¶25} The requisite length of time a condition must exist to establish constructive notice varies with each specific situation. *Danko v. Ohio Dept. of Transp*. (Feb. 4, 1993), 10th Dist. No. 92AP-1183. We need not address what length of time is sufficient to impute notice in the circumstances here, because plaintiffs' evidence at best was disputed and, in some aspects, offered no evidence to direct the trial court in ascertaining when the catch basin became unguarded or how long it remained so.

{¶26} While plaintiffs suggested grass on top of the manhole cover indicated the lid had been off the catch basin long enough for grass to grow over the top of it, ODOT presented contrary evidence in Wisniewski's testimony. Wisniewski was the only person to lift the catch basin lid, and he testified no grass was growing on it; the lid simply had been pushed into the grass. Furthermore, Wisniewski saw no signs of dead grass or other things underneath the manhole cover to indicate it had been on the ground for any appreciable length of time. The trial court, as the trier of fact, was within its discretion in finding Wisniewski's testimony more persuasive. See, e.g., *Jones v. Dept. of Transp*. (Oct. 3, 1996), 10th Dist. No. 96API03-387 (finding no constructive notice where plaintiffs failed to prove the defect existed for a time prior to the accident); *Manning v. Dept. of Transp*. (Apr. 24, 1997), 10th Dist. No. 96API07-931 (concluding trial court's finding that ODOT lacked constructive notice of an ice patch was not against the manifest weight of

the evidence where plaintiff did not present evidence to establish the defect existed for a sufficient period of time to impute knowledge or notice); *State Farm Auto Ins. Co*. (stating that "[w]hen there is no evidence that the specific condition on the date of the accident existed for a sufficient period so as to have been discovered, constructive notice is lacking").

{¶27} Plaintiffs attempt to compensate for the lack of evidence by pointing to Wisniewski's testimony regarding the condition of the catch basin itself and then using it to support their claim of constructive notice. Wisniewski's testimony, as well as other evidence in the record, indicates the concrete surrounding the opening to the catch basin had deteriorated significantly so that in some places the underneath rebar support system was exposed.

{¶28} Were plaintiffs' claim one that crumbling concrete caused plaintiff's injuries, the deteriorated state of the concrete may be enough to impute constructive notice. Here, however, plaintiffs claim a missing manhole cover rendered a catch basin open and unguarded. Plaintiffs offered no testimony, expert or otherwise, connecting the deterioration of the concrete surrounding the catch basin to the absence of a lid covering it. No evidence in the record explains, or even suggests, the reverse beveled edge meant to support the manhole cover, which is made of metal rather than concrete, deteriorates at the same rate or under the same conditions as does the concrete. In the end, the trial court did not have evidence that would allow it to infer the length of time the lid was off the catch basin due to the deteriorating concrete surrounding the catch basin. Its decision necessarily was not against the manifest weight of the evidence.

{¶29} Plaintiffs also urge evidence from ODOT's maintenance records supports constructive notice, arguing that ODOT, being in the immediate area of the catch basin, should have lifted the lid to inspect the condition of the reverse-beveled edge supporting the lid. Relying on evidence that ODOT maintenance crews cleaned the catch basins and underdrains on the stretch of I-71 directly encompassing the location of the catch basin, plaintiffs argue the evidence supports constructive notice.

{¶30} Once again, however, the evidence was controverted. ODOT presented Wisniewski's testimony, explaining the maintenance records actually indicated the ODOT crews cleaned the southbound side of I-71. Wisniewski testified the crews cleaning on the southbound side of the interstate could not possibly inspect catch basins on the northbound side. As a result, even if plaintiffs' version of events were sufficient to establish constructive notice, the trial court, as the trier of fact, could find the testimony ODOT presented on that point more persuasive. See *Motorist Mut. Ins. Co. v. Ohio Dept. of Transp*. (Sept. 29, 1992), 10th Dist. No. 91AP-1471 (stating "[e]ven assuming that the evidence produced by plaintiff, if accepted by the trial court, would be sufficient to establish constructive knowledge of ODOT as to the existence of a dangerous condition * * * the trial court was not required to accept that testimony but could accept testimony presented by a defendant state so long as it was competent, credible, and probative upon the issue of lack of constructive notice"). Thus, the trial court's determination that the maintenance records were not sufficient to constitute constructive notice was not against the manifest weight of the evidence.

V. Third Assignment of Error – Plaintiff's Own Negligence

{¶31} Because the trial court did not err in concluding ODOT did not breach the duty of care it owed to plaintiffs, in part because ODOT did not have either actual or constructive notice of the open catch basin into which plaintiff fell, plaintiffs' third assignment of error dealing with plaintiff's own negligence is rendered moot.

{¶32} Accordingly, we overrule plaintiffs' first and second assignments of error, rendering moot their third assignment of error, and we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

_____