

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Matthew Sparre, etc. et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 12AP-381
 : (Ct. of Cl. No. 2010-02286)
 [Ohio] Department of Transportation, : (REGULAR CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on September 24, 2013

Djordjevic, Casey & Marmaros, LLC, Daniel S. Cody and Michael M. Djordjevic, for appellants.

Michael DeWine, Attorney General, and Eric A. Walker, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Charles K. Sparre died in a motorcycle accident caused by damaged pavement on a state highway. His widow, plaintiff-appellant Bonnie Sparre, and his son, plaintiff-appellant Matthew Sparre, executor of the estate, sued defendant-appellee, the [Ohio] Department of Transportation ("ODOT") in the Court of Claims of Ohio. The matter went to trial and the Court of Claims rendered a decision and judgment in favor of ODOT, rejecting various theories of liability for the road conditions that led to the fatal accident. The Court of Claims found that although the deteriorated roadway caused Charles Sparre's death, ODOT was entitled to judgment in its favor because it did not have notice that the condition had deteriorated to the point of creating a hazard.

{¶ 2} Appellants have timely appealed and bring the following three assignments of error for our review:

[I.] The Trial Court Erred To The Prejudice Of Plaintiffs-Appellants When The Court Precluded Testimony Regarding The Foreseeability Of The Roadway Slip Worsening Over Time.

[II.] The Trial Court Erred When It Determined That There Was No Actual Or Constructive Notice Of The Precise Condition Of The Roadway That Caused Mr. Sparre's Death.

[III.] The Trial Court Failed To Evaluate The Evidence At Trial Under The General Notice Standards.

{¶ 3} Appellants' first assignment of error asserts that the trial court erred when it precluded testimony regarding the foreseeability of existing roadway conditions worsening over time to create a hazardous break in the pavement.

{¶ 4} The generally uncontroverted testimony at trial established that on June 20, 2008, the decedent set out on a recreational motorcycle ride in the company of two friends. While traveling on a winding and hilly section of State Route 536 in Monroe County, Ohio, the group encountered deteriorated road conditions caused by a hillside "slip" distorting the roadway. Post-accident photographs would document large cracks across the traveled portion of the roadway, including one crack with a difference in elevation of over four inches.

{¶ 5} The speed limit in the area was 55 miles per hour. The lead rider, Richard Avery, was travelling at about 30 miles per hour when he came upon and successfully negotiated the raised and fractured area of the asphalt at a point later identified as the 5.9 mile marker of State Route 536. Charles Sparre was the next rider in line, a short distance behind Avery. Charles Sparre was an experienced and prudent motorcycle rider and as was his custom was not riding aggressively on the day in question. After negotiating the slip area, Avery soon noticed that Charles Sparre was no longer following him. Avery returned to the slip area and found Charles Sparre's motorcycle lying in the roadway and Charles Sparre's body under the guardrail.

{¶ 6} The undisputed inference, as accepted by the trial court, was that Charles Sparre, despite his low speed, had failed to negotiate the fractured pavement caused by the slip, been thrown from his motorcycle into the guardrail, and killed by the impact despite wearing his helmet. David Kramer, the third rider in the group, happened upon the scene at about this time as did a passing motorist, who stopped to render assistance. Upon advice from the motorist, who indicated that the remote location would preclude rapid assistance from emergency personnel, the group loaded Charles Sparre's body into the back of the motorist's pickup truck and preceded southbound on State Route 536 toward a hospital. Within approximately three miles, the pickup truck met an ambulance with paramedics dispatched to the accident site. The paramedic crew began examination and treatment of Charles Sparre, and pronounced him dead at the scene. A coroner's report later confirmed negative drug and alcohol test results.

{¶ 7} The appellants allege that ODOT was negligent by failing to maintain State Route 536 in a reasonably safe condition, and that ODOT negligently failed to install signage to warn of the deteriorated pavement. Appellants allege that generally ODOT was aware that this stretch of State Route 536 was subject to land slips because the hilly ground and frequent need for sidehill road construction invited ground subsidence that would make the road surface unstable or uneven. Appellants specifically assert that the slip in question was not only detectable in some form before the accident, which ODOT concedes, but that ODOT should have been aware that it would rapidly worsen to the point of presenting a fatal hazard.

{¶ 8} Because ODOT does not dispute on appeal the trial court's conclusion that the defective road condition was the direct cause of Charles Sparre's accident and death, the issues on appeal relate only to the question of whether ODOT had actual or constructive notice of the defective pavement. Included in this is the question of when the actual or potential road deformation became observable, and when it actually worsened to the point of presenting a serious hazard.

{¶ 9} In order to sustain an action for negligence, a plaintiff must show the existence of a duty owing from the defendant to the plaintiff or injured party, a breach of that duty, and that the breach was the proximate cause of resulting damages. *Strother v.*

Hutchinson, 67 Ohio St.2d 282, 285 (1981). The state has a general duty to maintain its highways in a reasonable safe condition for the travelling public. *Knickel v. Dept. of Transp.*, 49 Ohio App.2d 335 (10th Dist.1976). The state, however, is not an insurer of the safety of travelers on its highways. *Rhodus v. Ohio Dept. of Transp.*, 67 Ohio App.3d 723 (10th Dist.1990). ODOT, therefore, is not liable for damages caused by hazards on state highways unless ODOT had actual or constructive notice of the hazard that caused Charles Sparre's injuries. *McClellan v. Ohio Dept. of Transp.*, 34 Ohio App.3d 247, 249 (10th Dist.1986).

{¶ 10} We first consider appellants' second assignment of error, which asserts that the Court of Claims' determination that ODOT had no actual or constructive notice of roadway conditions is against the manifest weight of the evidence. "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.*, 54 Ohio St.2d 279 (1978), syllabus. "The phrase 'some competent, credible evidence' in *C.E. Morris* presupposes evidentiary weighing by an appellate court to determine whether the evidence *is* competent and credible." (Emphasis sic.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 15. "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on its effect in inducing belief.'" (Emphasis omitted.) *Id.* at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). Thus, in reviewing a judgment under the manifest-weight standard, a court of appeals weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way. *Id.* at ¶ 20. In so applying the standard, the court of appeals "must always be mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 21.

{¶ 11} In determining whether a judgment is against the manifest weight of the evidence, an appellate court must consider whether the evidence on each element satisfied or failed to satisfy the burden of persuasion. *Id.* at ¶ 19. In other words, the appellate court "sits as a 'thirteenth juror' and [agrees or] disagrees with the factfinder's

resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

{¶ 12} In undertaking this limited reweighing of the evidence, however, we are guided by the presumption that the factual findings of the trial court were correct: an appellate court "must always be mindful of the presumption in favor of the finder of fact." *Eastley* at ¶ 21. Accordingly, the weight to be given the evidence and the credibility of the witnesses are primarily questions to be answered by the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. The determination of credibility of testimony and evidence must not be encroached upon by a reviewing tribunal." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984). The rationale for this deference is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Id.* at 80. Likewise, documentary evidence is best viewed in the context of the entire range of evidence heard at trial, and the trier of fact is better placed to assess the persuasive weight of documents and exhibits when considered jointly with the credibility of relevant witness testimony. *Washington v. Ohio Dept. of Rehab. & Corr.*, 166 Ohio App.3d 797, 2006-Ohio-2435 (10th Dist.).

{¶ 13} A reversal of a jury verdict on the ground that it is against the manifest weight of the evidence must be made with the concurrence of all three judges of the appellate panel. Ohio Constitution, Article IV, Section 3(B)(3). In contrast, when we review a civil verdict in a case tried to the bench, such as the one before us, reversal on manifest weight grounds may be by a simple majority. App.R. 12(C).

{¶ 14} Robert Roush, a transportation engineer for ODOT, testified that ODOT maintains a geological site management ("GSM") program to identify and prioritize locations on state roadways that require permanent repair. For slips, the permanent repair process would involve much more involved work than a temporary patch, including a drill-shaft retaining wall and steel beams filled with concrete. GSM sites are prioritized according to available funds and severity of conditions. Roush testified that the slip in question was on the GSM list prior to Charles Sparre's accident. After the accident, crews

performed interim repairs by resurfacing the roadway and placing an asphalt patch. These made the road safe for travel. The road remained stable until permanently repaired some two years after the accident.

{¶ 15} Jeff Schenerlein, ODOT's superintendent for Monroe County, testified that after the accident he directed another ODOT employee to take photographs of the roadway. Consistent with the state highway patrol report for the accident, he acknowledged that the defects in the roadway as they appeared at the time of the accident presented a hazard to the motoring public. Schenerlein testified that ODOT was aware that this stretch of highway was subject to slips, and that previous interim repairs at other slips in the area did not hold. Schenerlein estimated that there were 50 slip locations in Monroe County due to the hillside topography that rendered roadways unstable. He further stated that he had reported to Roush two slips warranting permanent repair, and one of these was the slip at the 5.9 mile marker. This slip was evidenced by pavement deformation on the roadway margin but not in the traveled portion of the road. Schenerlein further testified that as of his last inspection on June 9, 2008, 11 days prior to the accident, the slip at mile marker 5.9 was not moving and had not progressed to the point of presenting a hazard in the traveled portion of the roadway.

{¶ 16} Schenerlein testified that if the slip had been in the condition that it presented on June 20, 2008, when observed after the accident, he would have placed cones and barrels to block traffic and probably placed an asphalt patch. Schenerlein also stated that ODOT had no record of public complaints about a hazard in this specific area.

{¶ 17} Gary York testified that he was employed by ODOT in 2008, and that his duties included accompanying a painting crew that performed striping on State Route 536 on June 17, 2008. He testified that at that time he did not observe any defects or hazards. York specifically testified that if he observed a hazard on State Route 536 as severe as those depicted in the accident photos, he would have blocked the roadway and called for immediate repair. York stated that minor defects were common on the edges of state highways, and that he would allow crews to paint over cracks of one inch or less, but that he would not have allowed a crew to paint over a defect as severe as that depicted in the accident photographs.

{¶ 18} Darren Hendershot testified that he was an ODOT transportation manager for Monroe County and that Schenerlein was his direct supervisor. As part of his highway maintenance duties, Hendershot inspected State Route 536 on June 2, 2008 and found no hazard in the traveled roadway. When asked to examine photographs of the slip area taken after the accident, Hendershot stated that he could not determine the state of the cracks in the pavement at the time the last striping was applied. He noted that the latest edge line striping had been applied somewhat to the inside of the older edge line, thereby narrowing the road. In his view, the older paint was well into a deteriorated area but the newest striping might have been applied to undamaged pavement slightly further from the pavement edge.

{¶ 19} Kathy Hoskins testified that she was an ODOT employee in Monroe County. Her observations did not come from performance of her official duties, but from the fact that she resides on State Route 536 and passes over the area where the accident occurred on her way to and from work. She testified that she worked on June 19, 2008 but did not work on June 20, 2008. When she travelled to and from work on June 19, 2008, the severe hazard depicted in the accident scene photograph did not exist. Hoskins testified that she had noticed cracking on the berm, but not on the travelled portion of the highway.

{¶ 20} Appellants presented the testimony of an expert, John Robertson, a civil engineer. Robertson personally inspected the accident scene two years after the accident and described the process by which slips develop in side hill roadway construction. In his opinion, and based upon his review of the site and evidentiary materials, two slips were present on State Route 536 on the day of the accident at or around mile marker 5.9. Robertson further opined that because slips will continue to worsen if not permanently repaired, permanent repairs were needed at the location of the accident. In the absence of permanent repairs, Robertson testified ODOT should have placed signage to warn of rough road conditions and pavement defects so that the traveling public would reduce speed and prepare for hazards. Robertson noted that a 25 miles per hour advisory sign warning of curves was in the vicinity, but that this did not adequately warn of pavement defects and hazards. He testified that this was also true regarding a nearby sign warning

of falling rocks. Robertson's interpretation of photographs taken of the accident scene was that the painting crew had painted over the slip on June 17, 2008. He based this conclusion upon the presence of paint deep in the pavement cracks depicted in the photographs. On cross, Robertson conceded that slips can occur quickly, and worsen within hours or days. He concluded, however, that the slips in the affected area existed on May 2, 2008.

{¶ 21} ODOT's expert, David Ray, testified regarding the inspection methods and reporting process employed by ODOT. He stated that a roadway in the condition depicted in the accident scene photographs would warrant immediate patch once observed. He testified that the roadway in the severely deteriorated condition depicted in the accident scene photographs was neither observed by ODOT employees nor reported to ODOT prior to the accident.

{¶ 22} Based upon this evidence, we find that the trial court properly concluded that, although ODOT identified a slip on State Route 536 as early as May 2, 2008, and placed it on its GSM list for permanent repair, the hazardous condition depicted in the accident scene photographs did not exist at that time. We further find that the evidence supports the court's conclusion that ODOT did not have actual or constructive notice of the hazard that caused Charles Sparre's death.

{¶ 23} Actual notice exists when the relevant information has been permanently communicated to or received by the noticed party in the form of express or direct information. *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-288, 2011-Ohio-6388. "Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1052, 2010-Ohio-4736, ¶ 14. To support an inference of constructive notice, a plaintiff may submit evidence to establish the length of time that a condition existed, and thereby show that the defendant should have acquired knowledge of its existence. *Pressley v. Norwood*, 36 Ohio St.2d 29, 31 (1973). The finding of constructive notice is made with due regard to the individual facts of a case, and no rigid time standard for discovery should be inferred. *Bussard v. Ohio Dept. of Trans.*, 31 Ohio Misc.2d 1 (1986).

{¶ 24} In the present case, the Court of Claims found that ODOT's witnesses were credible with respect to the timing and severity of the road deterioration, and the expert testimony regarding the speed with which the slip condition could deteriorate to create the ultimate hazard that caused the accident. Two ODOT employees observed the condition of State Route 536 in the days immediately preceding the accident. Schenerlein, the ODOT county manager for Monroe County, made his inspection on June 9, 2008 and observed that the slip had not significantly moved when he inspected the road. Hendershot, ODOT transportation manager for Monroe County, testified that he did not observe hazards and the road was safe for the motoring public on June 2, 2008. The day before the accident, Hoskins testified that she drove to and from work and the roadway was not in the condition as observed at the time of the accident. York testified that State Route 536 was in good condition when he accompanied the painting crew on June 17, 2008.

{¶ 25} The fact that ODOT had observed slips and placed the section of road in its list for permanent repair does not, based upon the developed testimony of expert witnesses and ODOT's managerial witnesses, conclusively establish that the slip would inevitably deteriorate to create a fatal hazard in the interval before permanent repairs could be effectuated.

{¶ 26} We accordingly find that the Court of Claims' conclusions regarding the absence of notice are supported by the manifest weight of evidence, and appellants' second assignment of error is overruled.

{¶ 27} Appellants' first assignment of error asserts that the trial court erred when it excluded testimony regarding the foreseeability of the slip worsening rapidly in the absence of permanent repairs. This is based upon the court's handling of testimony of Schenerlein and Roush, who were asked on cross whether it was foreseeable that the roadway slip would worsen until permanently repaired. Counsel for ODOT objected to the use of the term foreseeable, and the court sustained the objection.

{¶ 28} The trial court's admission or exclusion of evidence is reviewed on appeal under an abuse of discretion standard. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 16. In this case, the court declined to allow Schenerlein and Roush to testify about

foreseeability because this term, in its proposed use, presented a legal term of art that dictated an ensuing legal conclusion. This was not an abuse of discretion, because the court did allow inquiry from the witnesses regarding foreseeability from the point of view of Roush as an engineer, that is, the physical probability that a slip would rapidly worsen.

{¶ 29} Appellants were thus allowed to develop the relative probability, from the point of view of the experienced road engineer witness, that slips would worsen over time when not permanently repaired. There was no prejudice to appellants from the trial court's carefully tailored ruling regarding testimony and use of the word "foreseeable," and appellants' first assignment of error is accordingly overruled.

{¶ 30} Appellants' third assignment of error asserts that the Court of Claims should have evaluated the evidence under an additional standard to ascertain whether ODOT had received notice. Appellants argue that Ohio law recognizes "general notice" as a basis for liability in highway cases. Appellants rely on *Knickel* for this proposition.

{¶ 31} *Knickel* involved a recurring problem with concrete roadways installed in the 1950s, which exhibited tendency to "blow up" or heave upward causing passing vehicles to be projected into the air. The question before this court in *Knickel*, was whether ODOT could be charged with notice because it was generally apprised of the problem with this type of concrete road construction, but had no particular notice as to deterioration of the highway at the precise location resulting in plaintiff's injury. We held that ODOT could be charged with notice.

{¶ 32} It is doubtful whether this court ever intended *Knickel* to be read for the broad proposition that knowledge by ODOT of a defect occurring in one type of road construction should be imputed as notice of the existence of a hazard in all comparable construction. In any case, this court has declined to extend general notice as a presumptive concept. See, e.g., *Hill v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-265, 2012-Ohio-5304, ¶ 14. We are not persuaded that *Knickel*, even if still viable when applied to general notice of construction defects arising from use of certain materials or techniques in roadway construction, is thereby applicable to broadly-occurring conditions such as roadway slips in side hill construction, which occur as much as a result of natural topography and the forces of nature as from construction and repair techniques. To

conclude otherwise would make ODOT subject to a general notice standard for all roadway hazards arising from terrain subsidence, regardless whether they arise within the period of time under which they could have been observed and repaired by ODOT.

{¶ 33} We accordingly decline to find that the Court of Claims should have applied a general notice standard based on *Knickel*, and appellants' third assignment of error is overruled.

{¶ 34} In summary, appellants' three assignments of error are overruled and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
