[Cite as *Dalesandro v. Ohio Dept. of Transp.*, 2010-Ohio-6177.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Susan Dalesandro and Joseph Conti,	:	
Plaintiffs-Appellants,	:	
Kingdom Properties, Inc.,	:	
Plaintiff-Appellee,	:	No. 10AP-241 (C.C. No. 2007-08368)
v.	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 16, 2010

Ziccarelli & Martello, Mark A. Ziccarelli, and *Thomas J. Mayernik*, for plaintiffs-appellants.

Richard Cordray, Attorney General, *Eric A. Walker*, and *Steven McGann*, for defendant-appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiffs-appellants, Susan Dalesandro and Joseph Conti (collectively, "appellants"), appeal the judgment of the Court of Claims of Ohio, in favor of defendant-

appellee, Ohio Department of Transportation ("ODOT"), based on its determination that appellants' claim was untimely. For the following reasons, we affirm.

{¶2} Appellants were the owners of plaintiff-appellee, Kingdom Properties, Inc. ("Kingdom Properties"), an Ohio corporation that was incorporated in December 1999 and that purchased, renovated, and sold houses. On November 2, 2001, Kingdom Properties purchased the real property located at 7652 Center Street in Mentor, Ohio (the "property"), for $89,500. In June 2004, Kingdom Properties transferred title to the property to Dalesandro, and, in July 2005, Dalesandro added Conti's name to the deed.

{¶3} As early as November 2001, Dalesandro was aware of a road construction project (the "construction project"), which commenced on July 18, 2001, and was substantially complete in December 2002, in front of the property. The construction project involved widening State Route 615, also known as Center Street, from two to four lanes and installing storm sewers along the street. The city of Mentor retained CT Consultants to draft the plans for the construction project, but the construction project was administered by ODOT, with Great Lakes Construction serving as the general contractor.

{¶4} When Kingdom Properties purchased the property in 2001, it was essentially uninhabitable. Kingdom Properties began an extensive renovation of the property in late 2002.

{¶5} Dalesandro moved into the property in March 2005 and, shortly thereafter, discovered the backup of raw sewage in the basement. In April 2005, Dalesandro retained three separate sewer contractors to clear the sewer line connecting the

property to the main sewer line under the street. One company determined that the sewer pipe from the property to the main line was collapsed approximately 71 feet from the cleanout tee, while another believed that something was broken near the main line in the street. During this time, Dalesandro contacted Francis Manning, Kingdom Properties' attorney, for help in determining the party responsible for the sewage backup. Dalesandro vacated the property in April 2005 on the advice of the health department.

{¶6} On May 17 and 18, 2005, Dalesandro spoke with Robert Kovac, a city of Mentor employee, who served as the city's project manager and the liaison between ODOT and city residents with respect to the construction project. Kovac informed Dalesandro that the construction project was an ODOT project and that she should make the necessary repairs and contact ODOT to file a claim against ODOT or its contractor. Kovac provided Dalesandro with the name and address of ODOT employee Ed Bais. He also informed Dalesandro that she should consider filing a claim in the Court of Claims. Kovac, himself, followed up with ODOT, but learned that ODOT had no indication of a problem regarding the property's sewer line.

{¶7} Upon Kovac's suggestion, Dalesandro attempted to contact Bais to ascertain whether ODOT was responsible for severing the property's sewer line. Although Dalesandro could not recall how many times she attempted to contact Bais, she was unsuccessful in making contact.

{¶8} Dalesandro subsequently received a letter, dated September 29, 2005, from Laura Kramer Kuns, an employee of the Lake County General Health District, in

response to an inquiry by Dalesandro. Like Kovac, Kuns informed Dalesandro that the construction project was an ODOT project. Kuns explained that the construction project involved the installation of a storm sewer that crossed either over or under the sanitary sewer laterals from the homes on Center Street. Kuns stated that she had requested construction inspection records, but had not yet received the records from ODOT. Based on her review of the inspection and service records provided by Dalesandro, however, Kuns opined that the blockage and/or breakage might be under the road pavement. Kuns advised Dalesandro to contact the Lake County Department of Utilities for a list of approved sewer contractors from whom to obtain estimates for repairing or replacing the sewer lateral and to obtain necessary permits. In conclusion, Kuns advised, "[i]f you are able to secure sufficient documentation that would support the assumption that the sewer was damaged during the road construction, then perhaps your attorney, Mr. Manning could contact ODOT on your behalf."

{¶9} In October 2006, the city of Mentor excavated in front of the property, confirmed that the storm sewer installed as part of the construction project ran through and completely blocked the sewer lateral from the property, and repaired the sewer lateral.

{¶10} Appellants filed their complaint against ODOT in the Court of Claims on October 30, 2007, alleging that ODOT's negligence in the performance and acceptance of the construction project damaged appellants. In an amended complaint, which amended their prayer for relief, appellants requested compensatory damages for the funds they expended in attempting to fix the sewer problem, as well as for the alleged

diminution in value of the property. In its answer to appellants' complaint, ODOT raised the statute of limitations as a defense. ODOT also filed a motion for summary judgment, based on its contention that appellants' complaint was untimely. The trial court denied ODOT's motion for summary judgment, finding genuine issues of material fact regarding the accrual date of appellants' claim.

{¶11} This matter was tried to the trial court. At the close of appellants' case, ODOT moved the trial court to dismiss the action, pursuant to Civ.R. 41(B)(2), in part because appellants failed to commence their action within the applicable limitations period. At trial, the court reserved ruling on ODOT's motion but, in its February 19, 2010 decision, the court concluded that appellants' case was time-barred and that ODOT was, accordingly, entitled to judgment in its favor. The trial court filed its final judgment entry concurrent with its decision.

{¶12} In their single assignment of error, appellants assert that "[t]he trial court erred in granting [ODOT's] Motion to Dismiss pursuant to Civil Rule 41(B)(2) claiming that [appellants] failed to file their Complaint within the applicable statute of limitations."

{¶13} Application of a statute of limitations presents a mixed question of law and fact. *DeAscentisi v. Margello*, 10th Dist. No. 08AP-522, 2008-Ohio-6821, ¶32. The determination of when a cause of action accrues is to be decided by the trier of fact. Id., citing *Phelps v. Lengyel* (N.D.Ohio 2002), 237 F.Supp.2d 829, 838. Application of the statute of limitations is a question of law only in the absence of a factual dispute. *DeAscentisi* at ¶32, citing *Bell v. Ohio St. Bd. of Trustees*, 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶21. Here, having previously found genuine issues of material fact

regarding the accrual of appellants' claim, the trial court determined that factual issue upon consideration of the trial testimony and evidence.

{¶14} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. An appellate court neither weighs the evidence nor judges the credibility of the witnesses, but, instead, determines whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Hoover v. James*, 5th Dist. No. 02-COA-045, 2003-Ohio-4373, ¶18. This court must indulge every reasonable presumption in favor of the lower court's factual determinations. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80.

{¶15} The statute of limitations applicable here is R.C. 2743.16(A), which governs actions filed in the Court of Claims and provides, in relevant part, that "civil actions against the state * * * shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." A cause of action generally accrues at the time the wrongful act was committed. *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, ¶8, citing *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507. In certain instances, however, a discovery rule applies as an exception to the general rule. Id.

{¶16} Under the discovery rule, a cause of action accrues when the plaintiff discovers or, in the exercise of reasonable care, should have discovered that he or she was injured by the defendant's wrongful conduct. Id., citing *O'Stricker v. Jim Walter*

Corp. (1983), 4 Ohio St.3d 84, 90, and *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, syllabus. Discovery of an injury alone is insufficient to start the running of the statute of limitations if, at the time, there is no indication of wrongful conduct by the defendant. *Norgard* at ¶10. Before the statute of limitations begins to run, the plaintiff not only must have discovered, or reasonably should have discovered, that he or she has been injured, but also that the injury was caused by the defendant's conduct. Id. at ¶9, citing *O'Stricker*, paragraph two of the syllabus.

{¶17} Where otherwise applicable, the discovery rule may delay the running of the limitations period imposed by R.C. 2743.16(A) for actions in the Court of Claims. See *Rosendale v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-378, 2008-Ohio-4899, ¶7. Moreover, Ohio courts, including this court, have applied the discovery rule to cases, like this, arising out of latent property damage. In *Rosendale* at ¶7, quoting *NCR Corp. v. U.S. Mineral Prods. Co.*, 72 Ohio St.3d 269, 271, 1995-Ohio-191, this court noted that the discovery rule " 'is invoked in situations where the injury complained of may not manifest itself immediately and, therefore, fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations.' "

{¶18} The parties here do not dispute that the two-year limitations period imposed by R.C. 2743.16(A) applies to appellants' claim or that the discovery rule applies. Rather, the parties' dispute concerns when appellants' cause of action accrued, so as to begin the running of the statute of limitations. Appellants argue that the trial court erroneously found that their cause of action against ODOT accrued more than two years before they filed their complaint on October 30, 2007. Appellants

contend that their cause of action did not accrue until 2006, when the city of Mentor visually inspected the lines, excavated the street, and confirmed that the problem with the property's sewer lateral resulted from the placement of the storm sewer during the construction project. There is no dispute that appellants learned of the damage to the property in March or April 2005, when Dalesandro noticed the sewage backing up into the basement. The sole disputed issue, therefore, resolves to when appellants knew or, in the exercise of reasonable care, should have known that the sewage problem was the result of wrongdoing by ODOT.

{¶19} With respect to the accrual of appellants' claim, the trial court stated, as follows:

> Upon review of the evidence submitted, the court finds that [appellants] discovered, or through the exercise of reasonable diligence should have discovered, the damage to the residence on or before May 18, 2005, inasmuch as all three sewer cleaning companies had informed [appellants] that the pipe was damaged most likely at or near the connection to the main sewer line; the city of Mentor's project manager had identified ODOT as the party who had administered the roadway construction project; and Kovac had directed Dalesandro to contact ODOT. Indeed, Kovac testified, quite credibly, that Dalesandro told him during their conversations that she already suspected that the damage had been caused during the construction project. Dalesandro acknowledged that she was provided with a contact person at ODOT and that she placed a call to such person in May 2005 in order to resolve the problems with the sanitary sewer.
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> * * * It is apparent that Dalesandro failed to follow up with ODOT, despite the fact that she repeatedly spoke with local and county agents of the health department and others employed with the city of Mentor. Even as late as

> September 29, 2005, [Dalesandro] and her counsel were directed to contact ODOT for assistance. * * *

Thus, the trial court determined that appellants' cause of action accrued more than two years before appellants filed their complaint.

{¶20} The question of whether a reasonable person would have been alerted that his or her damage was caused by the defendant is a factual determination. "A reviewing court should not substitute its opinion as to what is reasonable * * *. The trier of facts is in the best position, by listening to the evidence and viewing witnesses, to determine what is reasonable in any given factual situation." *Laipply v. Bates*, 166 Ohio App.3d 132, 2006-Ohio-1766, ¶29. "[G]enerally the trier of fact determines how a reasonable person would act in the situation presented. That decision is not easily reversible. It is not the place of this court to substitute its opinion for that of the trial court." Id. at ¶34.

{¶21} Appellants correctly state that they did not know with certainty that the underlying problem causing the sewer backup was caused by the construction project administered by ODOT until the city excavated the line in 2006. The discovery of wrongdoing, however, may be constructive, as well as actual. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 181. The discovery rule tolls the statute of limitations only until a plaintiff has an " '*indication* of wrongful conduct of the defendant.' " *Twee Jonge Gezellen, Ltd. v. Owens-Illinois, Inc.* (C.A.6, 2007), 238 Fed.Appx. 159, 163, quoting *Norgard* at ¶10. (Emphasis sic.) " ' "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make

further inquiry, and he fails to do so, he is chargeable with knowledge which by ordinary diligence he would have acquired." ' " *Hambleton* at 181, quoting *Schofield v. Cleveland Trust Co.* (1948), 149 Ohio St. 133, 142.

{¶22} A plaintiff need not have discovered all relevant facts necessary to file a claim to trigger the statute of limitations. *Norris v. Yamaha Motor Corp. U.S.A.*, 5th Dist. No. 2008 CA 00296, 2009-Ohio-4158, ¶41, citing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549. While the plaintiff must have an indication that his or her damages result from misconduct of the defendant, the plaintiff need not know, with absolute certainty, that the defendant is responsible. For example, in *Rosendale* at ¶10, this court affirmed summary judgment in favor of the defendant, based on the statute of limitations, where the plaintiff knew, more than two years before filing his complaint, "that his home *may* have been damaged due to *possible* negligence of [the defendant] in connection with the construction project near his home." (Emphasis added.) We noted that the plaintiff was aware of some damages, "which, *in his view*, were the result of negligence on [the defendant's] part." Id. at ¶8. (Emphasis added.)

{¶23} We conclude that competent, credible evidence supports the trial court's factual finding that appellants' cause of action accrued prior to October 30, 2005. By May 2005, the sewer contractors Dalesandro engaged informed her of a blockage near the main line under the street. Dalesandro was aware of the construction project, and Kovac's notes of his May 17, 2005 conversation with Dalesandro state that Dalesandro relayed that she suspected the sewer problem was caused by the construction project. At that time, Kovac informed Dalesandro that the construction project was an ODOT

project and that she should contact ODOT to file a claim against ODOT or its contractor after making repairs. The following day, Kovac provided Dalesandro with an ODOT contact. As a result of her conversation with Kovac, Dalesandro unsuccessfully attempted to contact Bais "to try to ascertain * * * whether ODOT was responsible or had any kind of responsibility for the severing of [the] sewer line." (Tr. 91.) Thus, in May 2005, Dalesandro suspected that the sewer problem was caused by the construction project, knew that ODOT administered the construction project, and had a contact at ODOT, whom she had attempted to reach.

{¶24} Kuns' September 29, 2005 letter detailed that the construction project involved the installation of a storm sewer crossing the sanitary sewer laterals on Center Street and informed Dalesandro that the blockage and/or breakage of the sanitary sewer lateral might be under the road pavement. Kuns recommended that Dalesandro undertake repairs and that, upon securing appropriate documentation to support the assumption that the sewer was damaged during the construction project, that Dalesandro's attorney contact ODOT on her behalf. Dalesandro did not attempt to contact ODOT after receiving the September 29, 2005 letter.

{¶25} If not by May 18, 2005, as the trial court found, appellants should have had an indication of wrongful conduct by ODOT upon receipt of Kuns' September 29, 2005 letter. Dalesandro's knowledge of the construction project, that ODOT administered the construction project, of the proximity of the sewer blockage or breakage to the construction site, not to mention her belief that the sewer problem was

caused by the construction project, was sufficient to indicate that wrongful conduct by ODOT was the cause of appellants' damages.

{¶26} In support of this appeal, appellants contend that the trial court failed to consider additional testimony of Kovac, supposedly demonstrating that appellants could not have reasonably been aware that ODOT was responsible for their injuries until the city excavated the sewer lateral in 2006. Appellants point to Kovac's testimony that when he contacted ODOT on May 18, 2005, it had no indication of any problems relating to the property. Appellants also point to Kovac's testimony that, in May 2005, he did not know what the problem was with the property's sewer lateral and that filing a claim with ODOT would be a follow-up step to making the repairs.

{¶27} In making the factual determination of when appellants' cause of action accrued, the trial court appropriately weighed the evidence and assessed the credibility of the witnesses. The trial court expressly found credible evidence that Dalesandro told Kovac, in May 2005, that she suspected the sewer problem was caused by the construction project. Kovac's testimony that he did not know, with certainty, the cause of the sewer problem in May 2005 goes to the weight of Kovac's testimony, but we may not weigh the evidence in our review of the trial court's factual findings. Neither that testimony, nor testimony that ODOT had no documents demonstrating damage to the property's sewer line, undermines the existence of competent, credible evidence demonstrating that appellants should have had an indication of wrongful conduct by ODOT prior to October 2005. Because competent, credible evidence supports the trial

court's conclusion that appellants' complaint was time-barred, we must affirm the trial court's judgment.

{¶28} For these reasons, we overrule appellants' single assignment of error and affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.