

[Cite as *Lennon v. Ohio Dept. of Transp.*, 2017-Ohio-8086.]

LAWRENCE J. LENNON, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2017-00216-AD

Clerk Mark H. Reed

MEMORANDUM DECISION

{¶1} Plaintiffs Lawrence and Louise Lennon (hereinafter “plaintiffs”) filed their claim on March 9, 2017 against the Ohio Department of Transportation (hereinafter “ODOT”), who filed its investigation and response on May 18, 2017. Plaintiffs, owners of a parcel of property in Lake County, seek \$500.00 as reimbursement for the cost of surveying and replacing property survey pins along the southern border of their parcel. Plaintiffs discovered the pins were missing when they recently marketed the property. Plaintiffs assert that “ODOT used our property for ingress and egress of heavy equipment. During the repair of the culvert, ODOT must have dislodged the pins.” Plaintiffs indicate that the pins were dislodged “[d]uring construction 2008-9.” However, plaintiffs do not provide a specific date that the survey pins were damaged and do not point to any specific action or inaction as a source of their injury. In response to ODOT’s investigation which raised the statute of limitations as a defense, plaintiffs indicated that “we only recently discovered the property pins were missing when we sold the property. We do not live on the property and being vacant land, we had no reason to question or to consider the pins being removed during the construction.” Plaintiffs further indicate that, absent the sale “a few months ago,” they would not have known the pins were missing and that only pins near where construction took place are missing. Plaintiffs, with their complaint, provided a bill from Jones Surveying, LLC for \$500.00 dated January 5, 2017.

{¶2} Initially, the Court addresses ODOT’s argument that plaintiffs failed to file their claim within the 2-year statute of limitations contained in R.C. § 2743.16 and applicable to actions against the state. While plaintiffs complain about ODOT construction that took place in 2008 and/or 2009 and, therefore, seek recovery based on actions from 8 or 9 years ago, the Court nonetheless concludes that plaintiffs timely filed their complaint based on the discovery rule.

{¶3} The two-year statute of limitations contained in R.C. § 2743.16 “generally accrues at the time the wrongful act was committed.” The discovery rule is an exception and provides that 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.” Discovery of injury alone is insufficient to start the running of the statute of limitations. Rather, a plaintiff must discover, or reasonably should have discovered “that the injury was caused by the defendant’s conduct.” *Dalesandro v. Ohio DOT*, 10th Dist. No. 10AP-241, 2010 Ohio 6177, 2010 Ohio App. Lexis 5203, ¶ 15-16. The discovery rule may “delay the running of the limitations period imposed by R.C. § 2743.16(A)” and has been applied in “cases... arising out of latent property damage.” *Id.* at ¶ 17. The discovery rule is properly applied in circumstances, such as here, where injury or damage does not manifest itself immediately. *Id.* The discovery of wrongdoing may be actual or constructive. Constructive knowledge exists where a party has an “indication of wrongful conduct” and where a party has “knowledge of such facts as would lead a fair and prudent man... to make further inquiry.” *Id.* at ¶ 21.

{¶4} Here, there is no indication that plaintiffs had actual or constructive knowledge of the missing survey pins until plaintiffs recently sold the property. Plaintiffs provided an invoice for the survey work dated January 5, 2017 and also indicated that the property’s sale occurred just a few months ago. Further, there is no indication that

plaintiffs had any reason to suspect tortious or wrongful conduct on the part of ODOT until they discovered the missing survey pins.

{¶5} Finally, the statute of limitations is an affirmative defense. *Stainbrook v. Ohio Sec'y of State*, 10th Dist. No. 16AP-314, 2017 Ohio 1526, 2017 Ohio App. Lexis 1531, ¶ 26. Thus, ODOT bears the burden to demonstrate that the statute of limitations bars plaintiff's claims. Though it is apparent that plaintiff's claims are based on construction activity that took place 8 or 9 years ago, ODOT does not address the discovery rule and plaintiffs' contention that they discovered the missing survey pins in the last few months is unrefuted. Based on the foregoing, the Court finds that the statute of limitations does not bar plaintiff's claims. See, *Daugherty v. Ohio DOT*, Ct. of Cl. No. 2012-04031-AD, 2013-Ohio-5918, ¶ 16 (plaintiff's complaint deemed timely despite being filed almost 3 years after statute of limitations where plaintiff did not discover damage until a month before filing claim).

{¶6} Turning to the merits of plaintiffs' claims, the Court finds that plaintiffs' complaint asserts a negligence claim. To prevail, plaintiffs must establish that ODOT owed a duty of care, that it breached this duty of care, and that its breach was the direct and proximate cause of their damages. *Franklin County Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 203-204, 2003-Ohio-1331, ¶ 30, (10th Dist.). The Court finds that plaintiffs have not met their burden relative to the above elements.

{¶7} Specifically, plaintiffs' complaint is based on the presumption that ODOT's conduct during the 2008-2009 construction damaged and/or dislodged the survey pins. Plaintiffs point to no specific action on the part of ODOT. Rather, they point to the fact of construction and the missing pins and assert that "ODOT must have dislodged the pins." Plaintiffs cannot establish a breach of duty or causation through their own opinion that the missing survey pins "must have" been dislodged by ODOT. There is simply no way this Court can determine that the unspecified and/or unknown actions of ODOT breached any duty without knowing the nature of those actions. The same is true with

respect to causation. Without the identification of specific actions or inaction, the Court cannot find that these actions proximately caused plaintiff's damages. The Court cannot assume either a breach of duty or causation based solely on damages. Most importantly, the Court cannot assume causation based on time alone. There is no "after this, therefore, because of this" allowance for causation in the law and correlation does not equate to causation.

{¶8} Employing a temporal approach to causation is especially problematic in this case. Online records of the Lake County auditor indicate that plaintiffs purchased this property in 2006, two years before the alleged start of ODOT construction. Further, at least 8 years have elapsed since the end of this construction. Were this Court to grant judgment to plaintiffs, it would be doing so based on multiple presumptions, specifically a presumption that the pins were still in place when construction began, a presumption ODOT acted negligently and breached a duty at some point during construction, a presumption that ODOT's conduct caused the pins to dislodge, and a presumption that no intervening act or act subsequent to the completion of construction in 2009 caused the pins to dislodge. See, *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, ¶ 6 of the syllabus ("In order to recover against a defendant in a tort action, plaintiff must produce evidence which furnishes a reasonable basis for sustaining his claim. If his evidence furnishes a basis for only a guess, among different possibilities, as to any essential issue in the case, he fails to sustain the burden as to such issue."). Even if reasonable, presumptions are not facts and do not establish the elements of a negligence claim.

{¶9} For the reasons stated herein, plaintiffs' negligence claim against ODOT fails and the March 9, 2017 complaint is hereby DISMISSED.

Plaintiffs

Clerk Mark H. Reed

v.

OHIO DEPARTMENT OF
TRANSPORTATION

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 defendant. Court costs shall be absorbed by the Court.

MARK H. REED
Clerk