

***** NOT DESIGNATED FOR PUBLICATION *****

MELODY LITTLE * **NO. 2011-CA-1419**
VERSUS *
PARISH OF PLAQUEMINES * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 51-401, DIVISION "B"
Honorable Joy Cossich Lobrano, Judge

* * * * *

PER CURIAM

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(Court composed of Judge Edwin A. Lombard, Judge Paul A. Bonin, Judge Madeleine M. Landrieu)

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AFFIRMED
February 9, 2012

Melody Little Panepinto¹ appeals the trial court judgment dismissing her claims against the Plaquemines Parish Government. Mrs. Panepinto claims that she injured herself when she stepped onto a cracked water meter lid owned and under the control of the Parish. The trial judge found as a fact that the Parish had neither actual or constructive notice of the defect alleged to have caused the harm.

After our review, we conclude that the trial judge's factual findings are not clearly wrong and are reasonable. We affirm, and explain our holding below.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Mrs. Panepinto filed suit alleging that she sustained injuries when she stepped on the cover of a water meter box which broke, causing her to fall. Mrs. Panepinto filed suit against the Plaquemines Parish Government and Severn Trent Environmental Services, Inc. Prior to trial, Severn Trent filed a motion for summary judgment, which the trial court granted, dismissing Mrs. Panepinto's claims against Severn Trent. That summary judgment is not before us.

The case against the Parish proceeded to trial. At trial, Mrs. Panepinto testified that she moved into an apartment located at 215 Avenue A, Apartment B, Belle Chasse, Louisiana, in August of 2003. Mrs. Panepinto stated that she noticed

that the cover to the water meter was off. When she appeared at the Parish's water department to request service at the new apartment, Mrs. Panepinto notified the employee on duty that the water meter was cracked. Mrs. Panepinto stated that she notified them a second time that the water meter was cracked before it was eventually repaired by the Parish.

Mrs. Panepinto testified that on February 19, 2004, she was raking leaves in the yard. Mrs. Panepinto noted that she stepped on the water meter while raking leaves and did not have trouble. Mrs. Panepinto stated that as she continued raking leaves, she stepped onto the water meter lid a second time and the lid gave way. As the lid gave way, Mrs. Panepinto's foot twisted into the hole, causing her to fall. Mrs. Panepinto stated that she yelled, and Mr. Roy Panepinto, her fiancé at the time, came over and helped her out of the hole. Mrs. Panepinto testified that she received treatment for the injuries that she sustained as a result of the fall.

Mrs. Panepinto testified that she recalled stepping on the water meter lid a month prior to the February 19, 2004 incident. Mrs. Panepinto stated that when she stepped on the lid the month prior to the February 19, 2004 incident, the lid stayed secure. In Mrs. Panepinto's mind, the water meter was fixed.

During trial, Mrs. Panepinto identified several pictures of the water meter taken a week or so after the February 19, 2004 incident. The pictures revealed a cracked lip on the inside of the meter. The "lip" is the part that holds the lid to the water meter in place.

Mr. Panepinto testified that he and Mrs. Panepinto appeared in August 2003 at the water department to request service on the apartment at 215 Avenue A, Apartment B. Mr. Panepinto notified an employee that the water meter cover was

¹ Melody Little married after the petition was filed. Panepinto is her married name.

off and broken in two. Additionally, Mr. Panepinto testified that he later notified a supervisor of the water department that the cover was broken. At some point, an employee of the water department placed a new cover on the water meter, and Mr. Panepinto believed that the problem was fixed. Mr. Panepinto stated that at various times, he would notice the water meter cover off and would report that to the water department. Mr. Panepinto stated that kids could have removed the cover.

Mr. Panepinto stated that he was on the roof on February 19, 2004, when he heard Mrs. Panepinto cry out. Mr. Panepinto stated that he assisted Mrs. Panepinto in getting up. Mr. Panepinto noticed Mrs. Panepinto's foot in the hole where the water meter is located.

Angela Barthelemy testified that she is a supervisor for the water department. Mrs. Barthelemy stated that a meter reader goes to a residence once a month to perform a meter reading. In order to read the meter, the meter reader must lift up the lid and look at the meter, which is located underneath the lid. Once the meter is read, the lid is closed and secured by the meter reader stepping on the lid.

Mrs. Barthelemy stated that the meter readers are informed that they are the eyes in the field and that they are to report any problems that they observe. In the event that a problem is observed, such as a broken lid, Mrs. Barthelemy stated that the meter reader is to document the problem on their paperwork. Mrs. Barthelemy noted that the meter readers are sometimes able to fix problems immediately. Mrs. Barthelemy testified that once a problem is noted on the paperwork, a work order is generated.

Mrs. Barthelemy stated that a work order was generated on August 14, 2003, for 215 Avenue A, Apartment B. On August 15, 2003, a new top or lid was placed on the meter at 215 Avenue A, Apartment B. Mrs. Barthelemy stated that another work order was generated on August 27, 2003, for 215 Avenue A, Apartment B and a new top or lid was again placed on the meter. The last work order was a request for a final meter reading. Mrs. Barthelemy testified that approximately one month prior to February 19, 2004, the meter reader noticed that the lid was again missing and replaced it. Other than nicks in the box, no other damage was reported during the time the Panepinto family resided at 215 Avenue A, Apartment B.

Mrs. Barthelemy identified that customer-transaction summary for 215 Avenue A, Apartment B. The summary provides the dates that the meter was read. Mrs. Barthelemy noted that the meter for 215 Avenue A, Apartment B was read on February 17, 2004, two days before Mrs. Panepinto's accident.

Mrs. Barthelemy reviewed the pictures submitted by Mrs. Panepinto. Mrs. Barthelemy testified that the damage in the pictures was significant damage that should be reported. Mrs. Barthelemy stated that a meter reader would not be able to secure the lid with the damage to the lip observed in the photo.

Lastly, Mr. John E. Washington, III, testified. Mr. Washington stated that for ten years, he has been employed by the Parish's water department. Mr. Washington stated that his duties include meter reading and repair. Mr. Washington testified that he was the meter reader for 215 Avenue A, Apartment B. Mr. Washington stated that some of the lids for the water meter covers have a square piece or flap in them that can be lifted for ease in reading the numbers on the meter. Mr. Washington testified that the lid at 215 Avenue A, Apartment B, was a lid with a flap that could be lifted to easily read the meter. Mr. Washington

stated that he noticed the flap was broken in January of 2004. Mr. Washington stated that he replaced the entire lid as the flap alone could not be replaced. When he placed the new lid on the meter box in January of 2004, he stepped on the lid to secure the new lid.

Mr. Washington noted that when he read the meter on February 17, 2004, he observed some slight nicks in the box itself, which he believed could have come from a lawn mower. Mr. Washington reviewed the photographs admitted into evidence and testified that the photos revealed significant damage. Mr. Washington testified that he did not observe significant damage on February 17, 2004. Mr. Washington stated that he is required to report the sort of damage observed in the photographs.

The trial court issued a judgment in favor of the Parish, finding that it did not have actual or constructive knowledge of the defect that caused Mrs. Panepinto's accident. The trial court dismissed Mrs. Panepinto's claims against the Parish with prejudice. From that judgment, Mrs. Panepinto filed the instant appeal.

STANDARD OF REVIEW

We review both facts and law. La. Const. Art. V, §10(B). The standard of review for a factual finding is the manifestly erroneous or clearly wrong standard. To reverse a fact-finder's determination under this standard of review, we undertake a two-part inquiry: (1) we must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact, and (2) we must further determine the record establishes the finding is clearly wrong. *Stobart v. State, through the Dept. of Transp. and Dev.*, 617 So.2d 880, 882 (La. 1993). The issue to be resolved by the reviewing court is not whether the trier of fact was right

or wrong, but whether the fact finder's conclusion was a reasonable one. *Id.*, 617 So.2d at 882. If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*, 617 So.2d at 882-883. Accordingly, where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous. *Id.*, 617 So.2d at 883. Further, when a fact finder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844-845 (La. 1989).

Where documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination.

Harbor Const. Co., Inc. v. Board of Sup'rs of Louisiana State University and Agr. Mechanical College, 2010-1663, p.2 (La. App. 4 Cir. 5/12/11), 69 So.3d 498, 500, citing *Rosell v. ESCO*, 549 So.2d 840, 844-845 (La. 1989).

DISCUSSION

Sources of liability occasioned by someone's fault are found in La. C.C. art. 2315, 2316, and 2317. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. C.C. art. 2315. "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." La. C.C. art. 2316. "We are responsible, not only for the damage occasioned by our own act, but for that which

is caused by the acts of persons for whom we are answerable, or of the things which we have in our custody.” La. C.C. art. 2317.

Article 2317 is qualified generally by La. C.C. art. 2317.1, which provides:

The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew, or in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

La. C.C. art. 2317.1.

Article 2317 is qualified particularly as it relates to public entities by La.

R.S. 9:2800, which provides in pertinent part:

C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

D. Constructive notice shall mean the existence of facts which infer actual knowledge.

* * *

G. “Public entity” means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.

La. R.S. 9:2800.

The jurisprudence notes that to succeed in an action against a public entity based on the condition of property for which it allegedly had responsibility, a plaintiff must prove that:

- (1) the property causing damage was in the custody of the public entity;
- (2) the property was defective due to a condition that created an unreasonable risk of harm;
- (3) the public entity had actual or constructive knowledge of the risk; and
- (4) the defect was a cause-in-fact of the plaintiff's injury.

Moffitt v. Sewerage & Water Bd. of New Orleans, 2009-1596, p.9 (La. App. 4 Cir. 5/19/10), 40 So.3d 336, 342, citing *Williams v. Cooper*, 2005-0654, p.5 (La. App. 4 Cir. 1/25/06), 926 So.2d 571, 574. (Other citations omitted.).

In this case, the trial court found that the Parish did not have actual or constructive knowledge of the defect that caused the accident and thus, it was not liable for the damages. Mrs. Panepinto argues that the trial court erred in finding that the Parish had neither actual nor constructive notice of the hazardous condition.

In support of her argument, Mrs. Panepinto noted that she and Mr. Panepinto complained on numerous occasions about the deteriorated condition of the water meter to the Parish. Mrs. Panepinto pointed to her testimony that when she first moved in, she notified the Parish that "the cover - - well, the cover was broken, and the - - the lip of it, I guess, - - I don't know what you would call it - - it was broken." Mrs. Panepinto stated that she believed that the problem was resolved as she noticed a Parish employee looking at the water meter. Further, she stepped on the lid approximately one month prior to the February 19, 2004 incident and the lid stayed secure. Mrs. Panepinto concluded that the Parish did not actually fix the problem because when she stepped on the lid to the meter box on February 19, 2004, the lid gave way and she fell into the hole.

Mr. Panepinto testified that in August of 2003, the cover was laying in the yard, broken. Mr. Panepinto noted that he complained several times about the

cover being off and/or broken. Mr. Panepinto stated that kids could have taken the cover off. Mr. Panepinto concluded that the Parish did not fix the problem as the lip was cracked. Mr. Panepinto, however, did not testify that he reported the lip being cracked to the Parish, only that the cover or lid was cracked.

Mrs. Barthelemy provided the complaint log for 215 Avenue A, Apartment B, which showed that there were two work orders for a new top or lid. No complaints of a broken or cracked lip were reported.

Mr. Washington stated that the flap in the middle of the lid was broken in January of 2004. Because the flap could not be replaced, Mr. Washington stated that he placed a new top or lid on the water meter. When he placed the new top or lid on the meter box, Mr. Washington testified that he stepped on the lid to secure the new top or lid.

Both Mrs. Panepinto and Mr. Washington stepped on the top or lid in January 2004, and the top or lid stayed in place. Mr. Washington read the water meter on February 17, 2004, two days prior to the accident at issue and did not notice any problems. Thus, a reasonable factual basis for the finding of the trial court that the Parish lacked notice of a defect exists. Therefore, we find no manifest error in the judgment of the trial court.

DECREE

The judgment of the trial court dismissing Melody Little Panepinto's claims against the Plaquemines Parish Government with prejudice is affirmed.

AFFIRMED