[Cite as *Townsend v. Ohio Dept. of Transp.*, 2012-Ohio-2945.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Townsend, Individually and as Guardian of Violet Townsend,	:	
	:	
Plaintiffs-Appellants,		No. 11AP-672
	:	(C.C. No. 2008-11044)
v.		
	:	(REGULAR CALENDAR)
Ohio Department of Transportation,		
	:	
Defendant-Appellee.		
	:	

D E C I S I O N

Rendered on June 28, 2012

Robert E. Epstein; *Murray D. Bilfield*, for appellants.

Michael DeWine, Attorney General, *William C. Becker*, and *Christopher P. Conomy*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶ 1} Plaintiffs-appellants, Michael Townsend, individually and as guardian of Violet Townsend (collectively, "appellants"), appeal the Court of Claims' judgment in favor of defendant-appellee, the Ohio Department of Transportation ("ODOT"), on appellants' claims of negligence, loss of consortium, and spoliation of evidence.

I. BACKGROUND

{¶ 2} On the morning of April 23, 2005, in Independence, Ohio, Violet Townsend ("Townsend") was driving in the left lane of the exit ramp from Interstate

480 ("I-480") to southbound Interstate 77 ("I-77"), when she lost control of her vehicle and crashed into the guardrail on the left side of the roadway. Carmel Phillips ("Phillips") was driving in closest proximity to Townsend's vehicle at the time of the accident. Phillips testified that it was raining heavily at the time and that Townsend was driving within the posted speed limit when she hydroplaned, floated into the center lane, turned sharply left across the lanes, and crashed into the guardrail. Phillips testified that, immediately after the accident, she observed standing water covering the left lane of the roadway. As a result of the accident, Townsend suffered serious injuries and has remained in a persistent vegetative state.

{¶ 3} The Independence Yard in ODOT District 12 was responsible for day-to-day maintenance of highways, including the maintenance of drainage systems, where Townsend's accident occurred. At the time of the accident, George Holloway ("Holloway") was the manager in charge of the Independence Yard, and Brian Jung ("Jung") was the assistant manager. ODOT employee James Marszal, P.E. ("Marszal"), served as a Pavement and Geotechnical Engineer at the time of the accident, but he had previously worked as an Assistant Maintenance Engineer in District 12 for 19 years. Marszal continued to provide assistance and support to the maintenance department.

{¶ 4} Appellants filed their complaint on November 19, 2008.[1] Appellants' theories of negligence stem from their allegation that ODOT breached its duty to maintain the highway in a reasonably safe condition by failing to maintain, repair or replace clogged catch basins located along the left side of the exit ramp, all of which allowed water to unnaturally accumulate on the roadway.

{¶ 5} During the discovery process, the trial court denied motions for an order granting appellants access to ODOT's email and electronic data systems for computer forensic analysis and for leave to amend appellants' complaint to add a claim for spoliation of evidence. The trial court stated that it would revisit appellants' request for computer forensic analysis if it found ODOT's witnesses untrustworthy and stated that, if it determined that spoliation had occurred, it would make such orders as it deemed just.

[1] This is a refiled action. Appellants originally filed their claims in case No. 2006-02315.

{¶ 6} The trial court bifurcated the issues of liability and damages, and the liability trial commenced on March 10, 2010, and continued on March 11, 12, 15, and 16. The court scheduled the trial to reconvene on April 26, 2010. In the meantime, on April 7, 2010, appellants filed a motion to continue the resumption of the trial, based upon evidence newly discovered during the fifth day of trial. Appellants also moved for reconsideration of their motion to amend their complaint on April 13, 2010. The trial court denied appellants' motion for a continuance, but it granted their motion for reconsideration and allowed appellants to amend the complaint by adding a claim for spoliation of evidence. The trial concluded on April 28, 2010.

{¶ 7} On July 7, 2011, the trial court entered judgment in favor of ODOT. The court concluded that appellants failed to prove that, prior to Townsend's accident, ODOT had actual or constructive knowledge of any clogged catch basins in the vicinity of the accident, that any such clogging contributed to an unnatural accumulation of water or that maintenance work was required in the area. The court held that Townsend's own negligence was the sole proximate cause of her injuries. The court also rejected appellants' argument that ODOT negligently failed to implement an approved catch basin maintenance program, as it determined that ODOT was entitled to discretionary immunity for its decisions surrounding the implementation of such a program. Lastly, the trial court rejected appellants' spoliation claim. The court found that appellants were not prejudiced, given its finding that Townsend's own negligence was the sole proximate cause of the accident, and considering the abundance of evidence that appellants presented. The court was also unconvinced that ODOT acted willfully to disrupt appellants' case. Appellants filed a timely notice of appeal.

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellants raise the following assignments of error for our review:

> [I.] "The trial court's finding that * * * Townsend's own negligence was the sole proximate cause of the accident was against the manifest weight of the evidence."
>
> [II.] "The trial court abused its discretion in denying [Appellants'] Motion to allow [Appellants] access to [ODOT's] email and electronic data systems to conduct their own nondestructive computer forensic analysis when

> [ODOT's] employees were unable to retrieve crucial, relevant emails."
>
> [III.] "The trial court's finding that there was no notice [general, actual or constructive] to ODOT that the catch basins and/or drainage system in the accident site location were not working as intended on the date of * * * Townsend's accident is against the manifest weight of the evidence."
>
> [IV.] "The trial court abused its discretion in denying [Appellants'] Motion for a Continuance to conduct further discovery on the issue of [tufa] once [Appellants] learned [ODOT] knew there were problems with [tufa] clogging drainpipes from emails [Appellants] were unaware of and not provided with until the trial had already commenced."
>
> [V.] "The trial court abused its discretion by: A) Denying [Appellants'] January 27, 2010 Motion to Amend their Complaint to include a cause of action for spoliation of evidence and not granting it until the fifth day of trial, thus denying [Appellants] the opportunity to complete their discovery on this cause of action and be prepared for trial, and B) Once the court granted [Appellants'] Motion to amend their complaint during the course of the trial, the court denied [Appellants] the opportunity to complete their discovery, forcing [Appellants] to argue their case without benefit of discovery and preparation which prejudiced the [Appellants'] case."
>
> [VI.] "The trial court incorrectly applied the doctrine of discretionary immunity when it failed to find that [ODOT's] employees' negligence in carrying out their own established maintenance practice and procedures proximately caused * * * Townsend's injury and pierced the shield of discretionary immunity."

III. DISCUSSION

{¶ 9} For ease of discussion, we address appellants' assignments of error out of order, beginning with those assignments of error that stem from the trial court's procedural rulings. We will address additional, necessary facts within our discussion of each assignment of error.

A. Second Assignment of Error

{¶ 10} We begin with appellants' second assignment of error, by which appellants contend that the trial court abused its discretion by denying them access to ODOT's email and electronic data systems to conduct computer forensic analysis.

{¶ 11} At his deposition in July 2007, Marszal testified that he drove the ramp where Townsend's accident occurred almost every weekday. In the general timeframe of Townsend's accident, Marszal noticed that the guardrail along the ramp was being hit more often than he would have expected and that, during heavy rains, there was more water on the pavement than he would have expected. Marszal himself encountered "quite a bit of water" in the left lane of the ramp "under heavy rain." (Marszal Deposition, 47.) Marszal stated that, upon seeing water on the roadway, he began to look for drainage issues. Marszal subsequently noticed that two catch basin inlets along the ramp were partially blocked with debris. He emailed Holloway to suggest that the catch basins should be checked and, if necessary, cleaned. Holloway admitted receiving an email from Marszal concerning the catch basins, and Marszal and Holloway had a follow-up exchange after Jung was unable to locate the inlets. Marszal could not recall whether his email to Holloway predated Townsend's accident.

{¶ 12} Appellants requested that ODOT produce email communications between Marszal and the Independence Yard, Holloway, and Jung, regarding the partially blocked catch basins, but ODOT denied having those emails. On November 23, 2009, appellants filed a motion, pursuant to Civ.R. 26 and 34, for an order granting them access to ODOT's email and electronic data systems to conduct nondestructive, computer forensic analysis. Appellants requested access to search for relevant emails, including the specific email that Marszal testified he wrote. Because no one could remember whether Marszal's email predated Townsend's accident, appellants argued that production of the email was vital to their ability to establish ODOT's prior notice of a hazardous condition, especially in light of testimony by ODOT's expert, David Ray, P.E. ("Ray"), that the email would have constituted notice to ODOT had it predated the accident. (*See* Ray Deposition, 106.)

{¶ 13} ODOT opposed appellants' motion, arguing that its email system is private and contains privileged and confidential matter. ODOT also claimed that its unsuccessful search for the email satisfied its discovery obligation and ended appellants' right to further discovery regarding the email. ODOT submitted an affidavit from Mike Blake ("Blake"), an employee in ODOT's information technology section, who stated that he was unable to find the email that Marszal described by searching the email accounts of Marszal and the likely recipients of the email. In a supplemental affidavit, Blake stated that ODOT did not archive Marszal's emails.

{¶ 14} Appellants contend that ODOT was under an affirmative duty to preserve electronic evidence related to this case as early as spring 2006 and that deletion of the emails from employees' mailboxes does not remove the emails from the scope of discovery. In their reply memorandum, appellants described a forensic analysis procedure used to identify and extract relevant data from a computer hard drive. The procedure, which both Ohio and federal courts have accepted, involves creating a mirror-image copy of the hard drive. By affidavit, appellants' attorney stated that he had spoken with an identified computer forensic analyst, who informed him that forensic testing would take approximately one-half day and could be conducted at a convenient time, including after-hours, to not unduly burden ODOT.

{¶ 15} Subject to the scope of discovery set forth in Civ.R. 26(B), a party may request production of electronically stored information from another party. Civ.R. 34(A). Pursuant to Civ.R. 26(B)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *, including * * * electronically stored information." With respect to electronically stored information, Civ.R. 26(B)(4) provides as follows:

> A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The

> court shall consider the following factors when determining if good cause exists:
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> (a) whether the discovery sought is unreasonably cumulative or duplicative;
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> (b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;
>
> (c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and
>
> (d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.
>
> In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

{¶ 16} Appellants submitted Civ.R. 34(A) requests for production of documents and electronically stored information that encompassed the email from Marszal to Holloway, as well as follow-up emails. There is no dispute that the requested emails are relevant to the subject matter of this action, and ODOT has never claimed that the emails are privileged. Rather, ODOT asserted that the emails no longer exist in the employees' mailboxes and that its email system contains confidential and privileged information. Although a party need not provide discovery of electronically stored data when production would impose an undue burden or expense, ODOT did not claim undue burden or expense in response to appellants' discovery requests. Nor did ODOT move for a protective order to preclude the requested discovery.

{¶ 17} Even had ODOT shown that the requested emails were not accessible because of undue burden or expense, Civ.R. 26(B)(4) permits discovery upon a showing of good cause. Civ.R. 26(B)(4) lists four factors for determining whether good cause exists. Appellants' motion for an order allowing computer forensic analysis addresses

those factors, at least impliedly, and establishes good cause for the requested discovery. First, the information sought is not unreasonably cumulative or duplicative. Although Marszal testified generally about the content of his email to Holloway, and Holloway admitted receiving the email, no witness could testify as to the date of the email beyond Marszal's general recollection that it was around the timeframe of Townsend's accident. The question of whether the email predated or postdated the accident was not answered by any other evidence in the record, and there has been no suggestion that the information could be obtained from another source. Appellants diligently attempted to obtain the discovery through means authorized by the Civil Rules, but ODOT claimed it could not produce the emails because they no longer existed. Finally, the importance of the Marszal email cannot be underestimated. The trial court ultimately found that appellants failed to prove that ODOT had knowledge of clogged catch basins prior to Townsend's accident, that the clogged basins contributed to an unnatural accumulation of water or that maintenance work was required. ODOT's expert witness testified that an email, notifying Holloway of Marszal's observations of obstructions to the catch basins on the ramp, would have constituted notice to ODOT had it predated Townsend's accident. Consideration of the factors set forth in Civ.R. 26(B)(4), in light of the facts in the record, overwhelmingly establishes good cause for appellants' request for electronically stored information.

{¶ 18} This court recently engaged in a thorough discussion of the use of forensic computer analysis in discovery, as well as the parameters a trial court can establish to protect privileged and/or confidential information. *See Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195 (10th Dist.). Citing federal case law, we described the process of forensic or mirror imaging as replicating all allocated and unallocated space on a computer hard drive. *Id.* at ¶ 40, citing *Balboa Threadworks, Inc. v. Stucky*, D.Kan. No. 05-1157-JTM-DWB (Mar. 24, 2006), citing *Communications Ctr., Inc. v. Hewitt*, E.D.Cal. No. Civ.S-03-1968 WBS KJ (Apr. 5, 2005). *See also Ferron v. Search Catcus, L.L.C.*, S.D.Ohio No. 2:06-CV-327 (Apr. 28, 2008), fn. 5 ("A mirror image copy represents a snapshot of the computer's records. * * * It contains all the information in the computer, including embedded, residual, and *deleted* data."). (Emphasis added.) We acknowledged that allowing direct access to another party's electronic information

raises issues of privacy and confidentiality, and stated that a court must weigh those concerns against the utility or necessity of the information sought before compelling forensic imaging. *Bennett* at ¶ 41. "In determining whether the particular circumstances justify forensic imaging, a court must consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests." *Id.* "When a requesting party demonstrates either discrepancies in a response to a discovery request or the responding party's failure to produce requested information, the scales tip in favor of compelling forensic imaging." *Id.*

{¶ 19} In *Bennett*, the trial court ordered the defendants to provide, at the defendants' cost, a forensic copy of employees' hard drives, but permitted the defendants to redact from the forensic copies any privileged material and to designate personal information on the forensic copies as for attorneys' eyes only. We concluded that the trial court did not abuse its discretion in ordering forensic imaging, based on the defendants' noncompliance with discovery rules. Nevertheless, we concluded that the trial court failed to provide adequate safeguards to protect the defendants' confidential information.

{¶ 20} In *Bennett*, at ¶ 47, we described the parameters a trial court can establish to safeguard confidential and privileged information, as follows:

> The failure to produce discovery as requested or ordered will rarely warrant unfettered access to a party's computer system. * * * Instead, courts adopt a protocol whereby an independent computer expert, subject to a confidentiality order, creates a forensic image of the computer system. The expert then retrieves any responsive files (including deleted files) from the forensic image, normally using search terms submitted by the plaintiff. The defendant's counsel reviews the responsive files for privilege, creates a privilege log, and turns over the nonprivileged files and privilege log to the plaintiff.

(Citation omitted.) We urged the trial court, on remand, to adopt a similar protocol, which would allow the plaintiff sufficient access to recover useful, relevant information, while also providing the defendants an opportunity to identify and protect privileged

and/or confidential matter. Based on *Bennett*, we conclude that ODOT's assertion that its email system contains privileged and confidential matter is insufficient to preclude forensic analysis, where protocols can be established to protect ODOT from dissemination of that matter. *See also Cornwall v. N. Ohio Surgical Ctr., Ltd.*, 185 Ohio App.3d 337, 2009-Ohio-6975 (6th Dist.) (plaintiff's request for computer forensic analysis of defendants' computers was warranted where it was impossible for the defendants to produce the requested documents because of a virus and/or inoperability and where the trial court established a specific protocol to protect privileged information).

{¶ 21} Although ODOT maintains that the requested emails no longer exist in the employees' email accounts, deleted computer files are discoverable. *See State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 25. " 'Contrary to popular belief, * * * computer data is not safe from disclosure merely because it has been "deleted" from a system or is contained in a damaged disk or hard drive. Using sophisticated computer programs, electronic mail messages or computer files thought to be deleted can be retrieved from the deep recesses of a computer data base long after they have disappeared from the screen.' " *Id.* at ¶ 24, quoting Annotation, *Discovery of Deleted E-mail and Other Deleted Electronic Records*, 27 A.L.R.6th 565, 576, Section 2 (2007). In *Toledo Blade*, which involved public record requests, the Supreme Court of Ohio stated, at ¶ 28, that "[a]s long as [the deleted] e-mails are on the hard drives * * *, they do not lose their status as public records." The same rationale applies to the discoverability of deleted electronic information. *See Ameriwood Industries, Inc. v. Liberman*, E.D.Mo. No. 4:06CV524-DJS (Dec. 27, 2006). The *Ameriwood* court quoted the advisory committee notes to Fed.R.Civ.P. 26(f), as follows: " 'Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image.' " The court allowed mirror imaging where, despite the defendants'

failed search for emails, deleted emails might have existed on the defendants' computers.

{¶ 22} Federal courts have also relied on the advisory committee notes for Fed.R.Civ.P. 34 in addressing issues like those in this case. *See Playboy Ents., Inc. v. Welles*, 60 F.Supp.2d 1050, 1053 (S.D.Cal.1999). The *Playboy* court quoted the advisory committee notes, as follows: " 'Rule 34 applies to [electronic] data compilations from which information can be obtained only with the use of detection devices, and * * * when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form.' " Where a defendant's deletion of an email makes it impossible for the defendant to produce the information as a document, a plaintiff may be entitled to access the defendant's hard drive. *Id.* The *Playboy* court held that information stored in computer format is discoverable, and the only restriction is that the producing party be protected against undue burden and expense and/or invasion of privileged matter. As in *Bennett*, the *Playboy* court established a protocol to protect the defendant's privacy and confidentiality concerns, but, unlike in *Bennett*, the court ordered the plaintiff to pay the costs associated with the information recovery. *See also Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (D.Minn.2002) (plaintiff entitled to resurrect data that had been deleted from the defendant's computer equipment).

{¶ 23} At trial, Blake testified that he was first asked to search for the Marszal email in October 2009, and that he searched current, existing mailboxes four times between October and December 2009, using different parameters. The searches did not include backup or archived media. Blake stated, "[o]ur search engine only searches the existing mailboxes." (Tr. 928.) Blake explained that undeleted emails in ODOT employee mailboxes are backed up onto a storage device once a week, and ODOT retains the backups for 28 days before they are "expired." (Tr. 878.) Blake testified that ODOT does not maintain archives for email, and that deleted emails are gone after 28 days unless they exist in another inbox.

{¶ 24} The trial court denied appellants' motion for an order allowing computer forensic analysis and for reconsideration of that decision. The court offered no reason for denying those motions but stated as follows: "[i]n the event that the court finds untrustworthy the trial testimony of [ODOT's] witness(es) as to whether the information at issue exists, the court will consider allowing the record to be left open for the purpose of obtaining access to such data." Blake was the only witness to testify about the existence of the relevant emails and ODOT's attempts to produce them, but the trustworthiness of Blake's testimony does not determine appellants' right to the requested relief. Even were the trial court to believe Blake's testimony in its entirety, nothing in his testimony suggests that the deleted email may not still be accessible on one or more of the hard drives upon which that email was stored. Moreover, Blake admitted that he did not search ODOT's backups, which presumably would have contained the email had it been deleted by Marszal or any recipient in the previous 28 days. As the *Ameriwood* court recognized, some electronically stored information may exist, yet not be retrieved during a typical search. ODOT has offered no evidence that computer forensic analysis would be unable to retrieve the allegedly deleted email.

{¶ 25} Here, ODOT does not dispute that Marszal sent an email to Holloway concerning the catch basins at issue, but suggests that the email was deleted and no longer exists. ODOT maintains that it disclosed all responsive documents, even though it could not locate Marszal's email, but ODOT admittedly made no attempt to search deleted electronic information for requested emails. Appellants properly moved the trial court for an order for computer forensic analysis to recover critical emails purportedly deleted from ODOT's computers, and ODOT did not establish that production would incur undue burden or expense. In light of these facts, we conclude that the trial court abused its discretion by denying appellants' motion for an order allowing computer forensic analysis. Of course, the trial court must establish protocols to protect ODOT's private and confidential information. The court may also specify the allocation of costs for the computer forensic analysis, which appellants have not sought to impose on ODOT. For these reasons, we sustain appellants' second assignment of error.

B. Fourth Assignment of Error

{¶ 26} We now turn to appellants' fourth assignment of error, by which they contend that the trial court abused it discretion by denying their motion for a continuance to conduct further discovery on the issue of tufa,[2] based on ODOT emails appellants obtained after the start of trial. Appellants filed their motion for a continuance on April 7, 2010, during a recess after several days of trial. The trial court summarily denied appellants motion on April 22, 2010.

{¶ 27} On the fifth day of trial, Blake testified that his searches of ODOT email accounts in late 2009 produced 151 emails, which ODOT did not disclose to appellants. The parties dispute whether any of the emails were responsive to appellants' discovery requests, but the trial court ordered ODOT to produce the emails.

{¶ 28} Of the 151 emails, appellants rely on two. The first email, dated February 9, 2005, is from Randy Morris, State Construction Geotechnical Engineer, to Marszal and others. The email concerns a developer's construction of an embankment and ODOT's response to reports by the developer's soil consultants regarding the slag to be used. In the email, Morris noted that steel slag can expand and produce tufa, which can block underdrains, a problem "well documented in Ohio for the past 50 years." In a separate, attached email, Morris noted that ODOT had found slag clogging underdrain systems in the late 1970's and early 1980's. Morris acknowledged that ODOT's present specifications, which preclude the use of open hearth slag above underdrain outlets, minimize the problems with tufa. The second email, dated March 24, 2005, is from Thomas Hyland, District 12 Area Engineer, to Lou Hazapis, who worked in the District 12 production department. Hyland's email concerns the inspection and maintenance of underdrain outlets in specified sections of highway. As a result of those emails, appellants argued that they had a right to conduct additional discovery to determine ODOT's knowledge of blockage caused by tufa in the underdrains of the highway system

[2] Tufa is defined as "a porous limestone formed from calcium carbonate deposited by springs or the like." *Webster's Encyclopedic Unabridged Dictionary* 1523 (1997). In this context, Marszal explained tufa as a precipitate formed when water and air interact with the oxides in slag, which ODOT has used as fill in roadway and drainage construction. (*See* Tr. 1075.)

in District 12. Specifically, appellants sought to conduct eight additional depositions. The trial court denied appellants' motion for a continuance.

{¶ 29} A trial court has broad discretion when ruling on a motion for a continuance. *Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶ 31, citing *State v. Unger*, 67 Ohio St.2d 65 (1981), syllabus. We will not reverse a trial court's decision to grant or deny a continuance absent an abuse of discretion. *Unger* at 67. In ruling upon a motion for a continuance, the trial court balances its interest in controlling its docket and the public's interest in an efficient dispatch of justice with the possibility of prejudice to the moving party. *Parker* at ¶ 31. The court may consider the length of delay requested, prior requests for continuances, the legitimacy of the request, whether the moving party contributed to the need for a continuance, inconvenience to the parties, counsel, and the court, and other relevant factors. *Id.*, citing *Unger* at 67-68.

{¶ 30} The trial court did not abuse its discretion in denying appellants' motion for a continuance. First, while appellants maintain that ODOT failed to disclose the emails in response to their fifth request for production of documents and knowingly offered false responses to that request, neither of the emails upon which appellants now rely are responsive to that request. In their fifth request for production of documents, appellants requested emails from Marszal to Holloway, James Mahilik, and the Independence Yard from January 1, 2000 to December 31, 2005, as well as emails from Holloway, Mahilik, and the Independence Yard to Marszal during the same timeframe. Because neither of the identified emails falls within those parameters, we cannot conclude that ODOT wrongfully withheld them. Second, the first email addresses potential problems with tufa in relation to underdrains and not in relation to catch basins or inlets, whereas the second email does not mention tufa. Third, the projects discussed in the emails were located several miles away from the accident site. Finally, when ODOT excavated a pipe running from the catch basin at issue here in 2009, it made available to appellants a sample of the material removed from the drainpipe, but appellants did not acquire or test the sample. Thus, there was nothing in the record to connect tufa to the accident site.

{¶ 31} When appellants requested a continuance, the trial court and the parties were five days into trial, which was set to resume several days later, and appellants had conducted significant discovery, including more than 40 depositions. In balancing the factors weighing for and against a continuance, the trial court could reasonably have concluded that a continuance was unwarranted. Upon review, we conclude that the trial court's denial of appellants' motion for continuance to conduct additional discovery related to ODOT's knowledge of tufa in District 12 was not unreasonable, arbitrary or unconscionable. Finding no abuse of discretion, we overrule appellants' fourth assignment of error.

C. Fifth Assignment of Error

{¶ 32} In their fifth assignment of error, appellants argue that the trial court abused its discretion by initially denying their motion to amend their complaint to add a claim for spoliation of evidence. They alternatively argue that the trial court abused its discretion by denying them the opportunity to conduct additional discovery regarding spoliation of evidence after reconsidering and allowing them to amend their complaint during the trial.

{¶ 33} Appellants moved for leave to amend their complaint on January 27, 2010, after learning that ODOT had excavated and disposed of a blocked pipe connected to a catch basin along the ramp where Townsend's accident occurred. Appellants' expert visited the accident site in July 2009, more than four years after Townsend's accident, and observed a blockage in one of the catch basins. ODOT discovered the blockage in August 2009, and Ray and Jung testified about the blockage in their depositions in October and November 2009. On November 16, 2009, ODOT filed a motion for a protective order to block further discovery, arguing that the blockage in 2009 was not relevant to the condition of the pipe or the catch basin at the time of Townsend's accident. On or about November 20, 2009, without notifying appellants, ODOT's contractor excavated the blocked pipe and disposed of it at a construction dump site. In their motion for leave to amend their complaint, appellants state that they first learned of the excavation when ODOT employee Jim Boyle testified at his deposition on January 13, 2010, that he and another ODOT employee arranged for the contractor to

excavate the blockage. The trial court denied appellants' motion to amend their complaint on February 17, 2010, but stated that it would make appropriate orders should it subsequently determine that spoliation had occurred.

{¶ 34} We first consider whether the trial court erred in February 2010 by denying appellants' motion to amend their complaint. Civ.R. 15(A) states that leave to amend a pleading "shall be freely given when justice so requires." The rule liberally favors amendment when a trial court is confronted with a motion to amend beyond the time when amendments are automatically allowed. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122 (1991). We review a decision to grant or deny leave to amend a complaint only for an abuse of discretion. *Id.* "It is an abuse of discretion for a court to deny a motion, timely filed, seeking leave to file an amended complaint, where it is possible that [the] plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed." *Peterson v. Teodosio*, 34 Ohio St.2d 161 (1973), paragraph six of the syllabus. Where a movant does not make a prima facie showing of support for new matters sought to be pled, however, a trial court acts within its discretion to deny a motion for leave to amend. *Wilmington Steel* at 123.

{¶ 35} The elements of a cause of action for interference with or destruction of evidence are the following: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29 (1993). Ohio does not recognize a cause of action for negligent spoliation; the plaintiff must show that the defendant acted willfully or purposefully to disrupt or deter litigation. *Barker v. Wal-Mart Stores, Inc.*, 10th Dist. No. 01AP-658 (Dec. 31, 2001).

{¶ 36} There is no dispute that appellants could satisfy the first two elements of a claim for destruction of evidence. In November 2009, when ODOT excavated the pipe, this refiled case had been pending for a year, and ODOT was fully aware of the litigation.

{¶ 37} With respect to the remaining elements, appellants argued that ODOT acted willfully and purposefully to secretly excavate and destroy the blocked pipe in order to disrupt appellants' case. ODOT, on the other hand, responded that appellants had no good-faith basis for alleging that ODOT acted secretly or willfully to disrupt appellants' case. ODOT's excavation occurred more than four years after Townsend's accident, several months after appellants' own expert viewed blockage in the catch basin, and after multiple ODOT employees testified about the blockage in October and November 2009. Even after its expert's observation of blockage in the summer of 2009 and the deposition testimony concerning the blockage in October and November 2009, appellants did not move for an order to preserve materials. As ODOT points out, multiple documents, including emails, interoffice communications, and work orders, regarding the excavation, and the fact that ODOT hired an outside contractor for the excavation, demonstrate the lack of secrecy surrounding ODOT's actions. Finally, ODOT made available to appellants samples of the blockage from the pipe, but appellants did not obtain the samples for testing. Based upon the state of the record in February 2010, the trial court could have reasonably determined that appellants had not established prima facie support for the remaining elements of a spoliation claim. Therefore, the trial court did not abuse its discretion in February 2010 by denying appellants' motion to amend their complaint.

{¶ 38} On April 13, 2010, after five days of trial and after reviewing the emails discussed in relation to their second assignment of error, appellants moved for reconsideration of their motion to file an amended complaint. The trial court granted that motion and afforded appellants leave to assert a claim for spoliation of evidence. ODOT has not filed a cross-appeal from the trial court's decision to grant appellants leave to amend their complaint, and the appropriateness of that decision is, therefore, not before this court.

{¶ 39} Appellants' second argument under their fifth assignment of error is that the trial court abused its discretion by denying them a continuance to conduct additional discovery after allowing them to add a spoliation claim. As stated previously,

we review a trial court's grant or denial of a request for a continuance under an abuse of discretion standard.

{¶ 40} Neither appellants' motion to amend their complaint nor appellants' motion for reconsideration contains a request for additional discovery or for a continuance. While appellants did file a motion for a continuance to conduct additional discovery on April 7, 2010, that motion did not address the need for discovery with respect to a potential spoliation claim arising out of ODOT's excavation. Rather, that motion concerned only appellants' desire to conduct additional discovery regarding ODOT's knowledge of tufa and its effects on drainage in District 12. Although appellants suggest that ODOT excavated and destroyed the pipe and its contents because ODOT believed the blockage was likely caused by tufa, the connection to appellants' spoliation claim is too attenuated to construe appellants' motion for additional time and discovery as relating to the spoliation claim.

{¶ 41} The trial court found no evidence that ODOT willfully destroyed evidence in an attempt to prejudice appellants' case. Appellants' counsel was able to question Jim Boyle regarding the excavation at his deposition in January 2010. Appellants' counsel was also able to cross-examine all witnesses at trial. At trial, the court stated as follows: "[a]s far as I can see here, there has to be some connection to the fact that they felt they had to save this pipe for some reason, and I don't -- at this point, there isn't any suggestion that there was any need to or was anybody requesting it." (Tr. 964.)

{¶ 42} We acknowledge this court's prior statement that "[c]ross-examination at trial is not an adequate substitute for pretrial discovery." *Becker & Becker Assoc., Inc. v. Busche*, 10th Dist. No. 76AP-333 (Dec. 23, 1976). The issue in *Becker* was whether a defendant took a construction project from the plaintiff and gave it to other defendants in exchange for personal gain. The parties' financial relationships were crucial to resolution of that issue, but the trial court denied the plaintiff's pretrial discovery of the defendants' financial dealings and relationships. We held, "it is not sufficient that a party have an opportunity, in this type of case, to examine material sought at trial." *Id.* Similarly, in *Rossman v. Rossman*, 47 Ohio App.2d 103, 108 (8th Dist.1975), the court of appeals held that cross-examination was an insufficient substitute for discovery

where the trial court's refusal to enforce its order compelling discovery, after the defendant willfully failed to comply with discovery rules, deprived the plaintiff the opportunity to prepare herself to litigate financial issues in that case. The Eighth District held that "[a] sua sponte exercise of judicial discretion that rewards a party's willful obstruction of his opponent's good faith discovery efforts is suspect [and] must be justified by a weightier interest than expediency." *Id.* at 110. Those cases, however, are distinguishable because, here, appellants did conduct at least limited pretrial discovery concerning ODOT's decision to excavate the pipe and ODOT's actions in carrying out that decision.

{¶ 43} A trial court does not necessarily abuse its discretion by denying discovery of relevant evidence. *Carrier v. Weisheimer Cos., Inc.*, 10th Dist. No. 95APE04-488 (Feb. 22, 1996). A court may permissibly limit discovery to prevent a mere fishing expedition to locate incriminating evidence. *Id.*, citing *Bland v. Graves*, 85 Ohio App.3d 644 (9th Dist.1993). Given the evidence in the record regarding ODOT's excavation and disposal of the pipe, appellants' awareness that the trial court was willing to reconsider their motion to amend the complaint upon an adequate showing of spoliation, the timing of the amendment, and the absence of any indication that additional discovery would lead to admissible evidence that ODOT willfully acted to disrupt appellants' case, we conclude that the trial court did not abuse its discretion by denying appellants a continuance to conduct additional discovery regarding their spoliation claim. Accordingly, we overrule appellants' fifth assignment of error.

D. First and Third Assignments of Error

{¶ 44} Appellants' first and third assignments of error are interrelated and assert manifest weight challenges to the court's resolution of appellants' negligence claims. The first assignment of error concerns the question of proximate cause, and the third assignment of error concerns ODOT's knowledge or notice of a hazardous condition. Having sustained appellants' second assignment of error, we must remand this matter to the trial court with instructions to grant appellants' motion for an order allowing computer forensic analysis. Any evidence obtained as a result of that analysis may have a direct and significant effect on the issues raised in appellants' first and third assignments of error and on the trial court's ultimate judgment. Therefore, any decision

on those assignments of error at this time would constitute an impermissible advisory opinion. Accordingly, the first and third assignments of error are rendered moot at this time.

E. Sixth Assignment of Error

{¶ 45} Appellants' final assignment of error concerns the trial court's application of discretionary immunity. Appellants maintain that the trial court erred in applying that doctrine when it failed to find that ODOT's employees' negligence in carrying out established maintenance procedures precluded application of immunity. We disagree.

{¶ 46} The state of Ohio has consented to "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties." R.C. 2743.02(A)(1). This "means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State, Div. of Parole & Community Servs.*, 14 Ohio St.3d 68, 70 (1984). Nevertheless, once the state makes a decision to engage in certain activity, the state may be held liable for its employees' negligence in performing that activity. *Id.*

{¶ 47} The trial court's holding regarding discretionary immunity relates only to appellants' claim that ODOT was negligent in failing to implement a catch basin maintenance program that it had developed and approved. The court held that ODOT's decision whether to implement a particular program, or how to best utilize its resources to maintain catch basins, is a policy decision for which the state cannot be sued. Accordingly, the court held that ODOT is entitled to discretionary immunity for its decisions surrounding the implementation of the proposed catch basin maintenance program.

{¶ 48} Appellants do not challenge the trial court's limited holding that ODOT is entitled to discretionary immunity for its decisions surrounding the implementation of the proposed catch basin maintenance program. Instead, they argue that the trial court failed to also address appellants' arguments that ODOT employees were negligent in performing already established procedures and that ODOT was not entitled to immunity

with respect to those actions. Appellants are correct in their assertion that the trial court did not address discretionary immunity in relation to their claims of negligence arising from ODOT's performance of established maintenance procedures. Rather, the court found that, prior to Townsend's accident, ODOT lacked sufficient knowledge of any clogging or that maintenance was required on the catch basins at issue and, for that reason, that appellants could not prove their negligence claims. Having found no negligence in that regard, the court had no need to consider whether ODOT was immune from liability. Should the court reach a different conclusion on remand, however, the court will have to determine whether ODOT is entitled to immunity for its actions giving rise to negligence. Finding no error in the trial court's limited application of discretionary immunity, we overrule appellants' sixth assignment of error.

IV. CONCLUSION

{¶ 49} For the foregoing reasons, we sustain appellants' second assignment of error, overrule appellants' fourth, fifth, and sixth assignments of error, and render moot appellants' first and third assignments of error. Accordingly, we affirm in part and reverse in part the trial court's judgment, as set forth in this decision. We also remand this matter to the Court of Claims of Ohio for further proceedings consistent with this decision. Specifically, we instruct that court to grant appellants' motion for an order allowing computer forensic analysis of specified ODOT computer hard drives, to tailor an order, in the manner described in *Bennett*, to safeguard ODOT's privacy and confidentiality, and to undertake any additional proceedings necessitated by new evidence discovered as a result of the computer forensic analysis.

Judgment affirmed in part, reversed in part;
cause remanded with instructions.

SADLER and DORRIAN, JJ., concur.