[Cite as *Lagowski v. Shelly & Sands, Inc.*, 2015-Ohio-2685.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROGER LAGOWSKI	)	CASE NO. 13 BE 21
	)	
PLAINTIFF-APPELLANT	)	
	)	
VS.	)	OPINION
	)	
SHELLY AND SANDS, INC.	)	
	)	
DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 13 CV 129

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

Atty. Elgine Heceta McArdle
McArdle Law Office
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Wheeling, WV 26003

For Defendant-Appellee:

Atty. Matthew P. Mullen
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& Dougherty Co., L.P.A.
158 North Broadway Street
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 29, 2015

[Cite as *Lagowski v. Shelly & Sands, Inc.*, 2015-Ohio-2685.]
WAITE, J.

{¶1} Appellant Roger Lagowski filed a negligence complaint in the Belmont County Court of Common Pleas alleging that Appellee Shelly and Sands, Inc. committed negligence by not securing one of its bulldozers at a construction site. Appellant alleged that an unknown intermeddler or thief was able to start the bulldozer and operate it, and the unknown person then used the bulldozer to destroy Appellant's residence. The trial court dismissed the complaint on the pleadings, based on our holding in *Tilton v. Austin Motors, Inc.*, 7th Dist. No. 96-CO-71, 1997 WL 816526 (Dec. 30, 1997), *appeal not allowed*, 81 Ohio St.3d 1516, 692 N.E.2d 621 (1998). *Tilton* held that a vehicle owner whose car is stolen is not liable for negligence, as a matter of law, to third parties injured by the stolen vehicle, even if the owner was negligent in leaving the keys in the ignition. The theft of the vehicle is an intervening cause that breaks the chain of proximate cause. Appellant argues that the vehicle in this case is a bulldozer, not a car. Appellant argues that a separate negligence rule should apply because bulldozers can be operated by anyone with a universal ignition key, and because bulldozers create a greater risk of harm than automobiles.

{¶2} Appellant relies on California caselaw, not Ohio law, to support his claim. There is no Ohio case allowing the type of claim alleged by Appellant. There is some precedent in Ohio to allow Appellant to proceed with his claim if there is an allegation that a special duty has arisen due to repeated vandalism at the construction site. Unfortunately, Appellant based his complaint solely on alleged duties owed by Appellee to secure the stolen vehicle. There are absolutely no

allegations as to "special duty" within the complaint. Therefore, the trial court was correct as a matter of law in dismissing this matter.

Background

{¶3} On April 4, 2013, Appellant filed his complaint in this matter. In it, Appellant alleges that Appellee is an entity that regularly performs highway construction. He alleges that in July of 2012, Appellee was working on a job on County Road 214 in Belmont County, and that a Caterpillar D-6 bulldozer was being used at the job site. He claimed that on July 16, 2012, the bulldozer was left unattended, and that an unidentified person started the bulldozer and completely destroyed his home using the bulldozer. Appellant alleges that Appellee had a duty to secure the bulldozer with a lock and is liable in negligence for the acts of the unknown intermeddler.

{¶4} Appellee filed an answer and a motion for judgment on the pleadings. After supportive briefs were filed, the court sustained the motion to dismiss on July 16, 2013. This timely appeal followed.

ASSIGNMENT OF ERROR

> The Court denied Plaintiff substantive due process by summarily granting judgment on the pleadings prior to allowing discovery to proceed.

{¶5} Appellant's sole argument is that the case should not have been dismissed on the pleadings because there is a viable cause of action for negligence against a construction company by third parties injured through misuse of a company

bulldozer that is not secured by a special lock to prevent trespassers from its operation. Appellant relies solely on a California case to support his argument. Appellee and the trial court relied on our decision in *Tilton*, as well as a case decided by the Ohio Supreme Court, *Pendrey v. Barnes*, 18 Ohio St.3d 27, 479 N.E.2d 283 (1985). Appellant's argument is not well-taken for the following reasons.

{¶6} Civ.R. 12(C) allows "any party [to] move for judgment on the pleadings" after the pleadings are closed, but within such time as not to delay the trial. The trial court considers both the complaint and the answer when ruling on a Civ.R. 12(C) motion. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 93 (1996). "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 570. A motion for judgment on the pleadings presents only questions of law and should be granted if it appears that no material factual issues exist and the moving party is entitled to judgment as a matter of law. *Id*. The allegations in the complaint and all reasonable inferences that can be drawn from them should be viewed in a light most favorable to the non-moving party. *Id.*

{¶7} Appellant raises a simple claim of negligence for failure to lock a bulldozer at a construction site. "The elements of a negligence claim are: (1) the existence of a duty owed by the defendant to the plaintiff; (2) breach of that duty; (3) harm to the plaintiff caused by the breach; and (4) damages. *Anderson v. St.*

Francis-St. George Hosp., Inc. (1996), 77 Ohio St.3d 82, 84, 671 N.E.2d 225. Whether the defendant owes a duty to the plaintiff presents a legal question that depends upon the foreseeability of the plaintiff's injury. *Menifee v. Ohio Welding Products* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. An injury is foreseeable if a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. *Id.*" *Gerace Flick v. Westfield Nat. Ins. Co.*, 7th Dist. No. 01 CO 45, 2002-Ohio-5222, ¶26.

{¶8} Appellant acknowledges that the *Tilton* case is current law in this appellate district and extinguishes negligence liability for an owner of a motor vehicle whose car is stolen when that car injures a third party, even if the owner negligently left the keys in the car. The theft amounts to a break in the chain of causation and eliminates the possibility of finding proximate cause in a negligence claim against the owner. Thus, it prevents any possible negligence liability. In *Tilton*, Eric Farr stole a car from a car lot owned by Austintown Motors. While being chased by the police, Farr crashed the vehicle into a car owned by Donald Tilton. Donald and his passenger, Connie Tilton, were severely injured and sued Austintown Motors, alleging negligence in allowing the cars on the sales lot to be left open and unattended with the keys in the ignition, and in failing to insure that the cars could not be used without Austintown Motor's consent. The trial court dismissed the claim on the pleadings pursuant to Civ.R. 12(C). We held that: "As a matter of law, any negligence on the part of appellee was superseded by the intervening act of theft committed by defendant, Eric G. Farr. The Ohio Supreme Court in *Pendrey v.*

Barnes (1985) 18 Ohio St.3d 27, 479 N.E.2d 283, held that the theft of an automobile is a sufficient superseding cause as a matter of law, to absolve an owner's liability." *Tilton* at *2.

{¶9} *Tilton* and *Pendrey* establish the principle that the theft of a motor vehicle, even when the keys are left in the ignition by the owner, is an intervening superseding cause breaking the chain of proximate cause in a negligence case. *Pendrey* at 29; *Tilton* at *2. Both of these cases were resolved prior to trial, *Tilton* on the pleadings, and *Pendrey* at summary judgment. Unless Appellant alleged facts that remove his case out of the realm of the rules established in *Pendrey* and *Tilton*, it was appropriate for the court to dismiss the case as a matter of law.

{¶10} Appellant contends that a bulldozer is not an automobile, and that the potential damage and harm that can be caused by a bulldozer is qualitatively and quantitatively different than the damage that can be caused by an automobile. On this basis, Appellant believes the facts of *Tilton* should be distinguished from the allegations in this case. Appellant relies primarily on a California case, *Richardson v. Ham*, 44 Cal.2d 772, 285 P.2d 269 (1955), to distinguish *Tilton*. In *Richardson*, two bulldozers were left at a construction site, one with a special lock to prevent it from being started, the other without such a lock. The bulldozers did not need ignition keys and could be started manually. Once started, they would immediately be in the appropriate gear and start moving. The bulldozers attracted spectators and curiosity seekers day and night, which was known to the persons operating the construction site. Bystanders would climb on the machines and explore them. One night, three

young men (who had been drinking) decided to see if they could start the bulldozers and race them. They were able to start the bulldozer that did not have a lock. They drove it around for 15 to 30 minutes, causing considerable damage. They could not stop the machine, so they left it running. It traveled past the edge of the mesa, across a highway, through a house, and came to a stop at a retaining wall. Various injured parties brought suit against the construction company for negligence because the bulldozers were left unattended and unlocked. The jury returned a verdict for the defendants, but the court granted a new trial and the defendants appealed the decision to grant a new trial.

{¶11} *Richardson* acknowledged that, in California, absent special circumstances, the owner of a motor vehicle owes no duty to remove the keys from a vehicle to protect third parties from the negligent acts of a thief. The evidence presented to the jury, though, showed that the bulldozers were known to attract onlookers and curiosity seekers, could be manually started by anyone without any type of key, would immediately start moving once started, would not be easy to operate except by those specially trained, and were located in an open area where they could not be contained if they were started accidentally. The court distinguished these characteristics from the typical situation of an automobile, where the only persons who might be curious would be thieves, where the risk of harm to others was much less if the vehicle was stolen, and where the thief would know how to operate the vehicle. The court concluded that there was a foreseeable risk that these particular bulldozers would be tampered with after work hours and that special

precautions should have been taken, given the size and nature of the machines. The concurring opinion made special note that the owner had knowledge that people were meddling with the bulldozers and gave special instructions to keep them locked up so that no one would be injured.

{¶12} Obviously, the *Richardson* case is not controlling law in Ohio, and the principles used in resolving that case arose out of the specific facts of that case. Most of the *Richardson* decision appears to be aimed at establishing a "special circumstances" exception to the general rule that there is no liability in negligence for an automobile owner whose car is stolen after the keys were left in it. There was no blanket rule established in *Richardson* that bulldozers must have special locks put on them, locks not installed by the manufacturer or required by any statute or regulation. Generally, this type of policy decision requiring extra locks on construction equipment would be established by the state legislature, but Appellant appears to believe that such a requirement should be imposed by the courts.

{¶13} Although *Richardson* does not set forth Ohio law, it is mentioned in an Ohio case. In *Fed. Steel & Wire Corp. v. Ruhlin Const. Co.*, 45 Ohio St.3d 171, 543 N.E.2d 769 (1989), a construction company was repairing a bridge located over plaintiff's property. During the winter months, the company ceased work on the bridge and left its construction site unguarded. Vandals repeatedly entered the site and threw construction materials from the bridge onto plaintiff's property. The court held that because it was reasonably foreseeable to the construction company that this vandalism would occur, the company may owe plaintiff a duty to take protective

measures to secure its job site. This case cites *Richardson v. Ham* as persuasive authority, but by no means adopts its holding. *Fed. Steel & Wire* does not set forth a blanket approval for negligence cases against construction companies for failure to secure a construction site or the equipment on the construction site. The syllabus of *Fed. Steel & Wire* holds: "If a person exercises control over real or personal property and such person is aware that the property is subject to repeated third-party vandalism, causing injury to or affecting parties off the controller's premises, then a special duty may arise, to those parties whose injuries are reasonably foreseeable, to take adequate measures under the circumstances to prevent future vandalism." *Id.* at syllabus. It is apparent that both *Richardson* and *Fed. Steel & Wire* were based on allegations of foreseeability: that the owners certainly knew a risk existed because of repeated acts of third persons.

{¶14} It appears, then, to arguably make a claim in Ohio that relies on the type of behavior arising from the situation found in *Fed. Steel & Wire*, the complaint must not allege mere negligence, but rather, a "special duty" where negligence is based on repeated intrusion, such as the vandalism described in *Fed. Steel & Wire*. Otherwise, a party in Appellee's position, in answering a complaint that appears to deal only with the allegation of simple negligence, would likely fail to plead (and possibly waive or forfeit) certain defenses or responses that might apply to the quite different type of claim described in *Fed. Steel & Wire*. Appellant did not allege that there was repeated trespass or vandalism, nor did he allege any other circumstance that should have led Appellee to recognize that its worksite was compromised and

that trespassers or intermeddlers may attempt to operate the bulldozer. Without "special duty" or "special circumstance" allegations in the complaint, there is nothing to distinguish the facts of this case from *Tilton* and *Pendrey*. While Appellant attempts to argue a special duty existed, this alleged duty is based simply on the size and the alleged ease of starting the machine. But this is no different factually than those scenarios involving an automobile. Certainly, the larger the vehicle, the more likely it may cause great damage. However, neither *Richardson* nor *Fed. Steel & Wire* were based merely on size. For that matter, *Tilton* and *Pendrey* would inarguably apply even if the vehicle in question was an oversized pickup truck or a Hummer.

{¶15} Appellant's additional claim that the vehicle was capable of being started with some sort of "universal key" is likewise insufficient to set up a special duty. *Tilton* and *Pendrey* are based on a break in the chain of causation. While the owners of the stolen vehicle were unquestionably negligent by leaving the keys in the vehicle (and making the theft easy), it was the intermeddler's act of theft and any subsequent actions that actually damaged the plaintiffs. Hence, the fact that anyone possessing a "universal bulldozer key," and we question their number, could operate this vehicle presents a distinction without a difference when we apply the legal principles found in controlling Ohio law.

{¶16} The trial court was correct in dismissing this negligence complaint on the pleadings based on the authority of our *Tilton* case. Appellant did not allege a single fact that would warrant treating a bulldozer stolen from a construction site any

differently than an automobile stolen from a homeowner or car dealer. This complaint sets forth a simple claim of negligence on the part of Appellee based on the failure to secure a vehicle from theft and the subsequent bad act of an intermeddler. There is absolutely no basis here to find that Appellant has presented facts to show that Appellee should have had a greater degree of foreseeability and which would lead any Ohio court to find that he may have alleged a "special duty" or "special circumstance." In fact, it would appear that even based on the California law on which he relies, Appellant's complaint falls short. As there is no merit to Appellant's argument, the decision of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.