

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 23, 2006 Session

**O'CHARLEY'S/DONELSON FOODS INC. v. TENN-KY AUTOMATIC  
SPRINKLER COMPANY, INC., ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 02-C-1100 Walter C. Kurtz, Judge**

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**No. M2004-02835-COA-R3-CV - Filed on February 12, 2007**

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After a three day trial, the trial court found that defendant installers were not liable for a sprinkler system failure caused by faulty maintenance. The evidence preponderates in favor of the trial court's finding regarding fault, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Larry D. Ashworth; Peter D. Heil, Nashville, Tennessee, for the appellant, O'Charley's/Donelson Foods, Inc.

H. Rowan Leathers III, Nashville, Tennessee, for the appellee, Bacar Constructors, Inc.;;  
Tom Corts, Nashville, Tennessee, for the appellee, Tenn-Ky Automatic Sprinkler Company, Inc.

**OPINION**

O'Charley's/Donelson Foods, Inc. ("O'Charley's") brought suit against a prime contractor, Bacar Constructions, Inc. ("Bacar"), that participated in the construction of its freezer facility, and the sprinkler subcontractor, Tenn-Ky Automatic Sprinkler Company, Inc. ("Tenn-Ky"), for damages resulting from the malfunction of the freezer facility's sprinkler system.

A three day bench trial of the matter was held in October of 2004. At the close of plaintiff's proof, the trial court dismissed several grounds for recovery. This dismissal is not the subject of

plaintiff's appeal.<sup>1</sup> The claims that Bacar and Tenn-Ky acted negligently proceeded. At the close of defendants' proof, the trial court found that the sprinkler failure was caused by faulty maintenance and that the faulty maintenance was the fault of O'Charley's employees and not the fault of Bacar or Tenn-Ky. Furthermore, the trial court found that O'Charley's breach of contract claim was not plead in the Fourth Amended Complaint or proved at trial. O'Charley's appeals.

The issues raised by O'Charley's on appeal are quite narrow and pertain to whether the evidence preponderates against the trial court's findings on two issues. First, whether the evidence preponderates against the trial court's findings about fault on the negligence claim. Second, plaintiff argues that the breach of contract claim was plead and that the evidence preponderates against the trial court's finding that it was not proved.

We review this case *de novo* on the record with a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). No presumption of correctness attaches to the trial court's decisions regarding questions of law. *Wilson v. Wilson*, 984 S.W.2d 898, 900 (Tenn. 1998), *cert. denied*, *Oakley v. Wilson*, 528 U.S. 822, 120 S.Ct. 68, (1999).

## I. NEGLIGENCE CLAIM

As part of its restaurant business, O'Charley's contracted with Bacar to build and equip a 20,000 square foot freezer at its Nashville distribution center. Bacar subcontracted with a specialist in the design and installation of sprinklers, Tenn-Ky, to perform the sprinkler work of the facility. The sprinkler installation was completed in December of 1999. The trial court found that the system was properly installed.<sup>2</sup>

Due in part to the fact that the sprinkler was being installed at a facility that was maintained below freezing, its design and operation are quite complicated. The pipes in the system had to be free of moisture. Otherwise, ice would block the pipes. Furthermore, because it is a storage facility with inventory being moved about, it was important that the sprinkler not trigger if one of the many sprinkler heads is damaged. Such sprinkler head damage was expected in this type of facility. The sprinkler system at the O'Charley's facility is a "dry pipe," double interlocking preaction system. The "dry" pipes contain pressurized air rather than water to prevent freezing. In order to keep the moisture out of the air in the dry sprinkler lines, the system uses two dryers which filter moisture out of the pressured air. In order to avoid triggering due to damage to a sprinkler head, the system is a "double interlocking preaction system." First, its detector must react to a fire that then activates a pneumatic valve that releases water into the sprinkler line. In addition, the pilot line which contains pressurized air must also experience a reduction in pressure. Since both lines must respond to a fire

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<sup>1</sup>Tenn-Ky was also successful on a counterclaim that is also not the subject of this appeal.

<sup>2</sup>O'Charley's originally alleged and attempted to prove at trial that the system was defective when installed. The trial court found otherwise, and this finding was not appealed.

event, simple damage to a sprinkler head will not activate the system. The trial court emphasized in its order, and the parties do not disagree, that this is a complicated system requiring routine maintenance and was designed with the expectation that maintenance of the system would be necessary for it to operate correctly.

O'Charley's maintenance employees last tested the sprinkler system in the freezer on April 18, 2001. The malfunction occurred on the next day, April 19, 2001, when for no apparent reason the sprinkler discharged water into the freezer facility creating a sheet of water two to three inches thick. This failure caused significant damage to the sprinkler system, the facility, and O'Charley's inventory.

The trial court determined that the failure was caused by improper maintenance. Specifically, the trial court found that the dryers that kept moisture out of the dry sprinkler pipes were not properly maintained<sup>3</sup> and that water pump testing was not done properly. The trial court found either or both of these maintenance failures caused the sprinkler system to malfunction. On appeal, the parties do not disagree with this finding of cause. O'Charley's argues, however, that the improper maintenance was caused by the defendants. The trial court determined that the faulty maintenance was the fault of O'Charley's, not the defendants, finding as follows:

The Court further finds that it is more likely than not that this faulty maintenance was done by the O'Charley's maintenance supervisor and his employees, and that includes the maintenance done on April 18, 2001. The Court finds that the maintenance supervisor was told by an employee of Tenn-Ky how to do correct maintenance on the water pump and on the desiccant holding canister [a part of the dryers], and he and/or his employee did it incorrectly. The maintenance supervisor was resistant to maintenance as he wanted a maintenance-free system and he had rejected Tenn-Ky's offer of a maintenance contract but failed to enter into a contract with another company.

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The Court finds that the reasons for the malfunction on April 19, 2001 was faulty maintenance and that the faulty maintenance was the fault of employees of O'Charley's and not the fault of the defendants. The Court finds that an employee of Tenn-Ky explained to the plaintiff's maintenance supervisor exactly what was needed and how it was to be done, and it was not done. Defendants could have done a better job in providing training and necessary maintenance manuals, but instruction was provided as to the two components of the system responsible for the failure. No employee of the defendants was responsible for the faulty maintenance. Even if some negligence could be imposed on the defendants, it would fall far short of the

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<sup>3</sup>Specifically, the dryers used a material that withdrew moisture from the lines. This desiccant material was contained in a holding canister. Apparently, some of the desiccant material escaped, thus compromising the system.

percentage of negligence attributable to plaintiff for failure to maintain and properly test the components at issue.

According to O'Charley's, the evidence preponderates against the trial court's finding of fault. It is undisputed that O'Charley's personnel performed all maintenance on the system and that defendants had no responsibility whatsoever to maintain the system. The defendants' fault, according to O'Charley's, lay in defendants' failure to properly train O'Charley's personnel and to provide O'Charley's with required maintenance information.

Being a comparative fault state, in Tennessee a plaintiff cannot recover if plaintiff is more negligent than defendants. *Ali v. Fisher*, 145 S.W.3d 557, 561 (Tenn. 2004); *McIntyre v. Balentine*, 833 S.W.2d 52, 57-58 (Tenn. 1992). Furthermore, it is axiomatic that in order to succeed in a negligence action, in addition to proving the breach of a duty of care and damages, the plaintiff must also prove causation. *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991).<sup>4</sup>

The proof showed that the defendants apprised O'Charley's of the importance of maintenance, trained O'Charley's employees, and offered O'Charley's a maintenance contract. Tenn-Ky provided O'Charley's written material about the importance of maintenance during its installation of the sprinkler system. This written material included information from the manufacturer of the system and the fire pump, and additional information about testing, maintenance and operation of the system. The National Fire Protection Association Standards ("NFPA") apply to this system. However, much of the information in the NFPA standards had no applicability to O'Charley's sprinkler. Rather than simply provide the 107 page document to O'Charley's, Tenn-Ky reviewed the maintenance procedures that applied to this sprinkler, summarized O'Charley's maintenance responsibilities, and prepared a laminated document of the summary that hung in O'Charley's pump room. Tenn-Ky's chief inspector and head technician, Mike Organ, testified that Gerald Daman, O'Charley's maintenance supervisor, had wanted a maintenance free sprinkler system. Mr. Organ, however, explained that a maintenance free system was not possible in a freezer storage facility. Mr. Organ testified that he told Mr. Daman that "you have a fire pump and you have dry pipes. They are the highest maintenance of the sprinkler industry."

While installing the sprinkler system, Tenn-Ky offered to perform maintenance on the system under a yearly contract with O'Charley's. Mr. Daman, however, rejected Tenn-Ky's offer explaining that O'Charley's would hire another company to maintain the sprinkler system. Mr. Daman told Tenn-Ky representative "There is no need for you to come by. I already have someone who does my maintenance and inspections. I had no choice in who Bacar picked to do this job, but I do have a choice in who does the maintenance and it will not be you." The record shows that O'Charley's did

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<sup>4</sup>O'Charley's tries to argue that the trial court found an "independent intervening cause" defense on behalf of defendants. We disagree. The trial court simply found if defendants were negligent at all, it was nominal compared to O'Charley's negligence.

not hire a contractor with expertise to perform maintenance on the system. Instead, O'Charley's chose to have it maintained by its employees.

In spite of the exchange related above, after the system was installed, Tenn-Ky attempted to provide unsolicited advice about the system when Tenn-Ky was on site for other reasons. A representative of Tenn-Ky explained to O'Charley's maintenance personnel, including Mr. Daman, on more than one occasion how to properly test the water pump and maintain the dryers. In other words, O'Charley's was properly instructed by Tenn-Ky about the two procedures that all parties agree were the cause of the failure and incorrectly performed by O'Charley's maintenance personnel.

While O'Charley's maintenance supervisor testified that he did not know the system required regular maintenance, the trial court found his testimony not to be credible. The trial court's determination about credibility is not questioned on appeal. For the foregoing reasons, we find the trial court's findings regarding fault and causation are supported by the record.

## II. BREACH OF CONTRACT CLAIM

O'Charley's argues on appeal that the trial court erred when it failed to find that defendants breached their contract with O'Charley's by improper placement of a check valve and failure to install a "water gong" outside alarm. According to O'Charley's both of these features were required by the design drawings.<sup>5</sup> It argues that improper check valve placement contributed to the sprinkler system failure and that omission of the water gong increased the damages. The trial court found that neither of these omissions caused the failure or the damages. O'Charley's appeals this finding and claims that the evidence preponderates against it.

First, with regard to the placement of the check valve, the trial court heard testimony from plaintiff's expert and Mr. Organ, Tenn-Ky's chief inspector and head technician. Plaintiff's expert, Randall Barnes, a fire protection engineer, testified that desiccant material, a rock salt type material used to eliminate moisture from the lines, had compromised one of many little check valves throughout the system, *i.e.*, kept the valves from closing. The screen on the canister that holds the desiccant had been bent, allowing it to escape. This is consistent with the trial court's findings. Plaintiff argues on appeal that defendants' misplacement of this check valve caused the failure. Plaintiff's own expert testified, however, that it was the desiccant clogging up the valve that caused it not to operate. The placement of the valve itself was not cited as an actual cause of the failure. In other words, if the system had been properly maintained by O'Charley's so that the desiccant had not leaked into the system, the valve would have operated properly in its location where it was installed.<sup>6</sup> Even if plaintiff had offered proof that the check valve misplacement caused the failure,

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<sup>5</sup>O'Charley's makes passing reference to the defendants' omission of a nitrogen bottle. Their own expert testified that its omission was not a violation of industry standards and had no effect on the malfunction.

<sup>6</sup>O'Charley's expert testified that "without the desiccant, with all the trim cleaned out and all the little check valves working like they were supposed to and all the little pneumatic actuators cleaned up with no foreign bodies in  
(continued...)

defendants proof showed that the check valve location was irrelevant. Mr. Organ testified that the check valve was properly placed and played no role in the system failure.

With regard to the water gong, there was ample evidence that the alarms in place warned O'Charley's that the sprinkler system had been activated. A water gong is a mechanical device that has a clapper that is activated by water flow in the system. It makes a loud and obnoxious noise signifying that there is water flow in the system. Since it is not powered by electricity, plaintiff's expert testified that a water gong provides an alarm even in the event of a power outage. When the sprinkler malfunctioned at 2:00 a.m. on April 19, and water was flowing through the system, the electric alarm activated. Therefore, a water gong was not needed. The fire detection system was connected directly to ADT, a private security company. ADT notified the security guard at the facility that the system alarm indicated that water was flowing in the freezer. ADT also notified the fire department. The security guard called Mr. Daman to alert him to the situation. Seeing no smoke or fire, the guard and fire department personnel assumed it was a false alarm. The security guard did not have a key to the freezer warehouse so he could not inspect inside.

Remarkably, even though no one looked inside the facility, ADT was told by O'Charley's that it was a false alarm and to put the system on test mode and ignore further alarms. The water was not cut off until about 4:20 a.m. By that time the water damage had been done. The court found that any failure to install a water gong had no impact on the system malfunction or on the damages suffered. Basically, O'Charley's employees ignored the alarm indicating water was flowing into the facility for over two hours. Based on these facts, there is ample evidence to support the conclusion that absence of a back-up alarm had no effect on O'Charley's damages.

The trial court found that despite the fact that these alleged failures had no role in the system failure, "there seems to be some confused hint in the plaintiff's proof and argument that it seeks damages for allegedly not receiving exactly what was contained in the sprinkler system submitted design diagram." After examining the Fourth Amended Complaint, the trial court concluded that O'Charley's complaint dealt exclusively with the system failure and did not seek to recover for any unrelated breach of contract action. We too have examined the amended complaint and agree with the trial court.

The judgment of the trial court is affirmed and costs of this appeal are taxed against O'Charley's/Donelson Foods, Inc., for which execution may issue if necessary.

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<sup>6</sup>(...continued)  
them, [the system] worked as designed."

PATRICIA J. COTTRELL, JUDGE