

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Constantinos (Gus) Poneris et al., :
Plaintiffs-Appellants, :
v. : No. 10AP-80
(C.C. No. 2004-05279)
The Ohio Department of Transportation, : (REGULAR CALENDAR)
Defendant-Appellee. :

D E C I S I O N

Rendered on November 16, 2010

Dinsmore & Shohl LLP, Mark A. Vander Laan, Alex M. Triantafilou and Richard P. Corthell; Harris & Burgin, Jerald D. Harris and Jeffrey W. Harris, for appellants.

Richard Cordray, Attorney General, Jeffrey L. Maloon and Kristin S. Boggs, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶1} Plaintiffs-appellants, Constantinos and Tara Poneris ("appellants," collectively), appeal the decision of the Court of Claims of Ohio granting summary judgment in favor of defendant-appellee, the Ohio Department of Transportation ("ODOT"), on appellants' negligence claim. For the reasons that follow, we affirm the judgment rendered by the trial court.

{¶2} In 2000, ODOT hired A&L Painting LLC ("A&L") to blast and repaint the Lorain-Carnegie Bridge ("bridge") in Cleveland, Ohio. A&L employed Mr. Poneris to blast

old paint away from the bridge in preparation for it to be repainted. On May 2, 2002, Mr. Poneris suffered injuries after he fell from a scaffolding that lacked appropriate guardrails, toeboards and lifelines. The Bureau of Workers Compensation has allowed a claim for a number of his resulting medical conditions. Mr. Poneris has also received an additional award for A&L's violations of specific safety requirements. He then filed an employer intentional tort claim against A&L that ultimately proved to be unsuccessful. See *Poneris v. A&L Painting, LLC*, 9th Dist. No. CA2008-05-133, 2009-Ohio-4128, appeal not allowed, 124 Ohio St.3d 1416, 2009-Ohio-6816.

{¶3} The instant matter presents appellants' claim for negligence on the part of ODOT.¹ Appellants argue ODOT failed to follow and enforce its inspection and safety policies with regard to the project. They further argue that ODOT was an active participant in or controlled a critical element of the project, such that it owed appellants a duty of care. On October 30, 2009, ODOT filed a motion for summary judgment and argued that it owed no duty to Mr. Poneris. The trial court granted ODOT's motion in a decision rendered on December 29, 2009. Appellants have timely appealed and raise the following assignments of error:

Assignment of Error No. 1

The Court of Claims erred by holding that ODOT did not have a duty to enforce its policy to suspend work on its projects due to the failure of the Contractor to correct conditions unsafe for the workers.

Assignment of Error No. 2

The Court of Claims erred by holding that ODOT was not an active participant on Carnegie.

¹ Based upon the assignments of error and arguments in this appeal, appellants do not contend that summary judgment was improper on the breach of contract and loss of consortium claims.

{¶4} Appellants' assignments of error will be addressed together because they both challenge the trial court's decision to grant summary judgment on appellants' negligence claim. At issue, therefore, is whether the trial court erred in granting summary judgment.

{¶5} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Comms.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶7} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving

party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶8} In the instant matter, the trial court granted summary judgment after finding that ODOT owed no duty to Mr. Poneris. The determinative issue before this court, therefore, is whether ODOT owed a duty to Mr. Poneris, who was an employee of A&L. In this regard, our court recently noted:

Those who engage the services of an independent contractor or subcontractor and actively participate in their work owe a duty of care to the contractor's employees and can be held liable in a negligence action for damages related to the injuries of the contractor's employees. *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St.3d 206, 207-08, 6 Ohio B. 259, 452 N.E.2d 326; *Cafferkey v. Truner Constr. C.* (1986), 21 Ohio St.3d 110,113,21 Ohio B. 416, 488 N.E.2d 189. Active participation means to direct "activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project." *Bond v. Howard Corp.*, 72 Ohio St.3d 332, 337, 1995 Ohio 81, 650 N.E.2d 416. See also *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 643, 1998 Ohio 341, 693 N.E.2d 233 (recognizing that active participation "may be found to exist where a property owner either directs or exercises control over the work activities of the independent contractor's employees, or where the owner retains or exercises control over a critical variable in the workplace").

Krystalis v. Ohio Dept. of Transp., 10th Dist. No. 09AP-112, 2009-Ohio-3481, ¶11.

{¶9} In *Krystalis*, our court had the opportunity to analyze the same contract to blast and repaint the same bridge underlying the instant matter. *Id.* at ¶2. Incorporated into the contract was a copy of ODOT's 1997 "*Construction and Material Specifications*." Section 105.01 of these specifications provided: "The Engineer will have the authority to suspend the work wholly or in part due to the failure of the Contractor to correct conditions unsafe for the workers or the general public." *Id.*

{¶10} The injured plaintiff in *Krystalis* was an employee of A&L who worked as a blaster on the bridge project. *Id.* at ¶6. He suffered from lead poisoning after having worked inside the blasting containment that was used to trap hazardous materials. *Id.* at ¶2-6. He filed suit against ODOT based upon its alleged negligence in failing to enforce its safety policies. *Id.* at ¶6. The trial court granted summary judgment to ODOT after finding that ODOT owed no duty to A&L's injured employee. *Id.* On appeal, the plaintiff argued that ODOT failed to suspend work in accordance with Section 105.01 based upon the impermissible levels of hazardous materials in the containment. *Id.* at ¶16. In support of his position, the plaintiff cited *Semadeni v. Ohio Dept. of Transp.*, 75 Ohio St.3d 128, 1996-Ohio-199 and argued that ODOT had assumed a duty of care by implementing a safety policy which required it to install protective fencing on certain overpasses. When faced with this argument, our court held: "The policy in *Semadeni* was mandatory, whereas Section 105.01 merely authorized, but did not require, work suspension." *Krystalis* at ¶16. We further held that *Semadeni* focused on ODOT's duty owed to the general public, rather than any duty owed to the employees of an independent contractor.

Id., citing *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp.* (1988), 49 Ohio App.3d 129, 130.

{¶11} The injured A&L employee in *Krystalis* also argued that ODOT's involvement in the bridge project demonstrated that it was an active participant, or controlled a critical element, on the bridge project. In support of this position, the injured A&L employee argued that ODOT inspectors continually monitored A&L's contract performance. Id. at ¶12. He also argued that ODOT's internal employment evaluations of its inspectors required them to observe safety standards. Id. at ¶5. We rejected these arguments and held that neither the monitoring of A&L's work nor the internal evaluations of ODOT's employees caused ODOT's general supervisory role to reach a level constituting active participation. Id. at ¶12-14. As a result, our court affirmed the decision to grant summary judgment to ODOT based upon the absence of a duty owed by ODOT to A&L's employees.

{¶12} In the instant matter, appellants raise the same two assignments of error as were raised in *Krystalis*. Further, appellants advance the same arguments in support of each assignment of error as the injured A&L employee did in *Krystalis*. Specifically, appellants first argue that ODOT assumed a duty to suspend work on the bridge project because it implemented Section 105.01. They argue that ODOT was required to suspend work based upon the unsafe conditions of the scaffold. We find, however, that the language set forth in Section 105.01 merely provided ODOT with the authority, rather than the affirmative duty, to suspend work on the bridge project. See *Krystalis* at ¶16.

{¶13} Appellants next argue that ODOT's role in the bridge project demonstrates that it was an active participant, or controlled a critical element in A&L's work on the

bridge project. In support, appellants make the same arguments that were advanced in *Krystalis*. Specifically, they argue that ODOT's inspectors monitored A&L's work and the performance under the contract. They further note that ODOT's internal evaluations required its inspectors to observe safety standards. Again, these same arguments were plainly rejected by this court in *Krystalis*. *Id.* at ¶5, 12. We follow the well-reasoned analysis established therein.

{¶14} While appellants claim that "distinguishing facts" require a deviation from the holding in *Krystalis*, they never specify what those distinctions are. The contract amongst A&L and ODOT formed the basis of both injured A&L employees' negligence claims against ODOT. Both injured plaintiffs were employed by A&L to blast paint from the bridge. Both plaintiffs cite Section 105.01 as the purported basis for the duty owed by ODOT to A&L employees. Both plaintiffs advance the same arguments with respect to the extent of ODOT's involvement in the bridge project.

{¶15} Without any guidance in the form of an argument advanced by appellants, the only distinctions that we see between *Krystalis* and the instant matter regard the alleged nature of the breach and the resulting injuries to A&L's employees. In *Krystalis*, the alleged breach related to the presence of unsafe levels of hazardous materials inside the blasting containment. In the instant matter, the allegations concern a scaffold's unsafe condition. Clearly, the resulting injuries to the two A&L employees were not the same. However, when asked to determine whether there was a duty owed, these amount to distinctions without a difference. In the absence of an argument as to how *Krystalis* is distinguishable, we find that appellants have given us no persuasive reason to deviate

from the well-reasoned analysis set forth therein. As a result, we find that there was no duty of care owed by ODOT to Mr. Poneris.

{¶16} Based upon the foregoing, we find that the Court of Claims did not err when it granted summary judgment in favor of ODOT on appellants' negligence claim. We overrule appellants' two assignments of error and affirm the judgment rendered by the Court of Claims of Ohio.

Judgment affirmed.

TYACK, P.J. and McGRATH, J., concur.
