**[Cite as *Krystalis v. Ohio Dept. of Transp.*, 2009-Ohio-3481.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| Theodore Krystalis et al., | : | |
| Plaintiffs-Appellants, | : | |
| | | No. 09AP-112 |
| v. | : | (C.C. No. 2004-07247) |
| The Ohio Department of Transportation, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on July 16, 2009

*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, and *Susan M. Sullivan*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, P.J.

**{¶1}** Plaintiffs-appellants, Theodore and Georgia Krystalis (collectively, "appellants"), appeal the Court of Claims of Ohio's decision to grant summary judgment in favor of defendant-appellee, the Ohio Department of Transportation ("ODOT"). For the following reasons, we affirm.

**{¶2}** ODOT hired A&L Painting LLC ("A&L") to repaint the Lorain-Carnegie bridge ("bridge"). Section 105.01 of ODOT's 1997 *Construction and Material Specifications*, which was incorporated in the contract with A&L, stated: "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." ODOT knew that lead paint was previously applied to the bridge and required A&L to erect a containment to surround workers sandblasting the bridge in preparation for painting. The containment trapped hazardous materials released from the sandblasting. A&L also had to (1) comply with work safety regulations, (2) provide safety equipment for its workers in the containment, (3) assure that its workers took proper safety precautions, (4) hold the state of Ohio harmless on any claim due to A&L's neglect in safeguarding work, and (5) provide access for ODOT's inspections.

**{¶3}** ODOT's inspectors determined the quality and progress of A&L's work and whether A&L was fulfilling the contract. Patrick McCafferty, an engineer for ODOT, indicated during deposition that, if he saw a tear in the containment, he would have had ODOT's inspectors talk to an A&L superintendent about repairing the damage. McCafferty did not recall having these conversations with the inspectors on the bridge project, but said that this is what he typically would have done. McCafferty explained that he would have wanted to make sure "there's no escape of any hazardous materials or toxic substances into the environment." (McCafferty Depo. 69.)

**{¶4}** Raymond Bencivengo, a manager for ODOT, said in a deposition that A&L was responsible for the safety of its employees. Bencivengo also said that ODOT

"doesn't really actually tell the contractor how to * * * work." (Bencivengo Depo. 21.) Nobody for ODOT inspected to determine (1) whether A&L employees working inside the containment were exposed to impermissible levels of harmful chemicals, (2) whether A&L employees' personal safety equipment for the containment worked or (3) whether A&L complied with work safety regulations. No one for ODOT suspended any work on the bridge project due to unsafe or unhealthy working conditions.

**{¶5}** Michael Billings, an inspector for ODOT, appeared inside the containment wearing a full-hooded respirator. Billings told an A&L employee that ODOT required him to wear the respirator because his blood lead levels had increased. Billings' employment evaluations indicated that he always observes current safety standards both for ODOT and the contractors. These comments were under the category: " 'Observes safety precautions. Ensures well-being of individuals within scope of responsibility.' " Bencivengo and McCafferty explained during depositions that, when contractors' safety standards are more stringent than ODOT's, the inspectors must observe the more stringent standards.

**{¶6}** Theodore sandblasted steel in the containment. Only his A&L foreman told him what to do. Theodore complained to his foreman about his safety equipment and the dusty conditions. Theodore has been diagnosed with lead poisoning. Appellants filed a complaint in the Court of Claims against ODOT, alleging that ODOT was negligent for failing to enforce safety policies and regulations during the bridge project. ODOT moved for summary judgment, and the court granted the motion. Appellants appeal, raising the following assignments of error:

**Assignment of Error No. I**

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.

**{¶7}** We address appellants' assignments of error together. Appellants assert that the Court of Claims erred by granting summary judgment in favor of ODOT. We disagree.

**{¶8}** We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

**{¶9}** Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

**{¶10}** "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

**{¶11}** The Court of Claims concluded that ODOT was not liable for damages that stemmed from Theodore's injuries because ODOT did not owe a duty of care to A&L employees. 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; *Cafferkey v. Turner Constr. Co.* (1986), 21 Ohio St.3d 110, 113. 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. See also *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 643, 1998-Ohio-341 (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").

**{¶12}** ODOT did not actively participate in A&L's sandblasting, which is the work alleged to have injured Theodore. Only Theodore's A&L foreman told him what to do, and Theodore reported work safety issues to his foreman. Bencivengo verified that ODOT does not "tell the contractor how to * * * work." (Bencivengo Depo. 21.) To be sure, ODOT's inspectors gauged A&L's work for progress, quality, and contract fulfillment. However, this monitoring did not transform ODOT's role to active participation, but pertained to ODOT's general supervisory function. See *Cafferkey* at 113; *Bond* at 337. ODOT's contract provisions on worker safety also did not transform ODOT's role to active participation. See *Cafferkey* at 113. Instead, ODOT required A&L to provide safety equipment for its workers in the containment and placed on A&L the responsibility to assure that its workers took proper safety precautions.

**{¶13}** ODOT also required that A&L hold the state of Ohio harmless on any claim due to the contractor's neglect in safeguarding work. No one for ODOT inspected

to determine (1) if A&L complied with work safety regulations, (2) if A&L employees working inside the containment were exposed to impermissible levels of harmful chemicals or (3) if A&L employees' personal safety equipment for the containment worked. Bencivengo confirmed that A&L was responsible for the safety of its employees.

**{¶14}** Appellants argue that Billings' job evaluations established that ODOT actively participated in A&L's work. We disagree. The evaluations did not specify that Billings directed the activity of A&L's workers, but only recognized that Billings adhered to contractor safety standards when required under ODOT's policy. Appellants imply that, when ODOT acted to control Billings' increased blood lead levels, it should have done the same for A&L employees. We do not conclude that ODOT created a duty of care to A&L employees when it made decisions about its own employees, however. Similarly, we find no active participation from McCafferty's testimony that if he saw a tear in the containment, he would have had ODOT's inspectors talk to an A&L superintendent about repairing the damage. By specifying the need to ensure that hazardous materials would not escape into the environment, McCafferty did not place himself in the position of directing A&L's work, but, instead, confirmed ODOT's general supervisory role and concern for the overall quality of the bridge project.

**{¶15}** Appellants assert that ODOT assumed the role of an active participant through Section 105.01. We conclude, however, that the section did not direct A&L's work activities, but preserved ODOT's general supervisory role over the bridge project.

**{¶16}** Alternatively, relying on *Semadeni v. Ohio Dept. of Transp.*, 75 Ohio St.3d 128, 1996-Ohio-199, appellants claim that ODOT is liable for not stopping work pursuant to Section 105.01. In *Semadeni*, the Supreme Court of Ohio ruled that ODOT was liable for injuries from its negligence in failing to timely implement a policy that required it to install fencing on selected overpasses. Id. at 132-33. The policy in *Semadeni* was mandatory, whereas Section 105.01 merely authorized, but did not require, work suspension. In addition, *Semadeni* has nothing to do with the duty owed to employees of independent contractors; the case applies to the traveling public, which is a class to whom ODOT plainly owes a duty. See *Lumbermens Mut. Cas. Co. v. Ohio Dept. of Transp.* (1988), 49 Ohio App.3d 129, 130. We have already discussed case law addressing whether ODOT owes a duty of care to employees of contractors, and that case law establishes no duty to A&L's employee Theodore because ODOT did not actively participate in A&L's sandblasting.

**{¶17}** Accordingly, we conclude that the Court of Claims did not err by granting summary judgment in favor of ODOT. We overrule appellants' two assignments of error and affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

SADLER and McGRATH, JJ., concur.