

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JOHN R. JURGENSEN COMPANY

Case No. 2006-02374

Plaintiff

Judge J. Craig Wright

v.

DECISION

DEPARTMENT OF
TRANSPORTATION

Defendant

{¶1} On March 9, 2006, plaintiff filed this action against defendant seeking indemnity or contribution. The issues of liability and damages were not bifurcated and the case proceeded to trial on both issues.

{¶2} Plaintiff, a general contractor, was the successful bidder on a construction project administered by defendant to improve the intersection of U.S. Route 40 and State Route (SR) 49 in Montgomery County, Ohio. The parties executed a contract for the project in May 1993. Heritage Insurance Company (Heritage) was plaintiff's liability insurer on the project.

{¶3} On August 12, 1993, plaintiff's electrical subcontractor, Sydney Electric Co. (Sydney), altered the traffic light phasing at the intersection from a "three-phase" sequence to a "two-phase" sequence. The three-phase sequence had allowed eastbound and westbound traffic on U.S. Route 40 to proceed simultaneously but allowed only one direction of traffic to proceed at a time on SR 49. The new two-phase sequence permitted traffic on SR 49 to proceed in both directions at the same time. Thus, a vehicle proceeding southbound on SR 49 was required to yield to traffic heading northbound on SR 49 before making a left turn onto eastbound U.S. Route 40. Sydney did not provide defendant with the contractually mandated three-day notice of such change.

{¶4} Although it was the understanding of both plaintiff and defendant that implementation of the phasing change would occur much later than August 12, 1993,

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neither defendant's District Seven Traffic Engineer, Philip Stormed, nor its Project Engineer, Scott Kasler, instructed Sydney to restore the three-phase sequence at the intersection. Defendant's plan also specified that once the phasing sequence had been changed, temporary signs reading, "Signal Operation Changed," were to be posted to inform motorists of the change; however, those signs were not installed until February 1994.

{15} On January 22, 1994, Thora Roweta Moore suffered fatal injuries in an automobile accident when her vehicle was struck by a truck heading north on SR 49 as Moore attempted to turn her vehicle from southbound SR 49 onto eastbound U.S. Route 40. Emergency Medical Technician Michel Ferguson arrived at the scene shortly after the collision. According to Ferguson, Moore was conscious when she began medical treatment, and that as she assessed Moore's condition, Moore stated: "What happened? What happened? I don't understand what happened. I thought I had the light." On January 26, 1994, Moore died as a result of the injuries she sustained.

{16} The executor of Moore's estate sued plaintiff in the Montgomery County Court of Common Pleas. Subsequently, a jury found in favor of the estate and returned a verdict in an amount of \$750,000 in damages, less 35 percent comparative negligence attributed to Moore, for a net verdict of \$487,500. Heritage paid the judgment in full on plaintiff's behalf. Pursuant to its insurance policy with Heritage, plaintiff paid a \$50,000 deductible toward the net verdict.

{17} On January 13, 1999, Heritage and plaintiff jointly sued defendant (Ct. of Cl. No. 1999-01250), for indemnification and/or contribution. On January 30, 2006, Case No. 1999-01250 was dismissed pursuant to Civ.R. 41(A)(1)(b). On March 9, 2006, plaintiff refiled its claim.¹

¹Heritage refiled its claim on March 9, 2006, in Ct. of Cl. No. 2006-02366.

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{¶8} Plaintiff alleges that defendant negligently maintained the intersection and that it is entitled to indemnification and/or contribution from defendant for the \$50,000 it paid to Heritage after Heritage satisfied the judgment rendered against plaintiff in the Montgomery County Court of Common Pleas.

{¶9} “Contribution, when it exists, is the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice. Indemnity, on the other hand, arises from contract, express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.” *Travelers Indemnity Co. v. Trowbridge* (1975), 41 Ohio St.2d 11, paragraph 2 of the syllabus.

{¶10} Plaintiff’s indemnity and contribution action is premised upon defendant’s negligence. In order for plaintiff to prevail upon its claim of negligence, it must prove by a preponderance of the evidence that defendant owed Moore a duty, that defendant’s acts or omissions resulted in a breach of that duty, and that the breach proximately caused Moore’s injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶11} Plaintiff claims that defendant did not provide it with notice of the premature change in traffic light phasing at the intersection. Absent such notice, plaintiff contends that it was not made aware of any need for temporary signage to warn motorists of that change. Plaintiff further alleges that if it is determined that defendant was negligent and that defendant’s negligence was a proximate cause of Moore’s death, then defendant should be liable to plaintiff for indemnification in that plaintiff’s negligence was passive or secondary, whereas defendant’s negligence was active or primary.

{¶12} As an alternative theory of relief, plaintiff alleges that the negligence of defendant combined with its own negligence to produce plaintiff’s injury. Under this theory,

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plaintiff may recover from defendant in contribution inasmuch as plaintiff would be a joint tortfeasor who has paid more than its proportionate share of Moore's damages.

{¶13} Defendant has asserted several defenses to plaintiff's claims. First, defendant argues that it did not breach a duty of care owed to Moore. Second, defendant argues that its negligence, if any, was not a proximate cause of Moore's death. Finally, defendant argues that even if its negligence was a proximate cause of Moore's death, Moore's contributory negligence was greater than the combined negligence of both defendant and plaintiff.

{¶14} For the reasons that follow, the court finds that defendant was negligent but that Moore's own contributory negligence was greater than the combined negligence of both defendant and plaintiff.

{¶15} Plaintiff's expert witness, William T. Jackman, P.E. , testified that the purpose of the temporary signage was to warn local motorists who had become accustomed to the "three-phase" sequence that the traffic light phasing had changed. According to Jackman, defendant was negligent in permitting an early change in the phasing at the intersection without notifying plaintiff of the need for temporary signage or otherwise assuring that such signage was erected. Jackman was also of the opinion, however, that Moore's own negligence in failing to yield to oncoming traffic proximately caused her death.

{¶16} It is not disputed that Moore resided in Pittsburgh, Ohio, approximately eight to ten miles from the intersection of SR 49 and U.S. Route 40. Moore's adult son, Kenneth Holt, had lived with his mother at her Pittsburgh residence for approximately one year before moving to another city and he was familiar with her driving habits. Holt estimated that his mother traveled through the intersection of SR 49 and U.S. Route 40 four or more times per week from August 12, 1993, the date when the phasing was changed, through January 22, 1994, the date of the accident. Based upon this undisputed evidence, the court finds that Moore traveled through this intersection on more than 80 occasions between the time that the phasing was changed and the date of her fatal accident. Given

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this frequency of travel, the only reasonable inference to draw from the evidence is that a reasonably prudent motorist in Moore’s position either knew, or should have known, that before making a left turn onto eastbound U.S. Route 40, a vehicle proceeding southbound on SR 49 must yield to traffic heading northbound on SR 49.

{¶17} The circumstances of this accident combined with the fact that plaintiff was contractually responsible for traffic control on this project convince the court that defendant’s failure to notify plaintiff of the early change in phasing was not a proximate cause of Moore’s fatal crash. Defendant’s negligent conduct was simply too remote to have been a substantial factor in bringing about Moore’s death. See *Jeffers v. Oxelo* (1989), 43 Ohio St.3d 140 (finding that a company that supplied helium tanks for a county fair would not be held liable for a helium inhalation death where the tanks had been left at the site for several weeks after the fair had ended and where another party was contractually responsible for removing the tanks).

{¶18} Moreover, even if the court were to conclude that defendant’s negligence was a proximate cause of Moore’s death, the facts and circumstances of this case compel the court to find that Moore’s contributory negligence was greater than the combined negligence of both plaintiff and defendant.

{¶19} R.C. 4511.39 provides in relevant part:

{¶20} “(A) No person shall turn a vehicle * * * or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety * * *.”

{¶21} R.C. 4511.42 states:

{¶22} “(A) The operator of a vehicle * * * intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle * * * approaching from the opposite direction, whenever the approaching vehicle * * * is within the intersection or so close to the intersection, * * * as to constitute an immediate hazard.”

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{¶23} Pursuant to the stipulation of facts filed by the parties, it is agreed that the fatal accident occurred during daylight hours; on a dry roadway under circumstances where Moore had a clear and unobstructed view of traffic northbound on SR 49. Based upon the evidence submitted in this case and the stipulation of facts, the court finds that Moore did not have the right-of-way as she proceeded to turn her vehicle at the intersection, and she did not exercise due care when making a left turn into the path of oncoming traffic.

{¶24} R.C. 2315.33, entitled “Effect of contributory fault on right to recover,” provides in relevant part:

{¶25} “The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action.”

{¶26} The parties have agreed that this court is not bound by the jury’s apportionment of fault in the Montgomery County action. Based upon the evidence presented in this case, the court finds that Moore’s contributory negligence was greater than the combined negligence of both plaintiff and defendant. In fact, contrary to the finding of the jury in Montgomery County, the court assesses Moore’s contributory negligence at 60 percent of the total. Therefore, by operation of R.C. 2315.33, Moore is legally barred from recovering damages from either Jurgensen or defendant. Therefore, Jurgensen has no legal right to recover from defendant under either a theory of indemnity or contribution. Accordingly, judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

DEPARTMENT OF
TRANSPORTATION

Defendant

This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

cc:

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