[Cite as *Krystalis v. Ohio Dept. of Transp.*, 2009-Ohio-631.]

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

THEODORE KRYSTALIS, et al.

Plaintiffs

v.

THE OHIO DEPARTMENT OF TRANSPORTATION

Defendant
Case No. 2004-07247

Judge Joseph T. Clark

DECISION

{¶ 1} On September 30, 2008, defendant Ohio Department of Transportation (ODOT), filed a motion for summary judgment, pursuant to Civ.R. 56(B). Plaintiffs filed a response on October 31, 2008. Defendant filed a reply on November 10, 2008. The case came before the court on November 12, 2008, for an oral hearing on defendant's motion. At the request of the court, the parties filed stipulated facts on November 24, 2008.

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

minds can 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 or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} Plaintiff, Theodore Krystalis, was employed by Atlas Central Corporation (Atlas) to perform blasting and spray-painting operations on highway bridge projects.[1] Atlas and another painting company, L.M. Lignos Enterprise, formed a joint venture in 2000 under the name A&L Painting LLC (A&L). ODOT contracted with A&L for the repair and repainting of the Lorain-Carnegie Bridge (Carnegie project). On June 16, 2002, three months after work commenced on the Carnegie project, plaintiff collapsed at the site and was subsequently diagnosed with lead poisoning. Plaintiff suffered toxic exposure to heavy metals and he remains permanently disabled. Plaintiff filed his complaint alleging claims of negligence and breach of contract. Plaintiff's wife filed a claim for loss of consortium.

{¶ 5} Plaintiff asserts that ODOT had a duty to protect him from undue exposure to hazardous and toxic chemicals and that ODOT was negligent in failing to ensure that he was provided with adequate personal protective gear for the job. Plaintiff further contends that pursuant to the language contained in ODOT's Construction and Material Specifications Manual (manual), which is incorporated into the contract, ODOT reserved the right to suspend work on the Carnegie project if ODOT determined that working conditions were unsafe. Plaintiff relies upon that part of the contract as the basis for his argument that ODOT had the responsibility to regulate workplace safety and to ascertain whether the work was performed in a manner that did not unduly harm A&L's employees or the traveling public. Defendant acknowledges that it has a statutory duty to protect the traveling public from unreasonable harm; however, it contends that such duty does not create a duty owed to an employee of a contractor, such as plaintiff. In addition, ODOT insists that the contract assigned to A&L the duty to provide a safe working environment and to ensure the safety of its own workforce.

[1]For the purposes of this decision, plaintiff shall refer to Theodore Krystalis.

{¶ 6} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his 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.

{¶ 7} It is undisputed that ODOT informed A&L that its employees would be exposed to lead and chromium while working at the Carnegie project. Supplemental Specification 815.04(C) stated that A&L would be "responsible to assure that workers take proper safety precautions when working in this environment." In addition, because the chemicals become airborne during blasting operations, A&L was required by the contract to provide its employees with personal protective equipment and to erect containment enclosures composed of flexible tarp-like materials. See Supplemental Specification 815.04(C) .

{¶ 8} Further, defendant maintains that section 107.14 of the manual states that A&L was responsible for all claims of any type brought on account of injury sustained by persons as the result of "neglect in safeguarding the work or through the use of unacceptable materials in the construction of the improvement or on account of any act or omission" of A&L or its agents.

{¶ 9} Where a contract is clear and unambiguous, a court should apply and enforce the contract as written as a matter of law. *Latina v. Woodpath Dev. Co.* (1990), 57 Ohio St.3d 212, 214. Also, "it is not the responsibility or function of the court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 362, 1997-Ohio-202. A contract will be read as a whole, and each of its provisions will be given effect. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 89, 2004-Ohio-24. A court will not apply a contract in such a way that is inconsistent with the contract's express terms. Id. Further, courts will not "thwart the intentions of parties to a contract, who must be allowed to bargain freely to allocate the risks attendant to their undertaking * * *." *Corporex Dev. & Constr. Mgmt. v. Shook, Inc.*, 106 Ohio St.3d 412, 416, 2005-Ohio-5409. In short, parties are free to define their relationship by contract. See *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989) , 42 Ohio St.3d 40, 42

("holding that parties to a commercial transaction should remain free to govern their own affairs").

{¶ 10} Section 105 of ODOT's manual reads as follows: "[ODOT] will have the authority to suspend the work wholly or in part due to the failure of [A&L] to correct conditions unsafe for the workers or the general public, for failure to carry out provisions of the contract and to carry out orders." According to plaintiff, this language obligates ODOT to oversee and regulate workplace safety for the specific benefit of A&L's employees.

{¶ 11} Plaintiff relies on the holding in *Semadeni v. Ohio Dep't of Transp.*, 75 Ohio St.3d 128, 1996-Ohio-199, as authority for his position that once ODOT adopted a policy to oversee the project it had a duty to implement safety inspections and controls at the worksite. The court finds that plaintiff's reliance on *Semadeni* is misplaced. In *Semadeni,* the Supreme Court of Ohio held that "pursuant to Policy 1005.1, ODOT's agents and employees were under a mandatory duty to complete [bridge overpass] fencing within a reasonable time. In a nearly five-year period, ODOT fenced only a small minority of the bridges which it had itself deemed to be in mandatory need of fencing * * *. Failure to timely implement Policy 1005.1 as to bridges highest in priority undoubtedly resulted in even greater delay in fencing bridges further down the list of priority * * *. We hold that, pursuant to R.C. 2743.02, ODOT is not immune from plaintiff's claims of liability. We conclude on this record that reasonable minds could only find that ODOT was negligent in failing to timely implement Policy 1005.1, and that its negligence was a proximate cause of Pietro Semadeni's death." Id. at 133. The court notes, however, that in *Semadeni*, ODOT had mandated that certain overpasses were to be retrofitted with protective fencing. The court found ODOT liable based upon the court's determination that delay in the installation of fencing constituted an unreasonable length of time. Here, the court does not find that ODOT announced a decision to regulate workplace safety, ODOT merely retained the authority to suspend bridge-painting operations in the event that an unsafe condition arose.

{¶ 12} Plaintiff argues that such contractual obligation placed ODOT in the role of being an active participant in directing the manner in which A&L provided a safe working environment for its employees. The court disagrees. The court notes that pursuant to

Ohio case law, an owner owes no duty to an employee of an independent contractor to ensure such employee's safety unless the owner actively participates in the contractor's work. Active participation has been described as instances where the owner directs or exercises control over the work or over a critical element of the work as opposed to exercising a general supervisory role. See *Hirschback v. Cincinnati Gas & Electric* Co. (1983), 6 Ohio St.3d 206; *Cafferkey v. Turner Construction Company* (1986), 21 Ohio St.3d 110; *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628, 1998-Ohio-341, (finding that an issue of fact existed regarding whether Ohio Edison had created a duty to the independent contractor's employee inasmuch as Ohio Edison had exerted control over a critical aspect of the employee's working environment).

{¶ 13} Defendant contends that the contract merely allows ODOT to monitor the progress of the work and to retain supervisory authority over the project. The court agrees. Retention of the authority to monitor or to supervise a construction project does not constitute active participation. *Bond v. Howard Corporation*, 72 Ohio St.3d 332, 1995-Ohio-81. A "concern for safety, which was evidenced in a variety of ways, does not constitute the kind of active participation in [the contractor's] work that is legally required to create a duty of care extending from [the owner] to [the contractor's] employees." *Sopkovich,* supra, at 640. Upon review, the court finds that the contract language is clear and unambiguous. Moreover, the court finds that according to the terms and conditions of the contract, A&L had sole responsibility for the safety of its workers, including plaintiff.[2]

{¶ 14} According to the complaint, plaintiff also asserts that he is a third-party beneficiary of the contract "who has been forced to endure injury, pain, suffering and economic loss by reason of ODOT's breach of the Bridge Contract." Plaintiff's claim for breach of contract must fail, inasmuch as section 107.14 of the contract states that "[n]othing in the Contract including but not limited to the plans, bid proposals, specifications and insurance requirements is intended to create in the public or any member thereof a third party beneficiary hereunder, nor is any term and condition or

[2]To the extent that plaintiff cited to R.C. 4167.07 as statutory authority that ODOT owed a duty to plaintiff, the court finds no merit in such argument inasmuch as the statute refers to a public employer's duty to provide a safe employment environment to public employees.

other provision of the contract intended to establish a standard of care owed to the public or any member thereof." In addition, plaintiff's complaint is limited to allegations of personal injury and damages flowing therefrom.

{¶ 15} "A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 736 N.E.2d 517, 532. Before a third-party beneficiary can enforce that contract, however, the individual must be an intended beneficiary, as opposed to merely an incidental beneficiary. *Hill v. Sonitrol of Southwestern Ohio, Inc*. (1988), 36 Ohio St.3d 36, 521 N.E.2d 780. It is not necessary for the third party to be expressly identified in the contract, however, the contract must have been made and entered into with the intent to benefit that individual. See *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 436, 674 N.E.2d 731; see, also, *Norfolk & Western Co. v. U.S.* (C.A.6, 1980), 641 F.2d 1201, 1208." *Bungard v. Dep't of Job & Family Servs*., Franklin App. No. 07AP-447, 2007-Ohio-6280, ¶23. Upon review, the court finds that plaintiff is not a party to the contract and that plaintiff's breach of contract claim fails as a matter of law. The court further finds that the loss of consortium claim is derivative of the central cause of action. Thus, the derivative claim fails as well. See *Breno v. City of Mentor,* Cuyahoga App. No. 81861, 2003-Ohio-4051.

{¶ 16} Based upon the foregoing, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

Plaintiffs

v.

THE OHIO DEPARTMENT OF TRANSPORTATION

Defendant
Case No. 2004-07247

Judge Joseph T. Clark

JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
JOSEPH T. CLARK
Judge

cc:

Jeffrey W. Harris
Jerald D. Harris
Tower of Blue Ash, Suite 301
9545 Kenwood Road
Cincinnati, Ohio 45242

Mark A. VanderLaan
Richard P. Corthell
1900 Chemed Center
255 East 5th Street
Cincinnati, Ohio 45202-3172

Susan M. Sullivan
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

SJM/cmd/Filed January 6, 2009/To S.C. reporter February 10, 2009