[Cite as *Simmons v. Ohio Dept. of Transp.*, 2015-Ohio-5641.]

DAVID B. SIMMONS Plaintiff v. OHIO DEPARTMENT OF TRANSPORTATION Defendant/Third-Party Plaintiff v. FECHKO EXCAVATING, INC. Third-Party Defendant	Case No. 2013-00442 Judge Patrick M. McGrath JUDGMENT ENTRY

{¶1} On June 11, 2015, the magistrate recommended judgment in favor of plaintiff, David B. Simmons, and against defendant/third-party plaintiff, Ohio Department of Transportation (ODOT), in the amount of $8,668.38. He further recommended that judgment be entered in favor of ODOT and against third-party defendant, Fechko Excavating, Inc. (Fechko), on a third-party claim in the amount of $8,668.38.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: "[a] party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." All three parties filed objections to the magistrate's decision and ODOT and Fechko also filed responses to plaintiff's objections.

{¶3} This matter arises out of an incident that occurred on December 8, 2011. On that day, a sign outside plaintiff's pet store was damaged when one of Fechko's employees backed into it with a dump truck which was attached with a large front-end loader. The accident occurred during the early stages of a highway construction project

for which ODOT was responsible and Fechko was the contractor. Plaintiff filed a claim against ODOT in this court and ODOT, in turn, filed a third-party complaint for indemnification against Fechko. A trial was held on the issues of liability and damages.

{¶4} In his decision, the magistrate noted that during trial, ODOT acknowledged and did not dispute the assertion that its duty during highway construction was nondelegable. The magistrate also found that ODOT entered into a contract delegating highway construction work to Fechko, whose employee negligently backed a dump truck into plaintiff's sign and caused damage. Additionally, he found that the operator's actions most likely occurred within an area where Fechko was directed to work by ODOT and, whether through mistake or otherwise, worked with ODOT's ratification. Consequently, the magistrate found ODOT vicariously liable because it was engaged in "inherently dangerous work" and as a result could not insulate itself from liability stemming from its contractor's employee's negligent actions. *See Pusey v. Bator*, 94 Ohio St.3d, 275, 279 (2002).

I. ODOT's objections

A. The magistrate's finding that "the actions of the Fechko employee in the operating loader around the sign occurred within the scope of Fechko's authority" is against the manifest weight of the evidence.

B. The magistrate's finding that "the evidence demonstrates that the operator's actions were clearly incidental to the work Fechko was hired to do and, more likely than not, occurred within an area either where Fechko had been directed to work by ODOT or, whether through mistake or otherwise, where Fechko worked with ODOT's ratification" is against the manifest weight of the evidence.

C. The magistrate erred by finding ODOT liable. As a legal principle, ODOT cannot be liable for the negligent acts of a contractor that occur outside the scope of the construction project.

{¶5} ODOT discusses the above three objections together and maintains it did not ratify Fechko's use of plaintiff's parking lot, a private lot, as part of the construction

zone. As a result, it states that it cannot be responsible for Fechko's employee's negligent acts (ODOT's "construction zone" argument). To bolster this argument, ODOT points to plaintiff's testimony during trial, when he indicated that prior to the commencement of the project, ODOT had informed him that his parking lot would not be used for construction purposes. Moreover, it states that operating a dump truck with a front-end loader attached to it is not inherently dangerous.

{¶6} Initially considering the construction zone argument, ODOT first introduced it during trial, without citing specific case law or evidence establishing right-of-way boundaries or easements. While admitting it could be liable for the negligent actions of its contractors, ODOT emphasized that the accident must occur within the construction zone. Now, in its objections, ODOT states that "as a matter of policy and sound legal reasoning, it cannot be held liable when a contractor's negligent actions occur outside the scope of the construction project." To support this proposition, it cites a California case, *Privette v. Superior Court*, 5 Cal. 4th 689 (1993), which refers to this theory as "collateral negligence." However, *Privette* primarily discusses a conflict in California between tort law and its workers' compensation system. *Id.* at 692. Notably, even that court said: "as we have also acknowledged, it is often difficult to distinguish those risks that are inherent in the work from those that are collateral, and the line to be drawn between the two types of risks is 'shadowy.'" *Id.* at 696.

{¶7} Under the nondelegable duty doctrine, an employer is held liable for the negligent actions of its contractor in one of two situations: "(1) affirmative duties that are imposed on the employer by statute, contract, franchise, charter, or common law and (2) duties imposed on the employer that arise out of the work itself because its performance creates dangers to others, *i.e.*, inherently dangerous work." *Pusey* at 279. Here, testimony at trial established that ODOT was ultimately in charge of this extensive construction project. Plaintiff's business is only 50 feet from the highway and his sign is at the outer edge of his parking lot, as little as 10 feet from the curb of the highway in its

finished state. Moreover, Sergeant Campbell, in whose jurisdiction the project took place and who worked special duty directing traffic through the construction zone many times, testified that he observed construction activity in nearly all the parking lots of businesses along the highway in this area throughout that time. As a result, the magistrate was correct in finding that ODOT was liable based on the proximity of plaintiff's sign to the highway, Sgt. Campbell's testimony, and the fact that ODOT did not present evidence establishing that the sign was outside the construction zone.

{¶8} Next, ODOT claims that operating a dump truck with a front-end loader attached to it is not inherently dangerous. For this particular proposition, it relies on *Gore v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 02AP-996, 2003-Ohio-1648, ¶ 27-29 (holding ODOT not liable for an independent contractor's negligence because mowing a lawn along highway is not inherently dangerous). But, as noted in *Pusey*, "[t]he inherently-dangerous-work exception does apply, however, when special risks are associated with the work such that a reasonable man would recognize the necessity of taking special precautions * * *" *Pusey* at 280; citing 2 Restatement of the Law 2d, Torts, at 385, Section 413, Comment b; Prosser & Keeton at 513-514, Section 71. Here, ODOT was not simply removing dirt from the highway; it was actively engaged in an extensive, two-year, construction project to rebuild and improve the highway in the area. Testimony during the trial indicated that the loader was capable of piling up dirt five feet high. A picture of the loader was admitted into evidence by plaintiff and indicates that it is a large, heavy piece of construction equipment. Joint Trial Exhibit 11. The driver needed to climb a ladder to reach the cab of the vehicle. The top of the loader was at least 2-3 times higher than the tires. *Id.* There were overhead power lines traversing the parking lot and several feet from plaintiff's sign. Joint Trial Exhibits 3, 7, and 9. Additionally, trial testimony indicated that after Fechko's employee struck the sign, its pole was leaning on the overhead electrical wires. *Id.* The testimony also indicated that this created a condition that was inherently dangerous. The facts in this

situation are markedly different from *Gore* and the court's holding there is not applicable here. For these reasons, defendant's first three objections are OVERRULED.

D. The magistrate erred when he stated that "ODOT acknowledged the legal authority underlying Simmons' position regarding its affirmative highway construction duty, and did not dispute the assertion that its duty under the circumstances presented in this case was nondelegable."

{¶9} In its last objection, ODOT states that the magistrate mischaracterized its position on whether it was liable for Fechko's employee's negligent actions. It maintains that it did not state "its duty under the circumstances presented in this case was nondelegable." Furthermore, it reiterates its construction zone argument, adding that if it were to state that its duty was nondelegable, then ODOT would be liable for Fechko's employee's negligent conduct, regardless of where it occurred.

{¶10} The trial transcript reads:

{¶11} MR. WALKER: The State of Ohio, as I understand, will make a motion for involuntary dismissal pursuant to Civ.R. 41(B)(2), I think it is.

{¶12} The plaintiff, as I understand, his case is that ODOT—and parenthetically, this is a case where the plaintiff has sued ODOT and not Fechko. ODOT in turned sued Fechko. So I'm going to focus on the direct case that the plaintiff has against ODOT. And they—we think it is quite clear that the claim for liability and damages rests with Fechko, whom they did not sue, not ODOT. And their theory of liability, I suppose, is based on the fact that they believe this incident occurred in a construction zone. There is a body of case law that says that ODOT can be held liable for a contractor's negligence if it involves something or an incident occurs within a construction zone. And then, of course, ODOT can then seek indemnification. That's not the case here. We've heard Mr. Simmons say rather emphatically, and he was quite clear on this, he talked to ODOT, Ms. Smiegielski, and she told him that his parking lot would not be part of the construction zone. * * *

{¶13} The point of fact is the accident, the incident occurred outside the confines of the construction zone. ODOT is entitled to judgment as a matter of law in its favor. Thank you. (Trial Transcript 111:20-113:18).

{¶14} When ODOT introduced its motion for involuntary dismissal during trial, it offered no evidence in the form of right-of-way boundaries or easements in support of its argument that Fechko's employee's negligence occurred outside the defined construction zone. ODOT pointed to plaintiff's testimony regarding statements made by Ms. Smielgielski, but she did not testify at trial. In fact, Sgt. Campbell testified that he observed construction activity in nearly all the parking lots of businesses along the highway in this area throughout that time. Additionally, ODOT did not refute that operating a loader is not inherently dangerous. As stated above, testimony indicates that when Fechko's employee backed into the sign, he created a condition that was inherently dangerous. Based on the evidence provided at trial, the magistrate was justified in holding that ODOT's duty in this situation was nondelegable. *See Pusey* at 27-28. Consequently, ODOT's fourth objection is OVERRULED.

II. Plaintiff's objections

A. Although there are two bases upon which ODOT is vicariously liable in this case for Fechko's actions, the magistrate's decision made no finding of fact or conclusion of law with respect to the first basis of vicarious liability: affirmative duty imposed by statute.

B. Regarding the second basis for imposing vicarious liability on ODOT in this case for Fechko's negligent acts, the magistrate's decision, although ultimately arriving at the proper conclusion, improperly considered ODOT's argument that Fechko's negligent act did not occur in the "construction zone."

{¶15} While principally agreeing with the outcome, plaintiff objects to the manner in which the magistrate arrived at his conclusions. With regard to plaintiff's first objection, the magistrate found ODOT liable under the second theory of the nondelegable doctrine because ODOT was engaged in inherently dangerous work. Simply put, the magistrate was not under a separate obligation to make a finding under the first theory and plaintiff points to no authority which indicates otherwise. As such,

there is no clear error in the magistrate's decision and consequently, plaintiff's first objection is OVERRULED.

{¶16} In its second objection, plaintiff indicates that the magistrate improperly considered ODOT's construction zone argument because it failed to include this "mandatory" argument in its pretrial statement. Plaintiff indicates that ODOT's construction zone argument is unsupported by law and evidence, and in support of this proposition, he provides a copy of a temporary easement that ODOT purportedly purchased from plaintiff prior to the commencement of the construction project. Plaintiff did not introduce this evidence during trial, but states that under Civ.R. 53(D)(4)(b) and (d), the court can consider the evidence.

{¶17} Civ.R. 53(D)(4)(d) states that "the court may hear additional evidence but *may refuse to do so* unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate" (emphasis added). Plaintiff introduces this evidence at this juncture because the construction zone argument "was never raised by ODOT prior to its closing argument." But, plaintiff does not state that he did not have access to this document until now. In fact, it is inexplicable why he did not introduce this piece of evidence, or even allude to it, when he filed his complaint or at trial. Additionally, plaintiff was apprised of the fact that ODOT may deny liability for the accident through affirmative defenses contained within its answer. Consequently, plaintiff's second objection is OVERRULED.

III. Fechko's objections

A. The magistrate erred in determining plaintiff proved ODOT had a duty to plaintiff which extended to the actions of Fechko's employee occurring on plaintiff's private property.

{¶18} Fechko's first objection is essentially a restatement of ODOT's construction zone argument. It states that it was incumbent upon plaintiff to prove that ODOT owed him a duty with regard to the actions taken by Fechko's employee upon plaintiff's

property. For the reasons stated above with regard to ODOT's first, second, and third objections, Fechko's first objection is OVERRULED.

B. The magistrate erred in determining that the alleged damage to plaintiff's real property was temporary and not permanent, and that the applicable measure of damages was the reasonable cost of restoration rather than the difference in market value of the real property.

{¶19} Fechko's next objection concerns the manner in which the magistrate assessed damages. It notes plaintiff testified that the damage to the pole and sign were permanent and could not be restored to their pre-injury condition. Consequently, it surmises the appropriate measure of damages as the difference in the market value of the property as a whole before and after the injury.

{¶20} "As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole." *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. "Although a party damaged by the acts of another is entitled to be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred." *Triangle Props. v. Homewood Corp.*, 10th Dist. Franklin No. 12AP-933, 2013-Ohio-3926, ¶ 52.

{¶21} "Under Ohio law, the measure of damages for permanent injury to real property is the difference in market value of the property as a whole, including the improvements thereon, before and after the injury." *Case Leasing & Rental, Inc. v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 09AP-498, 2009-Ohio-6573, ¶ 27, citing *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238 (1923). On the other hand, "[i]n an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market

value of the property as a factor bearing on the reasonableness of the cost of restoration * * * Either party may introduce evidence to support or refute claims of reasonableness, including evidence of the change in market value attributable to the temporary injury." *Martin v. Design Constr. Servs.*, 121 Ohio St.3d 66, 2009-Ohio-1, ¶ 24-25.

{¶22} In his decision, the magistrate found that because plaintiff's sign is affixed to the land, it constituted real property. Next, he noted that the damage to plaintiff's property was temporary, because it could be restored to its original condition, and found that the proper measure of damages was the reasonable cost of restoring the sign and the attached pole. Plaintiff's witness, Cliff Meyer, testified that sign companies, including his own, would not perform any work on the sign short of a total replacement because of the liability of repairing such a damaged sign. Moreover, even if it was possible to replace all the component parts, it would cost far more than erecting a new sign. According to Meyer, steel poles that have stood out in the elements like plaintiff's pole, should be replaced after about 40 years. He estimated that this particular pole appeared to be more than 20 years old.

{¶23} Based on the testimony above, the magistrate found that the most reasonable method of restoration was replacement of the pole and sign because repairs or partial replacements were not practicable. However, to avoid a windfall, the magistrate awarded plaintiff about half of the requested damages because of the sign's condition prior to the accident and the fact the pole was halfway through its useful life. Specifically, the magistrate computed the award amount of $8,668.38 as: $7,975 (half the $15,950 estimate from ABC Sign), sales tax of $518.38 based upon the 6.5% rate for Butler County, the $150 fee Simmons paid to obtain a zoning certificate from the West Chester Township Community Development Department, and the $25 filing fee Simmons paid to commence this action.

{¶24} Fechko's assertion that the damage to the pole and sign were permanent and they could not be restored to their pre-injury condition does not take into account that the magistrate found that both were *affixed* to the land. As a result, the focus of the damages assessment is whether the entire property could be restored to its original state prior to the accident. When permanent damage occurs to an item affixed to real property, it is considered to be only a temporary injury if the item can be replaced, because the replacement thereby restores the property to its original condition. *See Copeland v. Niedhamer*, 2nd Dist. Montgomery No. 9662, 1987 Ohio App. LEXIS 6687 (May 6, 1987) (holding that while damage to awnings affixed to a residence itself was permanent, injury to the entire real estate was only temporary and the wrong could be abated simply by replacing the awnings); *Stony Ridge Hill Condominium Owners Ass'n v. Auerbach*, 64 Ohio App. 2d 40 (6th Dist.1979) (holding that a defective roof is a temporary injury and compensatory damages for the cost of replacing the roof were appropriate). Here, the magistrate correctly found that both the pole and sign could be replaced and thereby plaintiff's real property would be restored. Therefore, Fechko's second objection is OVERRULED.

C. Assuming *arguendo* the magistrate was correct in determining the damage to the real property was temporary rather than permanent, the magistrate erred in awarding plaintiff other than nominal damages because of the complete lack of evidence presented as to the cost of restoration of the property.

{¶25} Next, Fechko asserts that plaintiff should have only received nominal damages because he did not present evidence regarding restoring the property. However, as noted above, with regard to temporary damage to real property, the reasonable cost of restoration includes the cost of replacing permanently damaged items affixed to the property. Furthermore, where there is temporary injury to noncommercial real estate, "the essential inquiry is whether the damages sought are reasonable." *Martin*, at ¶ 24-25. Based upon Meyer's testimony that ABC Sign would

not agree to perform any work on the sign short of a total replacement, Simmons's testimony that he contacted other sign companies who provided similar responses, and Meyer's testimony that if it were even possible to repair or replace all the component parts, it would cost far more than erecting a new sign, the magistrate found that the only reasonable method of restoration was a total replacement of the pole and sign assembly. The magistrate then adjusted plaintiff's award to half of the $15,950 estimate provided by ABC Sign (plus appropriate tax and a zoning certificate fee) to take into account for the fact that the sign and pole had been exposed to the elements for at least 20 years. Neither ODOT nor Fechko presented any contrary evidence calling into question the reasonableness of plaintiff's evidence. As a result, Fechko's third objection is OVERRULED.

{¶26} In light of the fact that neither ODOT nor Fechko presented case law or evidence supporting the construction zone argument, ODOT's objections and Fechko's first objection are OVERRULED. Additionally, plaintiff's objections are OVERRULED because he essentially agrees with the magistrate's outcome. Lastly, Fechko's second and third objections are OVERRULED because neither ODOT nor Fechko refuted the reasonableness of plaintiff's evidence regarding damages. The court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of plaintiff and against ODOT in the amount of $8,668.38. Furthermore, judgment is rendered in favor of ODOT and against Fechko on the third-party claim in the amount of $8,668.38. Court costs are assessed against ODOT. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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