[Cite as *Schuster v. Kokosing Constr. Co., Inc.* , 2010-Ohio-1459.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES V. SCHUSTER, et al.	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiffs-Appellants	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-COA-030
KOKOSING CONSTRUCTION COMPANY, INC.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas, Case No. 06-CIV-150
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	March 25, 2010

APPEARANCES:

For Plaintiffs-Appellants:	For Defendant-Appellee:
CHRISTOPHER J. REGAN JAMES B. STONEKING 1358 National Road Wheeling, WV 26003	MICHAEL J. VALENTINE Capitol Square 65 East State St., 4th Floor Columbus, OH 43215

Delaney, J.

{¶1} Plaintiffs-Appellants appeal the September 3, 2009 judgment of the Ashland County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee.

STATEMENT OF THE FACTS AND THE CASE

{¶2} During the winter of 2006, Defendant-Appellee, Kokosing Construction Company, was engaged in a highway construction project in the area wherein U.S. 250 dead-ends into U.S. 42, forming a "T" intersection. A stop sign is located on U.S. 250 to alert approaching motorists. As a result of the construction work, Appellee removed the stop sign and relocated it away from the edge of the roadway.

{¶3} On January 6, 2006, Plaintiff-Appellant, James Schuster, was traveling on U.S. 250 toward U.S. 42. Appellant did not see the stop sign, crossed through the intersection, and careened down an embankment, crashing into a ditch. He received injuries, as did his wife and son who were passengers in the vehicle.

{¶4} On April 14, 2006, Appellant, together with his wife and son, filed a complaint against Appellee, claiming negligence regarding the stop sign. On June 30, 2006, Appellants filed an amended complaint to include the city of Ashland as a party defendant. Appellants dismissed the city of Ashland on July 18, 2007.

{¶5} On July 26, 2007, Appellee filed a motion for summary judgment, claiming Appellants failed to establish the existence of a duty, a breach of that duty, and an injury resulting therefrom. By judgment entry filed September 7, 2007, the trial court denied the motion.

{¶6} A jury trial commenced on November 6, 2007. At the close of Appellants' case-in-chief, Appellee moved for a directed verdict. The trial court granted the motion, finding there was no evidence to establish the location of the stop sign violated Section 2B.06 of the Ohio Manual of Uniform Traffic Control Devices. A judgment entry journalizing this decision was filed on November 16, 2007.

{¶7} Appellants appealed the trial court's decision to this Court. On September 30, 2008, we reversed the judgment of the trial court and remanded the matter for further proceedings in accordance with our opinion. In *Schuster v. Kokosing Construction Company*, 5th Dist. No. 07COA049, 2008-Ohio-5075 ("*Schuster I*"), we found there was ample evidence in the record, when construed most favorably to Appellants, that a jury could find negligence on behalf of Appellee.

{¶8} When the case returned to the trial court, the trial court requested that Appellee file a motion for summary judgment. Appellee filed a motion for summary judgment to which Appellants responded. On September 3, 2009, the trial court granted summary judgment in favor of Appellee. The trial court found there was no genuine issue of material fact that Appellee did not owe Appellants a duty because the evidence demonstrated that Appellee followed the plans and specifications in regards to the placement of the stop sign and the repaving project.

{¶9} It is from this decision Appellants now appeal.

{¶10} Appellants raise one Assignment of Error:

{¶11} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT, KOKOSING, WHERE DOING SO DIRECTLY CONFLICTED WITH THIS COURT'S PRIOR OPINION."

{¶12} This appeal comes to us upon the trial court's decision pursuant to Civ.R. 56. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶13} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶14} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶15} Appellants argue the trial court erred in granting summary judgment in favor of Appellee as it was in contravention of this Court's previous decision. We agree.

{¶16} In order to analyze Appellants' argument, we will review the trial court's decision on directed verdict in comparison to its summary judgment decision. In the trial court's November 16, 2007 judgment entry granting a directed verdict in favor of Appellee, the trial court cited the rule of law regarding contractual duty as stated in *Farr*

v. Safe-Way Barricades (June 12, 1998), 6th Dist. No. L-97-1258 and *Jackson v. City of Franklin* (1988), 51 Ohio App.3d 51, 53, 554 N.E.2d 932:

{¶17} "An actionable negligence claim requires a showing of the existence of a duty on the part of the Defendant toward the Plaintiff, a violation of that duty and an injury proximately resulting therefrom. In the case of a contractor who performs work specified by someone else, courts have held that 'the contractor is not liable if he has merely carried out carefully the plans, specifications and directions given him, since in that case, the responsibility is assumed by the employer, at least where the plans are not so obviously defective and dangerous that no reasonable man would follow them.'"

{¶18} The trial court went on to find in its decision granting Appellee a directed verdict that Appellants failed to present evidence, expert or otherwise, that the location of the stop sign was in violation of the ODOT plans and specifications, specifically Section 2B.06 of the Ohio Manual of Uniform Traffic Control Devices. The trial court found that Appellants failed to establish the "signs placement violated Section 2B.06 or that the sign's placement was negligent." (Nov. 16, 2007 judgment entry). Because Appellants could not prove Appellee's negligence under the rule of law as stated in *Farr*, supra, the trial court found that Appellants' case must fail.

{¶19} On appeal, we reviewed the trial court's decision pursuant to Civ.R. 50(A)(4). We found that a reading of the trial testimony and a review of the evidence in a light most favorable to Appellants established the following facts:

{¶20} "1. The stop sign was replaced after the completion of the construction project, and was not in compliance with the specifications of the contract, even though appellee was specifically instructed to comply. T. at 43-44.

{¶21} “2. The 12' placement of the stop sign from the white edge line was discussed, but not complied with. T. at 49. The stop sign was 20' from the white edge line. T. at 139.

{¶22} “3. On November 10, 2005, an Ohio Department of Transportation engineer opened the roadway with the stop sign in the wrong place. T. at 56.

{¶23} “4. The Ohio Department of Transportation accepted the work that appellee had performed. T. at 60.

{¶24} “5. On December 14, 2005, the Ohio Department of Transportation requested a bid to correct the placement of the stop sign to be compliant with the 12' specification. T. at 78-80; Plaintiff's Exhibit 19.

{¶25} “6. The regulations in the Ohio Manual for Uniform Traffic Control Devices govern the placement of the stop sign. T. at 92-93.

{¶26} “7. The accident occurred prior to the correction of the stop sign placement.

{¶27} “8. There was expert opinion testimony from Kevin Theriault that the stop sign's placement was a factor in appellant's failure to see the sign. T. at 119-120.

{¶28} “9. There was testimony that a headlight would not illuminate a stop sign placed 20' from the white edge line. T. at 139.

{¶29} “10. Appellant testified he was aware that there should be a stop sign in the area and was searching for it. T. at 148. He never saw the stop sign. T. at 149, 178, 184-185.

{¶30} "11. Plaintiff's Exhibit 19, the letter from the Ohio Department of Transportation, set forth the placement requirements, and appellee's failure to fulfill those requirements." *Schuster I*, supra, ¶24-35.

{¶31} We went on to hold that:

{¶32} "* * * despite the lack of engineering expertise by appellants' witness, Mr. Theriault, there was ample evidence in the record, when construed most favorably for appellants, that a jury could find negligence on behalf of appellee. Plaintiff's Exhibit 19, signed by an engineer from the Ohio Department of Transportation, was sufficient to meet the burden. Further, there was testimony from appellant and Mr. Theriault that the stop sign was not visible at 20' from the white edge line." Id. at ¶ 36.

{¶33} The matter returned to the trial court for further proceedings and the trial court accepted summary judgment motions. On September 3, 2009, the trial court granted summary judgment in favor of Appellee. The trial court determined that the summary judgment motion raised a new issue under the theory of negligence distinct from the directed verdict decision.

{¶34} In a negligence action, a plaintiff must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. The trial court stated that the directed verdict decision determined that Appellants failed to present evidence on Appellee's "negligence," or more specifically, "breach of a duty."

{¶35} The trial court then differentiated the issue in the second summary judgment motion from that in the directed verdict. The trial court stated, "[w]hile the Court of Appeals found there was sufficient evidence on negligence (the failure to exercise ordinary care), which is the same as the breach of duty, the Court of Appeals

did not comment on, analyze or make any holding on the sufficiency of the evidence with the regard to the existence of a duty. In the absence of the existence of a duty, Kokosing cannot be held liable for negligence. Defendant Kokosing's motion for summary judgment on the issue of whether or not Kokosing had a duty is properly before the Court and the Court will analyze the issue." (Sept. 3, 2009 judgment entry).

{¶36} The trial court then utilized the rule of contractual duty as stated in *Farr*, supra, to show that Appellants failed to establish an existence of Appellee's duty. *Farr* states that:

{¶37} "In order to establish actionable negligence, 'one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom.' * * * " *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. The threshold inquiry, therefore, is whether Safe-Way owed a duty to appellant. In cases where, as here, a party agrees to perform services pursuant to a contract, he has a duty to use ordinary and reasonable care in the execution of his contractual duties. See *Berger v. American Bldg. Inspection, Inc.* (May 2, 1997), Lake App. No. 96-L-114, unreported, citing *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 482 N.E.2d 955. A plaintiff may establish a defendant's failure to exercise ordinary care by demonstrating that the defendant knew or should have known of an alleged hazard and failed to remove it or warn the plaintiff of its existence. *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31, 303 N.E.2d 81.

{¶38} "* * *

{¶39} "Generally, once a contractor has agreed to undertake performance of a contract with ODOT, the contractor cannot be held liable for negligence unless he does not follow the plans and specifications or unless the plans are so obviously defective that no reasonable person would follow them. *Jackson v. City of Franklin* (1988), 51 Ohio App.3d 51, 53, 554 N.E.2d 932. In addition, the duty to use ordinary care as set forth above in regard to Safe-Way, also applies to Gerken." *Farr*, supra.

{¶40} The trial court analyzed the facts developed in Appellants' case-in-chief at the November jury trial. It then found, as a matter of law, Appellee complied with the plans and specifications of the repaving project and placement of the stop sign. The trial court concluded that under *Farr*, Appellee owed no duty to Appellants; therefore, Appellee was not liable in negligence.

{¶41} Upon our review of the trial court's decision on summary judgment, we find that it is in contravention with our previous decision in *Schuster I* and therefore, the law of the case doctrine applies. In *Hopkins v. Dyer,* 104 Ohio St.3d 461, 820 N.E.2d 329, 2004-Ohio-6769, the Ohio Supreme Court discussed the law of the case doctrine and stated as follows:

{¶42} "The law of the case is a longstanding doctrine in Ohio jurisprudence. '[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *Nolan v. Nolan,* 11 Ohio St.3d at 3, 11 OBR 1, 462 N.E.2d 410. The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of

superior and inferior courts as designed by the Ohio Constitution. *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343." *Hopkins*, ¶15.

{¶43} While the trial court attempts to distinguish the directed verdict decision and the second summary judgment decision as being decided on the different issues of "breach of duty" and "existence of duty," we find the contrary -- the trial court utilized the same theory of contractual duty as stated in *Farr* for both decisions.

{¶44} *Farr* states that a defendant will not be liable for negligence if it is shown that it followed the plans and specifications. The issue as analyzed by the trial court in both decisions was whether Appellants established that Appellee followed the plans and specifications in placing the stop sign during the repaving project. We found in *Schuster I* there was adequate evidence, reviewed in a light most favorable to Appellants, to allow a jury to find that Appellee was negligent in that it did not follow the plans and specifications in the placement of the stop sign during the repaving project. The trial court's finding on summary judgment that the evidence established in Appellants' case-in-chief, reviewed in a light most favorable to Appellants, shows that Appellee was not negligent because it followed the plans and specifications is contrary to the law of *Schuster I*.

{¶45} Pursuant to the law of the case doctrine and our previous decision in *Schuster I*, we find the trial court's decision to grant summary judgment in favor of Appellee was in error. Appellants' sole Assignment of Error is sustained.

{¶46} The judgment of the Ashland County Court of Common Pleas is hereby reversed and the case is remanded to the trial court for proceedings consistent with this opinion and judgment.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

PAD:kgb

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IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMES V. SCHUSTER, et al.	:	
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Plaintiffs-Appellants	:	
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-vs-	:	JUDGMENT ENTRY
	:	
KOKOSING CONSTRUCTION COMPANY, INC.	:	
	:	
	:	
	:	Case No. 09-COA-030
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion and judgment. Costs assessed to Appellee.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN