[Cite as *Delta Fuels, Inc. v. Consol. Environmental Servs., Inc.*, 2012-Ohio-2227.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Delta Fuels, Inc.

Appellant

v.

Consolidated Environmental Services, Inc., et al.

Appellee

Court of Appeals No. L-11-1054

Trial Court No. CI0200603275

DECISION AND JUDGMENT

Decided: May 18, 2012

* * * * *

Martin J. McManus, Stephen J. Hitchcock and Daniel J. Kelly, for appellant.

Barry L. Lubow, Thomas P. Mannion and Colin P. Moeller, for appellee DLZ Corporation.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Delta Fuels, Inc., appeals a summary judgment issued by the Lucas County Court of Common Pleas in favor of appellee, DLZ Corporation, in a dispute alleging negligence in the design of an off-ramp. Because we conclude that

questions of material fact exist concerning the foreseeability of harm, appellee's duty to appellant and whether it breached that duty, we reverse the award of summary judgment on the principal claim. We affirm the trial court's denial of appellant's motion to amend its complaint for want of establishing prima facie support for the new claim.

{¶ 2} Appellant owns and operates a fuel storage facility and depot on Front Street near the Maumee River in Toledo. On the site are five above ground storage tanks, each capable of holding two million gallons of gasoline. The tanks are surrounded by a secondary containment system consisting of an earthen berm or dike that is five-feet tall and approximately 25-feet wide at its base. The purpose of this system is to contain spilled gasoline so that it may be cleaned up before it escapes into the environment.

{¶ 3} Interstate highway 280 is located a short distance south of appellant's site. The I-280 bridge, crossing the Maumee at that site, was one of the last lift bridges on the interstate system. During shipping season, the bridge was opened whenever a lake freighter proceeded up the river.

{¶ 4} In 2000, the Ohio Department of Transportation ("ODOT") acted to replace the old I-280 lift bridge with a new span across the river. ODOT hired Figg Bridge Engineers to design the bridge. Figg hired appellee to design a new I-280/Front Street entrance/exit ramp for the bridge.

{¶ 5} The ramp near appellant's storage facility was designated "Ramp X" in the construction plans. Ramp X provides an exit for southbound traffic on I-280 from the

new bridge onto Front Street. It also provides for northbound traffic to enter I-280 from Front Street. Ramp X nearly encircles appellant's tanks.

{¶ 6} Part of appellant's property, including a portion through which passed an eight-inch waterline for fire hydrants, was taken for the Ramp X project. Part of appellee's design was to relocate this line so that it would not be buried beneath the pavement. Appellee also designed storm sewers for the ramp and added 1,500 "wick drains" to dry the soil to speed compaction.

{¶ 7} On November 25, 2005, one of appellant's employees inadvertently directed a 400,000-gallon pipeline gasoline delivery into a tank that did not have the remaining capacity to hold that much product. It was later determined that more than 100,000 gallons of gasoline spilled into the secondary containment system.

{¶ 8} Although contract remediation workers spent days trying to clean up the spill, it soon became apparent that, unlike on prior occasions when the secondary containment needed to be pumped to clear standing liquid, this time the spilled gasoline seeped out. Thousands of gallons of gasoline found their way into the Maumee, an environmental discharge of major proportions. Appellant asserts that the cost of abatement of this spill exceeded $10 million.

{¶ 9} On May 1, 2006, appellee sued most, if not all, of the entities involved in the bridge project, alleging that the design and construction of Ramp X undermined the integrity of its secondary containment. The result, appellant asserted, was the escape of more than 100,000 gallons of gasoline into the environment.

{¶ 10} The claims against all of the parties, except appellee, have been resolved or are in another forum. On October 1, 2010, appellee moved for summary judgment. Appellee maintained that a contract claim against it was barred because appellant had failed to establish that it was a third-party beneficiary to appellee's agreement with Figg. Further, appellant's claim of negligent design was unsupported by the facts; its claim of a breach of professional standards was unsupported by evidence; and, finally, that appellant failed to demonstrate that appellee's conduct could foreseeably cause appellant's damages.

{¶ 11} Appellant also had a pending motion to amend its complaint to include an "unreasonable extraction of water" claim. Appellee maintained that the claim was not viable.

{¶ 12} Appellant responded to appellee's motion with a memorandum in opposition in which it withdrew its nuisance and contract claims. Appellant supported its remaining claims with the affidavit and deposition testimony of Professional Engineer Christopher Campbell. Campbell maintained that the cause of the failure of the secondary containment system was the relocation of the waterline to within a few feet of the outside of the containment dike.

{¶ 13} Campbell explained that, while the clay in the soil beneath the containment area was of low permeability, the soil was layered with deposits left when the land formed the bed of an ancient lake. Soil borings taken well before ramp construction

revealed pockets of sand within the clay. These borings also showed an unusually high water table at the site.

{¶ 14} Sand would provide a poor medium for containment, but, according to Campbell, petroleum products that reached these sand seams would still be contained because the seams were encapsulated by the impermeable clay. Moreover, Campbell stated, the high water table was likely "perched water," water trapped near the surface in the clay. Perched water would also act to contain a petroleum spill because the denser water would block movement of the gasoline.

{¶ 15} According to Campbell, when workers trenched next to the containment dike to relocate the waterline, they severed one or more of the sand seams. Since the waterline trench was backfilled with gravel, the trench provided an opportune path, not only to drain the perched water, but also to allow a gasoline spill to migrate into the environment. Additionally, since the wick drains in the area were improperly designed to reach beneath the natural water table in the area, they provided a direct path into the ground water and the nearby Maumee River, as did the storm sewers appellee designed.

{¶ 16} In his affidavit, Campbell averred that appellee should have anticipated that its design would compromise appellant's secondary containment system, its plan for wick drains was inconsistent with engineering design standards and its relocation plan for the waterline was inconsistent with published standards. Moreover, appellee's insistence that they had no duty to adjacent property owners is contrary to the engineering standard of care.

{¶ 17} Appellee replied, arguing first that, as an agent for the property owner, it is entitled to make whatever use of the property it may, "even if it causes injury to an adjoining property." Alternatively, if appellee had any potential duty to appellant, it must be foreseeable that its acts would result in harm. Since neither appellee nor appellant was aware that the efficacy of appellant's containment system was dependent on the integrity of hidden sand seams, appellee insisted that the harm that occurred was not foreseeable. As a result, it had no duty to appellant as a matter of law. Moreover, appellee suggests, the location of features in the project was dictated by others, relieving appellee of responsibility for their placement. Appellee also argued that it was entitled to summary judgment because appellant's own comparative negligence exceeds that of the defendants.

{¶ 18} As regards the unreasonable extraction of water claim, appellee urged the trial court to deny appellant's motion to amend. Appellee maintained that such a claim may only be pursued against a "proprietor of land or his grantee." Since ODOT owned the land at issue and appellee was not a grantee, appellee was not a party against whom such claim could be prosecuted.

{¶ 19} On February 11, 2011, the trial court granted appellee's motion for summary judgment, "for the reasons comprehensively set forth in [appellee's] motion filings and at oral argument * * *." The court also denied as moot various motions in limine and to strike. Appellant's motion for leave to file a second amended complaint was also denied. From this judgment, appellant now brings this appeal.

{¶ 20} Appellant sets forth the following two assignments of error:

> [I.] The lower court committed reversible error when it granted Appellee DLZ's Motion for Summary Judgment because Appellant Delta Fuels established a question of material fact by introducing evidence that: (1) DLZ owed Delta a legal duty; (2) DLZ breached its duty of care; and (3) DLZ's breach of its duty of care proximately caused harm to Delta.
>
> [II.] The lower court also committed reversible error when it held that it would be futile for Delta Fuels to amend its Complaint.

{¶ 21} Appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 22} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate

the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

I. Comparative Negligence

{¶ 23} Ohio is a comparative negligence state. *Ballinger v. Leaniz Roofing Ltd.*, 10th Dist. No. 07AP-696, 2008-Ohio-1421, ¶ 20. Under the doctrine of comparative negligence, if a plaintiff's own negligence contributed to his or her injuries, a defendant's liability for those injuries is reduced in an amount commensurate with the plaintiff's degree of fault. A defendant is not liable if a plaintiff's degree of fault is 50 percent or more. *Id., see* R.C. 2307.22 et seq. The issue of comparative negligence, however, is ordinarily a question of fact unless the evidence is so compelling that reasonable minds can reach but one conclusion. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 646, 597 N.E.2d 504 (1992).

{¶ 24} Appellee insisted that appellant's litany of negligent acts is so great that reasonable minds could only conclude that appellant's negligence was greater than half. Appellant employed an inexperienced untrained operator. Appellant's tanks lacked proper devices to warn of spills. It did not have in place a proper protocol for dealing with spills. It reacted slowly to the spill. It did not notify the proper environmental authorities in a timely fashion.

{¶ 25} Appellee's long recitation of appellant's alleged negligence is impressive, but enough of its components are sufficiently arguable to avoid summary judgment. Moreover, the bulk of these purported deficiencies go to prevention of the spill itself. The purpose of the secondary containment system was to contain a spill. There is little doubt that appellant's negligence is responsible for the spill and it is responsible for the cost associated with cleaning up within the secondary containment system.

{¶ 26} What appellant alleges, however, is that appellee's negligence is responsible for the failure of the secondary containment system. Thus, while appellant may be wholly responsible for the spill, appellee, arguably, is wholly responsible for the migration of the gasoline outside the secondary containment system and should be responsible for the costs associated with abatement of that contamination. In any event, these are questions of fact best sorted out by a trier of fact and, therefore, cannot form the basis of summary judgment.

II. Professional Negligence

{¶ 27} Appellant's principal claim against appellee is one of professional negligence in the design of Ramp X. To establish any type of actionable negligence, a plaintiff must show the existence of a duty, a breach of that duty and injury that is the proximate result of that breach. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). The principal issue in this matter is what duty, if any, appellee owed to appellant. A defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury in the plaintiff's position. When a defendant knows or should have known that its act or omission was likely to cause harm to someone, injury is foreseeable. *Simmers v. Bentley Constr. Co.*, *supra* at 645. The existence of a duty is a question of law. *Mussivand*, *supra*.

{¶ 28} Appellee offers multiple reasons why it should be absolved of any duty to appellant. The owner of the property, ODOT, has a right to do anything on its own property without regard to adjacent property and appellee stands in ODOT's place. Appellee's contract with Figg creates no duty to appellant. The location of the waterline on the property was dictated by ODOT.

{¶ 29} Citing *Hay v. Norwalk Lodge*, 92 Ohio App. 14, 18, 109 N.E.2d 481 (1951) and *McGlashan v. Spade Rockledge Terrace Condo.*, 8th Dist. No. 38390, 1979 WL 209965 (Apr. 5, 1979), appellee insists that Ohio property owners have the right to make reasonable use of their property, even if that use causes injury to adjoining property.

{¶ 30} The law, even in the cases cited, does not vest in a property owner the unfettered license that appellee implies. The emphasis is on what constitutes reasonable activity. This is sometimes a question of law and sometimes a question of fact. *Soukoup v. Republic Steel Corp.*, 78 Ohio App. 87, 102, 66 N.E.2d 334 (1946), citing *Ebur v. Alloy Metal Wire Co.*, 304 Pa. 177, 155 A. 280 (1931). A use reasonable under one set of facts may be unreasonable under another. *Id.* Given this emphasis on facts, the reasonableness of land usage would ordinarily be a question of fact. Given the complicated and disputed facts in this matter, we conclude that the reasonable use of ODOT's property is a question of fact. Summary judgment would consequently be improper on this basis.

{¶ 31} Appellee also states that its contract with Figg does not create a duty. Since appellant has abandoned it contract claims, we fail to see the relevancy of this assertion.

{¶ 32} Appellee also maintains that it should not be held to account for its design because ODOT dictated the placement of the waterline on the property. Moreover, appellee contends, even though the waterline was placed too close to the property line to satisfy the city code, this should not constitute negligence because the city approved the plans.

{¶ 33} Appellant's position is that appellee has an independent duty as a design engineer to avoid harm to neighboring property. If it discovered something in its design, whether dictated by its employer, the building codes or other influences, that would harm

an adjacent property, it had a professional obligation to negate or mitigate that harm. According to appellant's professional engineering expert Campbell, such a duty existed. The pivotal question is whether appellee knew or should have known that its design jeopardized the integrity of appellant's secondary containment system.

III. Foreseeability

{¶ 34} Throughout these proceedings appellee has insisted that it could not have foreseen that relocating a waterline along appellant's secondary containment embankment would have destroyed the integrity of that containment system. Even appellant, appellee argues, did not know that the efficacy of its secondary containment system was dependent on perched water in sand seams that extended beneath the walls of the containment system. It was years after the spill that appellant's experts developed this theory of the cause of the leak. If appellant, who owns the property and depended on the usefulness of the secondary containment system, did not know of this weakness, how then, appellee asks, could it have foreseen the harm associated with trenching next to the system?

{¶ 35} Appellant responds, pointing to the affidavit and deposition testimony of engineer Campbell who opined that appellee had a duty to perform its work in a manner consistent with industry and professional engineering standards so as not to damage appellee's containment system. This included taking particular care to avoid damaging the containment system when it relocated the waterline less than two feet from the base of the containment wall. Specifically, appellee breached that duty when it sited the

waterline in a manner that was inconsistent with industry standards, good engineering practice and applicable government regulations.

{¶ 36} The law of negligence provides that a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of harm to someone in the plaintiff's position. *Huston v. Konieczny*, 52 Ohio St.3d 214, 217, 556 N.E.2d 505 (1990). Injury is foreseeable where a defendant knows or should have known that its act was likely to result in harm to someone. *Id*. The test for foreseeability is whether a reasonably prudent person, or in this instance design engineering firm, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act. *Commerce & Industry Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). "While the creation of a legal duty is often dependent upon the foreseeability of the consequences, an actor cannot necessarily avoid the imposition of a legal duty merely because he/she did not foresee the exact consequence of his/her action." *Pavlides v. Niles Gun Show, Inc.*, 93 Ohio App.3d 46, 52, 637 N.E.2d 404 (5th Dist.1994), citing *Mudrich v. Std. Oil Co.*, 153 Ohio St. 31, 39, 90 N.E.2d 859 (1950), *accord DiGildo v. Caponi*, 18 Ohio St.2d 125, 130, 247 N.E.2d 732 (1969).

> Reasonable foreseeability of harm is * * * a judgment call. In some cases it is a call that is easy to make and so clear that courts will brook no argument. When the issue is negligence, the question of what is or is not

> foreseeable to a reasonable person in the position of the defendant is normally a jury question, part of its overall evaluation of the defendant's conduct unless the answer is so clear that reasonable people cannot differ. 1 Dobbs, Hayden and Bublick, *The Law of Torts*, Section 159, at 504 (2d Ed.2011).

{¶ 37} There is also a calculus of what constitutes a reasonable risk that dictates the degree of caution an individual is bound to exercise. This involves a balance between the probability that an untoward event will occur, the gravity of the harm that will result and the burden of taking adequate precaution to prevent the harm. *Benlehr v. Shell Oil Co.*, 62 Ohio App.2d 1, 9, 402 N.E.2d 1203 (1st Dist.1978), Keeton, *Prosser and Keeton on Torts*, Section 31, 171 (5th Ed.1984), 1 Dobbs, Hayden and Bublick, *The Law of Torts*, *supra*, at 501.

{¶ 38} Expert testimony may be sufficient to establish the foreseeability of harm necessary to support a duty of a professional to act or refrain from acting in a professional context. *Hitch v. Ohio Dept. of Mental Health*, 114 Ohio App.3d 229, 239-240, 683 N.E.2d 38 (10th Dist.1996). Engineer Campbell avers that it is the duty of a professional engineer to avoid causing damage to adjacent properties. The degree of duty is at issue.

{¶ 39} In this matter, it would seem the calculation of risk would dictate a high degree of care. Ramp X nearly encircles tanks that may potentially contain 10 million gallons of highly volatile, environmentally unfriendly gasoline. It takes little imagination to perceive any number of unfortunate events, many of catastrophic magnitude, which

could befall these tanks. The existence of the secondary containment system is evidence that a gasoline spill is less than a remote possibility. Indeed the system is designed to hold two million gallons, sufficient to contain the contents from the complete failure of one of the five tanks inside. Accordingly, there is some probability of an unfortunate event at the site and the potential gravity of the event is catastrophic. This would dictate a high degree of precaution due when dealing with the site.

{¶ 40} Appellee insists the failure of the containment system was unforeseeable because its integrity depended on sand seams and perched water, a fact no one knew. Even accepting this assertion for the sake of argument, this only establishes that harm was unforeseeable based on the information appellee knew. It does not address what appellee should have known. Again, because of the likelihood and catastrophic consequences of a spill, a high degree of caution is imposed. Appellant's expert engineer suggests that there were indicators in prior reports and soil borings by which it might be inferred that sand seams and perched water helped support the function of the dike. It is a material question of fact as to whether appellee should have discovered the anomaly in its investigation of the site.

{¶ 41} Perhaps more importantly, appellee knew that there was a great risk of a spill and some degree of risk that the secondary containment system might fail for some reason. Appellant's engineer testified that the net effect of the design appellee created was an incredibly efficient dispersal system for contaminants that might escape the secondary containment system.

{¶ 42} According to engineer Campbell, excavating and placing a waterline less than two feet from the base of the containment dike is below the standard of care due from a design engineer. Moreover, the interlocking trenches from the waterline to the storm sewer and the wick drains substantially exacerbated the damage from a spill escaping containment. It is a question of material fact as to whether appellee's design violated the standard of care of a reasonable engineer, constituting a breach of duty proximately causing injury to appellant. Such questions of material fact preclude summary judgment. Accordingly, appellant's first assignment of error is found well-taken.

IV. Unreasonable Extraction of Ground Water

{¶ 43} After engineer Campbell's testimony that appellee's excavation severed sand seams causing perched water to escape, appellant moved the court for leave to amend its complaint to add a count of unreasonable extraction of ground water. Appellee opposed the amendment, arguing that, pursuant to *Cline v. Am. Aggregates Corp.*, 15 Ohio St.3d 384, 474 N.E.2d 324 (1984), syllabus, the cause of action is only available to a "proprietor of land or his grantee." Since appellee was neither the "proprietor" of the Ramp X land, nor its "grantee," that count of the complaint did not state a cause and amendment would be "futile"

{¶ 44} A complaint, like any other pleading, may be amended as a matter of course at any time before a responsive pleading is served. Civ.R. 15(A). Once an answer to the complaint is served, "a party may amend his pleading only by leave of court or by

written consent of the adverse party. Leave of court shall be freely given when justice so requires." *Id.*

{¶ 45} The decision of whether to grant leave to file an amended complaint is within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *Easterling v. American Olean Tile Co.*, 75 Ohio App.3d 846, 850, 600 N.E.2d 1088 (4th Dist.1991). An abuse of discretion is more than an error of law or judgment, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 291, 450 N.E.2d 1140 (1983). "Where a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading." *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating*, 60 Ohio St.3d 120, 573 N.E.2d 622 (1991), syllabus.

{¶ 46} In the trial court, appellee, supported by *State ex rel. Brewer-Garrett Co. v. Metrohealth Systems*, 8th Dist. No. 87365, 2006-Ohio-5244, ¶ 17, argued that the *Wilmington* syllabus equated to a proper denial of amendment to a complaint when the cause of action would be "futile." Here, the trial court rejected appellant's amendment on the ground that the cause of action would be "futile." We would prefer to view this claim within the context of the original *Wilmington* syllabus language and examine whether appellant demonstrated prima facie support for its additional claim.

{¶ 47} *Cline*, *supra*, adopted the rule regarding ground water stated in 4 Restatement of the Law 2d, Torts, Section 858 (1977). The rule, in material part, provides:

> A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure[.]

{¶ 48} Appellee maintained that it was neither the proprietor nor grantee of the Ramp X property; the state of Ohio owned the land. Appellee was merely a subcontractor.

{¶ 49} Appellant responded, citing language in Comment a of the Restatement, that "[t]he word 'grantee' means any person to whom the proprietor has assigned his right to or share in the ground water regardless of the form of the assignment." According to appellant, this broad definition of "grantee" should encompass an entity that has been assigned, by the owner of the property, the responsibility of designing drains and moving waterlines.

{¶ 50} Appellant's reading of the restatement comment is overbroad. While indeed the rule states that there need be no adherence to the strict formalities of assignment, it also clearly states that the type of assignment to which the rule refers is

one from the proprietor to another of the "right to or share in" water. There is nothing apparent in the record to suggest that the proprietor, ODOT, assigned, by any means, any right in water to appellee. As a result, appellant failed to provide prima facie support for a new claim as against this defendant. Consequently, the trial court acted within its discretion in denying appellant's second motion to amend its complaint. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 51} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed, in part, and affirmed, in part. This matter is remanded to said court for further proceedings. It is ordered that appellee and appellant share the costs of this appeal pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE