[Cite as *Simpson v. Stieber Bros., Inc.*, 2013-Ohio-4089.]

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

Donald Simpson	Court of Appeals No. H-12-012
Appellant	Trial Court Nos. CVH 20110137 CVH 20110299 CVH 20110538
v.	
Stieber Bros., Inc., KRD, Ltd. and Kevin, Robert, and Daniel Stieber, Individually	**DECISION AND JUDGMENT**
Appellees	Decided: September 20, 2013

* * * * *

Florence J. Murray and Dennis E. Murray, Sr., for appellant.

Timothy C. James and Lorri J. Britsch, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Donald Simpson, appeals the March 29, 2012 judgment of the Huron County Court of Common Pleas which, following a jury trial, entered judgment in

favor of appellees, Stieber Bros., Inc., KRD Ltd., Robert Stieber, Daniel Stieber, and Kevin Stieber, in a negligence action. For the reasons that follow, we affirm.

{¶ 2} On June 23, 2011, appellant commenced a negligence action against appellees for personal injuries he sustained as a result of the November 30, 2010 grain silo collapse in Norwalk, Ohio. The collapse caused several hundred tons of corn to spill onto a roadway in a residential area. As a result of the spill, appellant's vehicle was pushed off the road and into a telephone pole. Appellant alleged that appellees failed to use reasonable care in inspecting, loading and controlling the silo pressure. In their answer, appellees asserted the defense that intervening and superseding negligent acts of a third party was the proximate cause of appellant's alleged injuries and damages.

{¶ 3} On November 30, 2011, appellant filed a motion to amend his complaint to include a claim for battery. On January 27, 2012, appellees filed a motion to amend their answer to plead the affirmative defense that the conduct of a third-party, the manufacturer of the silo that failed, was the proximate cause of appellant's injuries.

{¶ 4} Appellant's motion to add a battery claim was denied. Appellees' motion to add the third-party affirmative defense was also denied. On February 28, 2012, the case proceeded to a jury trial and the following relevant evidence was presented.

{¶ 5} Police officers testified that appellant was observed at the scene of the corn spill and that his car was damaged. Appellant did not appear to have been injured. The day after the spill, appellant took his car to the police station and it was photographed; the photos were admitted into evidence.

{¶ 6} Appellee, Robert Stieber, testified that the grain bin was owned by KRD, Ltd. consisting of Kevin, Robert and Daniel Stieber. Robert testified that internal inspections of the bin were conducted twice yearly; once in July after the grain was unloaded and in August or September prior to reloading the bin. Robert testified that his 30 years of farming experience qualified him to know if the grain silo needed maintenance.

{¶ 7} Robert speculated that in 1995, when KRD purchased the bin, the insurance company inspected it because it agreed to provide insurance for it. After purchasing the silo in 1995, KRD leased the silo back to the seller, Sunrise, Inc., until approximately 2005. Robert stated that this was not a yearly arrangement but that he could not exactly recall which years they leased it back. In 2005, KRD began filling the silo with its own grain.

{¶ 8} Similarly, Kevin Stieber testified that he conducted visual inspections of the silo which was built in 1971. Kevin stated that the inspections were conducted to ensure that moisture was not getting into the silo and damaging the corn. Kevin admitted that there was no fixed inspection schedule and that there were no written inspection reports. Kevin stated that they experienced no prior issues with the bin.

{¶ 9} Appellant's expert, architect and building contractor John Feick, testified that he inspected the remains of the silo on September 1, 2011. In Feick's opinion, the collapse of the silo was due to the combination of the grain shifting and causing stress on

the west side of the silo where some concrete deterioration had occurred and rusting on the interior surface of the silo.

{¶ 10} Feick testified that he did not know what caused the grain to shift before the collapse. Feick further acknowledged that he could find no written standards for silo maintenance. Feick investigated the manufacturer of the silo and found no history of prior failures due to a design defect. Feick denied that there was an inherent design defect which caused the collapse.

{¶ 11} Appellant's treating neurosurgeon, Bo Yoo, M.D., testified that he first saw appellant in 2003, when he performed a discectomy with fusion at the C5-C6 vertebrae. After surgery and his follow-up appointments, appellant next saw Dr. Yoo on March 8, 2011, following a referral from appellant's primary care physician. Appellant complained of exacerbated neck and right arm pain following the November 2010 accident. An MRI revealed a disc protrusion at C6-C7; Dr. Yoo stated that this was a new finding. Dr. Yoo sent appellant to physical therapy. On June 2, 2011, appellant returned to Yoo's office after minimal success during therapy. Dr. Yoo stated that, at this point, surgery was recommended. Dr. Yoo acknowledged that the 2003 MRI showed degeneration in the C6-C7 vertebrae. He also acknowledged that it is common to have issues in the areas next to the fused vertebrae.

{¶ 12} Appellant testified that in April 2003, he had neck surgery and was back to work and playing golf within six to eight weeks. Appellant was also unable to work or play golf following a 2009 workplace injury and workers' compensation claim.

Appellant was off of work for approximately six months and was cleared to return in December 2009, just as his employer was closing. Appellant worked at the same factory for 38 years.

{¶ 13} On the date of the silo collapse, appellant stated that at approximately 3:30 p.m. he was driving to his daughter's house and proceeding south on State Street in Norwalk, Ohio, when he heard two snaps. He looked over and observed that the silo had split down the middle and that corn was spilling out "like a tidal wave." Appellant said that his vehicle was completely engulfed in corn and that he eventually moved off the corn and into a pole. Appellant believed that the vehicle would have overturned had it not been stopped by the pole. Appellant's air bag did not deploy and his eyeglasses did not fall off. Appellant stated that he grabbed the back of his neck and that "something wasn't right." Appellant testified that he delayed seeking medical treatment due to the holiday season and questions about his health coverage.

{¶ 14} Appellant admitted that, during a prior deposition, he had forgotten about a March 6, 2007 work incident which resulted in an emergency room visit. The emergency room reported stated that appellant complained of left neck and posterior shoulder pain after pulling something at work and feeling a "pop." Appellant was further questioned about the May 2009 incident which resulted in the workers' compensation claim. Appellant stated that when he went to the doctor on January 4, 2011, for a follow-up appointment relating to his workers' compensation claim, he thought he mentioned the November 2010 accident, although it was not reflected in the doctor's notes.

{¶ 15} As to his injuries from the silo collapse, appellant stated that he injured his wrist and hip but that those injuries had resolved. Appellant further stated that following the collapse he suffered a bad cold and on at least two occasions sneezed and felt a separation in his neck. Appellant stated that he currently has pain radiating down his right arm to his thumb and index finger.

{¶ 16} Appellees' expert, Jerry Liechty, testified that he is a structural engineer who mainly designs structures for industrial applications. This included the design of silos. Liechty stated that he has also investigated structural failures. On December 3, 2010, Liechty began his investigation into the silo collapse speaking with the owners and conducting a visual inspection. Liechty's opinion was that the structure collapsed due to the defective design in the vertical bolted connections, most likely in the second, fourth, sixth, or eighth ring on the west side. Liechty also stated that he did not believe that a visual inspection of the silo by KRD members would have revealed the defect.

{¶ 17} Liechty acknowledged that there was some corrosion on the starter ring that was buried in the foundation and sporadic corrosion on the inside of the bin. Liechty did not feel that the condition of the foundation caused the collapse. Liechty was asked why the silo took 39 years to collapse if the defect had been there at the time it was constructed. He stated that he believed that the silo was close to failure throughout that time.

{¶ 18} At the close of the evidence, appellant moved for a directed verdict on the issue of the "intervening negligence" of the design defect as the proximate cause of the

silo collapse. Appellant's counsel requested that the jury be charged with determining only whether damages were proximately caused by the collapse or, possibly, whether negligent maintenance was the proximate cause of the collapse. Denying the motion, the court determined that sufficient evidence of the manufacturer's defect had been presented and, thus, whether the defect caused the collapse was a factual question for the jury.

{¶ 19} Appellant's counsel also sought to exclude the jury interrogatory regarding negligent design by the manufacturer. Counsel argued that because appellees were not permitted to amend their answer to include the affirmative defense of third-party negligence, they should not be permitted to submit an interrogatory as to whether the manufacturer proximately caused appellant's injuries. The court disagreed finding that because appellant's counsel did not file a motion in limine or otherwise attempt to prevent appellees' expert from testifying, the objection was untimely.

{¶ 20} Following deliberations, the jury found that appellees were not negligent and, thereafter, the court entered judgment in their favor. This appeal followed.

{¶ 21} Appellant presents six assignments of error for our review:

> Assignment of Error No. 1: The trial court erred by permitting the defendants to assert the affirmative defense of third-party negligence.
>
> Assignment of Error No. 2: The trial court erred by shifting the burden of proof to the plaintiff regarding the cause of the failure of the defendants to operate their business in such a manner so as to avoid obstructing the plaintiff's right-of-way.

Assignment of Error No. 3: The trial court erred by barring the plaintiff from providing rebuttal testimony as to new evidence first introduced during the defendant's case-in-chief, that the defendants had ceded control of the premises in question to a never-before-identified third party.

Assignment of Error No. 4: The trial court erred by failing to direct the verdict for the plaintiff at the close of the defendants' case in chief.

Assignment of Error No. 5: The trial court erred by refusing to instruct the jury as to the charge of battery.

Assignment of Error No. 6: The trial court erred by refusing to instruct the jury as to the duty to keep the roadway clear of obstructions from their business conduct.

{¶ 22} In appellant's first assignment of error, he argues that the trial court erroneously permitted appellees to assert during trial that a design defect caused the silo collapse. Appellant contends that this was error due to the court's denial of appellees' late motion to amend their answer to add the affirmative defense of non-party negligence. Appellant contends that the defense was waived.

{¶ 23} Conversely, appellees rely on R.C. 2307.23, which provides:

(A) In determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 or sections 2315.32 to 2315.36 of the Revised Code, the court in a nonjury action shall make

findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:

(1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;

(2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action.

(B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.

(C) For purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an

affirmative defense under this division at any time before the trial of the action. (Emphasis added.)

{¶ 24} In the present case, the agreed-upon jury interrogatories mirrored the above language. Further, appellant had notice well in advance of trial that appellees' expert was going to testify that the silo collapse was due to a design defect and never filed a motion in limine objecting to the testimony. Appellant's first assignment of error is not well-taken.

{¶ 25} In appellant's second assignment of error, he contends that the court erred by refusing to acknowledge the statutory violation of R.C. 5589.01, obstruction of a roadway, as negligence per se thus, improperly placing the burden on appellant. Appellees counter that the statute does not provide a basis for civil liability.

{¶ 26} Ohio courts have explained that the question of whether a statutory violation constitutes negligence per se depends on the specific enactment. *Moreland v. Oak Creek OB/GYN, Inc.*, 2005-Ohio-2014, 970 N.E.2d 455, ¶ 34 (2d Dist.), quoting *Mussivand v. David*, 45 Ohio St.3d 314, 319, 544 N.E.2d 265 (1989). "If the legislative enactment in question does not define a civil liability but instead only 'makes provision to secure the safety or welfare of the public,' the statute does not mandate the use of a negligence per se standard. *Id.*, quoting *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954), paragraph three of the syllabus. *See Hurst v. Ent. Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, 809 N.E.2d 689, ¶ 26 (11th Dist.).

{¶ 27} R.C. 5589.01 provides that "[n]o person shall encumber by fences, buildings, structures, or otherwise, a public ground, highway, street, or alley of a municipal corporation." Whoever violates this section is guilty of a third-degree misdemeanor. R.C. 5589.99(A). A violation of R.C. 5589.01 has been found not to be a basis for recovery in a civil action. *Savransky v. Cleveland*, 4 Ohio St.3d 118, 447 N.E.2d 98 (1983).

{¶ 28} Based on the foregoing, we find that the trial court did not err in finding that a violation of the statute did not constitute negligence per se. Appellant's second assignment of error is not well-taken.

{¶ 29} Appellant's third assignment of error asserts that the trial court erred when it denied rebuttal testimony regarding evidence first presented during the cross-examination of appellee, Robert Stieber. Stieber testified that after the 1995 purchase of the silo from Sunrise, Inc., KRD leased the silo back to Sunrise for approximately ten years. Appellant wished to subpoena an individual from Sunrise and obtain a copy of the lease between KRD and Sunrise. Stieber stressed, however, that KRD hauled Sunrise's grain to and from the silo and that from 1995 forward, was continuously responsible for inspecting and maintaining the silo.

{¶ 30} It is well-accepted that the scope of rebuttal may include matters raised during cross-examination. Because KRD acknowledged that, from 1995 forward, it had a continuous obligation to inspect and maintain the silo we find that any error in refusing to

allow appellant to question a Sunrise representative or obtain the lease was harmless. Appellant's third assignment of error is not well-taken.

{¶ 31} Appellant contends, in his fourth assignment of error, that the trial court erred in denying his motion for a directed verdict as to the negligent design issue. In deciding whether to grant a motion for a directed verdict, the trial court does not weigh evidence or consider the credibility of the witnesses, but rather, reviews and considers the sufficiency of the evidence as a matter of law. *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 430 N.E.2d 935 (1982); *O'Day v. Webb*, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972). Because a motion for a directed verdict presents a question of law, we review this assignment of error de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4.

{¶ 32} Directed verdicts are governed by Civ.R. 50(A)(4), which sets out the standard for granting such a motion. That rule states:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶ 33} As set forth above, at the close of the evidence, appellant's counsel moved for a directed verdict on the issue of negligent design of the silo. Counsel argued that the manufacturer of the silo was never identified and, more importantly, even if appellees' expert established a design defect it was implausible that it took 40 years for the defect to cause the collapse.

{¶ 34} Reviewing the trial testimony, we find that the parties presented conflicting expert testimony as to the cause of the silo collapse. Such conflict in the testimony is a classic example of a fact question to be resolved by a jury. Appellant's fourth assignment of error is not well-taken.

{¶ 35} In his fifth assignment of error, appellant argues that the trial court erred when it refused to instruct the jury as to the charge of battery. Appellant requested that the court instruct the jury that "[b]attery is intentional, unconsented, contact with another. Contact with another may include contact with objects held by him." Appellees assert procedural arguments as well as the argument that no evidence was presented demonstrating that appellees intended the corn to harm appellant.

{¶ 36} Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St .2d 266, 271, 421 N.E.2d 157 (1981). We review

the trial court's decision to refuse the requested jury instructions for an abuse of discretion. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

{¶ 37} Although appellant objected to the court's denial of his motion to amend his complaint to add a battery claim he never objected to the court's refusal to instruct the jury on battery. Waiver issue aside, we find that there was no evidence that appellees intended the collapse of the silo. This was strictly a negligence case. Accordingly, the trial court did not abuse its discretion when it failed to instruct the jury on the claim of battery. Appellant's fifth assignment of error is not well-taken.

{¶ 38} In appellant's sixth and final assignment of error, he argues that the trial court erred in refusing to instruct the jury on the duty to keep the roadway clear of obstructions. Appellant proposed the following instruction:

> When one chooses to collect or store a substance on their premises, Ohio law requires that person to use reasonable care to prevent the substance's escape.
>
> Additionally, Ohio law provides that "[a]butting owners are liable for injuries results from defects and dangerous structures in streets and sidewalks, created or negligently permitted to exist by them for their own private use or benefit."
>
> Moreover, Ohio has codified this rule under R.C. 5589.01 which provides: "No person shall obstruct or encumber by fences, buildings,

structures, or otherwise, a public ground, highway, street, or alley of a municipal corporation."

{¶ 39} As set forth above, a court should instruct a jury on actual issues raised in the case as demonstrated by the pleadings and evidence. The trial court concluded that a violation of the statute did not provide for liability in this case. We find that the court did not abuse its discretion in refusing to instruct the jury on the statute as it had the potential to confuse the jury as to the negligence claims at issue. Appellant's sixth assignment of error is not well-taken.

{¶ 40} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

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

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE